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June 9, 2010

Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL
A1A 5B2

ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: An Application by Newfoundland and Labrador Hydro (Hydro) concerning the Rate Stabilization Plan (RSP) components of the rates to be charged to Industrial Customers

Please find enclosed the original and eight copies of the Hydro's *Brief of Law on Preliminary Jurisdictional Issues* with regards to the above-noted Application.

We trust you will find the enclosed to be in order.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO

Geoffrey P. Young
Senior Legal Counsel

GPY/jc

cc: Gerard Hayes – Newfoundland Power
Paul Coxworthy – Stewart McKelvey Stirling Scales
Joseph S. Hutchings, Q.C. – Poole Althouse
Thomas Johnson – Consumer Advocate
Colm St. Roch Seviour – Abitibi Consolidated
Dan Simmons – Ottenheimer Baker

A REPORT TO
THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF the *Public Utilities Act*, (R.S.N.L. 1990, Chapter P-47 (the Act); and

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for the approval, pursuant to Sections 70 (1) and 76 of the Act, of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers

Brief of Law on Preliminary Jurisdictional Issues

Newfoundland and Labrador Hydro

June 9, 2010

newfoundland labrador hydro
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IN THE MATTER OF the *Public Utilities Act*, (R.S.N.L. 1990, Chapter P-47 (the Act); and

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Brief of Law on Preliminary Jurisdictional Issues

Newfoundland and Labrador Hydro

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Statement of Preliminary Issues of Jurisdiction

1. The following are the issues of preliminary jurisdiction that the Public Utilities Board (the Board) has been asked to determine:

   Does the Board have the jurisdiction to issue an order which changes how the rate stabilization plan (RSP) operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes? In particular:

   - *Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?*
   - *What would generally accepted sound public utility practice as set out in s. 4 of the EPCA require?*
   - *Are there any concerns in relation to vested rights, i.e. does the language of the RSP create a right/obligation in each of the customers or customer classes? If so at what point does this right/obligation accrue? Does this mean that credits/debits allocated to each customer in accordance with the plan are the responsibility of or to the benefit of customers in the class at the time of the accumulation or does the Board have the jurisdiction to order alternative disbursements of the balances?*
   - *Does the issuance of Order Nos. P.U. 34(2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?*

History

2. The RSP is a deferral account which stabilizes rates for Island Interconnected Retail customer, Newfoundland Power (NP); and for Hydro's Island Interconnected Industrial Customers. It does this by deferring the collection or the refunding of certain energy production costs, through rate adjustments, to the extent that those costs differ from those costs that are forecast. These are variations of fuel prices, fuel consumption volumes, and hydrology; all of these factors ultimately impact Hydro's fuel bill for fuel consumed at its Holyrood Thermal Generating Station.

3. There have been a number of amendments to the RSP over its 25 years of operation. RSP methodology changes have included fuel riders which were an attempt to use a more current fuel price forecast, changes in the allocation methods amongst customers, and changes in the period during which refunds or collections of amount would be made.

4. In December of 2007, Hydro applied for an interim order to freeze the 2008 RSP rates for its Industrial Customers citing significant load changes in this customer class resulting in volatility in the RSP rates that would apply to this class. An interim Order (Order No. P.U. 34 (2007) was issued by the Board freezing Industrial Customer rates. The Industrial Customer rates remain unchanged to date, due to the effect of similar successive interim orders.

Primary Jurisdictional Question

5. The primary jurisdictional question that is before the Board in the present matter is whether the Board has jurisdiction to refund RSP moneys owing to customers in a manner, or with a final result, which differs from the manner or result that would have applied had the RSP not been affected by the interim orders. This has been expressed in the jurisdictional question posed to the Board as to whether the Board has the authority to "change the way the RSP operated before the date of the order. . . including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes?"

Legislative Authority

6. The source of the Board's jurisdiction is its governing legislation, the Public Utilities Act and the Electrical Power Control Act, 1994. The Board's jurisdiction to set rates is derived from, *inter alia*, section 70 of the Public Utilities Act. The Board's authority to issue interim orders is derived from section 75 of that Act:

> **Interim order**
>
> 75. (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.
>
> (2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

7. Further, section 82 of the Public Utilities Act provides the Board with the power to investigate rates and, upon determining that the rates are unreasonable or unjustly discriminatory, section 87 empowers the Board to vary those rates.

8. Sections 3 and 4 of the Electrical Power Control Act, 1994, (hereinafter the EPCA) set out the policy the Board is to follow when setting rates. The relevant provisions are:

Power policy

3. It is declared to be the policy of the province that

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

Implementing Policy

4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

9. Through section 4 of the EPCA, the Legislature has clearly supplemented the substantive rate setting policy expressly stated in the Public Utilities Act and the EPCA with generally accepted rate making practices. The Board has the jurisdiction to consider and apply rate setting tests that are generally accepted and sound and if it fails to so apply those tests, that could be found to be an error of law, perhaps one going to its jurisdiction.

Interim Orders and Deferral Accounts

10. The fact that the final order to be sought in this matter arises from an interim order concerning a deferral account has jurisdictional implications.

11. The Legislature has given the Board authority to issue interim orders as to rates. Further, in paragraph 75(3)(b) of the Public Utilities Act, the Legislature has authorized two ways for the Board to deal with amounts that are collected through interim orders where those amounts are deemed to be in excess of amounts required: (a) to refund those amounts to customers, or (b) to place those amounts in a reserve fund for the purpose that may be approved by the Board.

12. Paragraph 75(3)(b) of the Public Utilities Act specifically empowers the Board to make an order as to an amount held in an account under an interim order "for a purpose that may be approved by the board". In making an interim order or a

final order which is further to an interim order made under this provision, the Board is not restricted to the purpose that applied prior the initial interim order. This is a grant of jurisdiction and power to the Board to exercise its discretion in carrying out this rate setting function. It need not put the customers back in the same situation or give them the same result as they would have had but for the interim order; indeed it is contemplated that a purposive approach can be taken which might well differ from the basis for setting rates prior to the time that the interim rate was set. Of course, the Board's rate setting functions are governed by the legislation that governs the Board generally and decisions as to those rate setting functions of the Board are informed by the common law sourced from decisions of the courts, from previous decisions of the Board, and from decision of other regulators.

13. The nature and purpose of interim orders has been considered by the Supreme Court of Canada in Bell Canada v. Canadian Radio-Television & Telecommunications Commission.

Per Gonthier, J., for the court at paragraphs 46 and 49:

> A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders.
>
> * * * * *
>
> Furthermore, the appellant [the CRTC] consistently reiterated throughout the procedures which led to the Decision 86-17 its intention to review the

> rates charged for the test year 1985 and up to the date of the final decision. Holding that the interim rates in force during that period cannot be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the appellant's order approving interim rates.
>
> (Bell Canada v. Canadian Radio-Television & Telecommunications Commission, 1989 CarswellNat 586, Hydro's Authorities, Tab 1,)

14. In the present case, starting from Order No. P.U 34 (2007), the Board specifically ordered that the rates were interim in nature and further, that if after a full review of the matter it was determined that excess revenue had been earned by Hydro as a result of the interim Order, customers of Hydro would receive a refund or that the excess revenue would be placed in a reserve account for that purpose. Thereafter, throughout Order Nos. P.U. 34 (2007), P.U. 37 (2008), P.U. 6 (2009), the Board maintained that the rates were interim in nature.

15. The case law dealing with interim orders of regulators is clear and it is responsive to the first jurisdictional question posed to the Board: does the Board have jurisdiction to issue an order which has the effect of changing the way the RSP operated prior to the issuance of the interim order, and more particularly, does the Board have jurisdiction to change the way a balance in the RSP is distributed amongst customers? Due to the interim nature of the order, especially when combined with the fact that it concerned a deferral account, the Board clearly has jurisdiction to revisit the outcome of the interim order, to consider whether

that outcome is just and reasonable in accordance with generally accepted sound public utility practice. Further, the Board also has jurisdiction to make a final order that varies the outcome of an interim order, and by necessary implication, the rules as to the rate structures that applied for the period between the issuance of the interim order and the final order.

16. While Canadian courts have generally decided that retroactive ratemaking is not permissible and an is excess of the utility regulator's jurisdiction, they have condoned and approved of ratemaking that has had a retrospective element provided that either of two elements are present: (1) the customers were aware that the rates were interim and therefore must be deemed to be aware that the rates could be reviewed and changed after they were made; or (2) the rates arose from a deferral account situation where amounts were shifted from one timeframe to another.

(Re ATCO Gas, 2010CarswellAlta 764 (Alta. C.A.) Hydro's Authorities, Tab 2, see esp. paragraphs 55 ff.)

17. As stated above, the primary jurisdictional question here is whether the Board has jurisdiction to refund RSP moneys owing to customers in a manner, or with a final result, which differs from the manner or result that would have applied had the RSP not been affected by the interim orders. In the present matter, it is Hydro's submission that it is not the inherently retrospective nature of the RSP

that answers the primary jurisdictional question; rather, the primary jurisdictional question is governed by the fact that the orders were interim in nature. Nevertheless, a consideration of the implications of the role of deferral accounts is appropriate.

18. Courts have determined that the treatment of amounts held in deferral accounts are subject to change, that the parties are aware of that potential, and therefore that orders that make those subsequent changes do not offend notions of predictability and fairness which is the basis for the presumption against retroactive ratemaking.

(Re ATCO Gas, 2010CarswellAlta 764 (Alta. C.A.), Hydro's Authorities, Tab 2 at paragraph 57)

19. In some cases that deal with deferral accounts, there may be no customer group that has a valid expectation whatsoever of receiving any particular portion of that account. The Board may not be concerned about offending principles of fairness or predictability in these cases so the retrospective nature of the orders may not be controversial.

20. However, in the case of the RSP, the rate design includes rules which set out the means by which balances in the account are distributed amongst customers.

Barring an intervening order of the Board, which can be either a final order changing the way that the collection or disbursement of amounts occur through rate setting of for future energy consumption, or an interim order signaling a potential change in the rate for consumption that occurs after the interim order is issued, the customer can expect to rely upon the rate structure to provide an outcome which will be calculated in a manner which has already been set.

21. In the present matter, the fact that the Board is dealing with a deferral account is not determinative of the jurisdictional question; however the interim nature of the orders provides the Board with ample jurisdiction to consider and render a final order which has a different result than would have applied had the interim order not been made. The retrospective character of the final order to be made does not infringe principles of fairness or predictability.

22. In the context of the matter before the Board at present, the Board has received applications to make the rate interim on the basis of, *inter alia*, load related volatility. The Board has responded by issuing successive interim orders. In so doing, the Board has stated that it may later determine that excess revenues be refunded or held in a reserve account for that purpose. Section 75 of the Public Utilities Act provides the Board with those powers. Section 3 of the EPCA requires the Board to set rates that are reasonable and not unjustly

discriminatory. Section 4 of the EPCA requires the Board to apply generally accepted sound public utility practice.

23. The legislation clearly provides the discretionary powers to achieve a fair outcome. Taken together, the interim orders, the factual context, and the legislative rant of power and discretion constitute clear signals that amounts attributable to the period following the issuance of the first interim order were at the discretion of the Board to disburse or refund in accordance with sound rate making practices. The parties knew, or reasonably should have known, that the Board had through its interim orders reserved its regulatory power to make a disposition of amounts in the RSP accounts in a different manner and with a different outcome than would have been the case had no interim order been made affecting the Industrial Customer RSP.

Vested Rights

24. There are no vested rights held by any particular customers, or by any customer class, of the amounts held by Hydro with regard to RSP amounts affected by the interim orders. The concept of vested rights requires more than an expectation; at a minimum it requires a right which is both distinct and certain.

(Excerpt from Black's Law Dictionary, 6th ed. Hydro's Authorities, Tab 3)

25. The RSP is a deferral account which, in part, works by shifting the collection of costs from one year to a later year or years. Deferral accounts are well accepted regulatory mechanisms to provide for utilities' commodity costs recovery. The RSP is intended to smooth cost and rate volatility caused by the volatility of commodity prices and volumes, hydrology, and customer loads. By their very nature, commodity cost deferral accounts shift of costs from present customers to future customers. While intergenerational equity issues inevitably arise, deferral accounts of this type are implemented when it is deemed to be worthwhile to sacrifice that rate objective in order to avoid cost and rate volatility.

26. Under the RSP, because of its deferral effect on cost recoveries or refunds, it is each customer's actual consumption in future years which will determine the amount which that customer will pay for the previous consumption of the customers in the class. The matching of costs causality and cost collection is, quite clearly, imperfect. Because RSP amounts are refunded or collected in accordance with future consumption, it is impossible for any customer within the Industrial Customer class to claim that there is a vested right to any specific amount of a previous RSP balances.

27. Due to the manner by which balances owing to or owing from the RSP are collected or refunded (through future consumption), and due to the interim

nature of the orders made by the Board (which necessarily implies that the Board may make a final order which differs from that which applied prior to the time that the interim order was made) none of the attributes of vested rights apply. Any plausible claim to have a vested right to receive an amount under the RSP vanishes once RSP rates are made interim. It is clearly at risk. As stated by the Supreme Court of Canada in Bell Canada (1989) at paragraph 58):

> The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order.

(Bell Canada v. Canadian Radio-Television & Telecommunications Commission, 1989 CarswellNat 586, Hydro's Authorities, Tab 1)

Common Law Implications on Jurisdiction

28. As stated above, as a statutory tribunal the Board acquires jurisdiction to act through its governing statutes, the Public Utilities Act and the EPCA. However, the relevant jurisprudence provides useful guidance to the Board as to how these statutory sources of jurisdiction should be construed. In fact, due to the Legislature's direction found in section 4 of the EPCA that the power policy is to be implemented in accordance with "generally accepted sound public utility practices", the Board is required to consider sources such as relevant court and regulatory decisions in carrying out its duties.

29. There are several court decisions which are relevant. The 1989 Supreme Court of Canada decision regarding the regulation of Bell Canada by the CRTC is binding on this Board on the issue of the Board's jurisdiction to make retrospective changes to rates that are the subject of an interim order. The Court found that the Board's governing legislation (1) required the CRTC to make rates that are always just and reasonable and (2) provided the CRTC with the power to make interim orders which may be reviewed and modified by a final decision. The court found that this gave the CRTC the jurisdiction to make orders with retrospective effects. In so finding, the court focused on the nature of interim orders and disposed of the argument that the interim rates were merely rates for the time being. The court observed that final rates orders were subject to the CRTC's review with prospective effect but interim rates were subject to the CRTC's review on a retrospective basis.

(Hydro's Authorities, Tab 1, Bell Canada v. Canadian Radio-Television & Telecommunications Commission, 1989 CarswellNat 586, at paragraphs 44 ff.)

30. In reaching the 1989 Bell Canada decision, the Supreme Court of Canada cited with approval the 1980 Alberta Court of Appeal case Coseka Resources Ltd. v. Saratoga Processing Co. In that case the court held, based upon legislative provisions which are similar in intent to those which apply in the instant case, that upon a consideration for final rates, interim rates may be reviewed

retrospectively back to the date of the application for the interim order and at the time that the Board issues its final order, it can determine and set the just and reasonable rates that should have applied for that interim period.

(Coseka Resources Ltd. v. Saratoga Processing Co., 1980 CarswellAlta 136, Hydro's Authorities, Tab 4)

31. Further jurisprudential guidance is available from a very recent decision of the Alberta Court of Appeal, the abovementioned Re ATCO Gas (2010) case. That case deals with a deferral account that was intended to be used to manage the costs and rate impacts of commodity volatility. The utility applied successfully to the Board to have rectified through its rates the effects of certain past accounting errors it had made with respect to the account. The court held that permitting the recovery of amounts that were previously unrecovered due to the utility's errors was outside the scope of the intention of the deferral account such that the ratepayers could not have foreseen that the deferral account in question could be used in that manner. It is instructive that the court did not find that the decision amounted to an error as to the Board's jurisdiction; the retrospective nature of the order did not constitute prohibited ratemaking, *per se*. It was, however, an unreasonable decision that the court reversed on appeal.

(Re ATCO Gas, 2010CarswellAlta 764 (Alta. C.A.) Hydro's Authorities, Tab 2)

32. In an earlier ATCO case (ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), hereafter ATCO (2006), the Supreme Court of Canada considered whether the disbursement to ratepayers of the proceeds of the sale of a gas company's asset constituted an excess of the Board's jurisdiction. The court analyzed the jurisdictional question before it by referring to the legislation and determining whether the decision and action of the Board was within that legislative intention. In finding that the decision constituted an excess of the Board's jurisdiction the court considered the essence of the Board's decision making role, essentially a ratemaking function, and determined that advancing ratepayers' interests by providing them with a property right in the utility's proceeds from an asset sale went beyond the Board's jurisdiction.

(ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) 2006 CarswellAlta 139 (S.C.C.), Hydro's Authorities, Tab 5,)

33. The ATCO (2006) case provides guidance to regulators as to which matters can be considered when making its decisions. Regulators are not permitted to consider matters that are outside the proper scope of their investigations or to provide remedies that are outside the contemplation of their governing legislation.

34. But there is no *prima facie* excess of jurisdiction triggered in the matter before the Board at present. It was dramatic Industrial Customer load changes that

motivated the original application to the Board for an interim order to freeze rates (i.e. the application which resulted in Order No. P.U 34(2007)). That Order signaled clearly to the parties that the Board would revisit the matter and could make a final order refunding amounts to customers or requiring a reserve account for that purpose. The Board was acting within its jurisdiction and powers when it granted an interim order, deferring a final order as to those rates and those interim orders have not been challenged.

Limits on the Board's Jurisdiction to Grant Particular Orders

35. It is explicit in the Board's grant of jurisdiction that it be empowered to set rates that are just and reasonable. Provided that the Board approaches this task by applying appropriate rate making practices, it will continue to act within its jurisdiction. If the Board then makes a decision based upon considerations that fall outside the realm of proper ratemaking it will, according to the ATCO (2006) decision, have exceeded its jurisdiction. In dealing with the present matter with regard to the RSP, the law constrains the Board to providing a final order that is determined using generally accepted sound public utility practices.

(Re Newfoundland (Board of Commissioners of Public Utilities) (the "Stated Case"), 1998 CarswellNfld 150, Hydro's Authorities, Tab 6)

36. The Board has received expert evidence suggesting that the amounts held in the Industrial Customer's load variation component of the RSP can be properly reallocated amongst all Island Interconnected customers using energy ratios or by a method that more closely follows the methodology used in Hydro's approved cost of service methodology. It is submitted that these methods would be amongst the proper rate setting methodologies that the Board could apply in disbursing the amounts in a just and reasonable manner and that in deciding in such a manner the Board would be acting within its jurisdiction.

37. The Board is not jurisdictionally constrained to follow the rules used to determine the RSP rates that applied previously, indeed if it decided that it was so constrained it might be found to have unnecessarily fettered its decision making discretion, an error of law which itself goes to the Board's jurisdiction. The ATCO (2010) Supreme Court of Canada decision is clear authority that its final order as to the disposition or disbursement of this deferral account must be one that falls within those rate setting practices that are within the reasonable contemplation of the parties when the deferral account was instituted. It is also clear from that decision, however, that not all such errors would be errors of jurisdiction.

(Macaulay & Sprague, Practice and Procedure Before Administrative Tribunals, Vol. 1, pp. 5B-14.3 – 15, Hydro's Authorities, Tab 7;

Re ATCO Gas, 2010CarswellAlta 764 (Alta. C.A.), Hydro's Authorities, Tab 2)

Summary of Submissions on Jurisdiction

38. In furtherance to its interim orders to set the final rates, the Board is empowered to take into consideration, and to apply, proper ratemaking principles as derived from its governing statutes and as informed by relevant decisions of courts and decisions and practices of regulators. The Board is not constrained to make a decision that adheres to the rate structures that applied prior to the issuance of the first relevant interim order, Order No. P.U. 34 (2007). From the effective date of that interim order forward, the Board may set rates or disburse amounts held by Hydro in connection with the RSP, in accordance with its legislated jurisdiction and powers and in accordance with appropriate ratemaking principles. There are no vested rights held by any customers, or by any customer classes, to any portions of the Industrial Customer RSP amounts held by Hydro that arose after Order No. P.U. 34 (2007) was issued.

All of which is respectively submitted on June 9, 2010.

Geoffrey P. Young
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Authorities

TAB 1

1989 CarswellNat 586, 38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

1989 CarswellNat 586

Bell Canada v. Canadian Radio-Television & Telecommunications Commission

CDN. RADIO-TELEVISION & TELECOMMUNICATIONS COMM. v. BELL CAN. et al.

Supreme Court of Canada

Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, and Cory JJ.

Heard: Febuary 21, 1989
Judgment: June 22, 1989
Docket: Doc. No. 20525

Counsel: *Raynold Langlois, Q.C.* , *Greg Van Koughnett* and *Luc Huppé* , for appellant.

Gérald Tremblay, Q.C. , and *Michel Racicot*, for respondent.

Graham Garton , for Attorney General of Canada.

Janet Yale , for Consumers' Association of Canada.

Kenneth Engelhart , for Canadian Business Telecommunications Alliance.

Michel Ryan , for C.N.C.P. Telecommunications

Andrew Roman and *Robert Horwood*, for National Anti-Poverty Organization.

Subject: Public

Communications Law --- Regulatory commissions — C.R.T.C. (Canadian Radio-Television and Telecommunications Commission) — Powers and duties.

Appeals — Statutory appeal on questions of law and jurisdiction — No scope for curial deference towards agency's decisions — Specialization of duties requiring respect for decision on matters within expertise — Power of C.R.T.C. to revisit interim rate orders being question of jurisdiction not within C.R.T.C.'s expertise — Method of rectifying unjust or unreasonable rates within realm of C.R.T.C.'s expertise.

Jurisdiction — C.R.T.C. making order for one-time credit to rectify excessive revenues found to have been earned by Bell Can. as result of interim orders — C.R.T.C. having authority to revisit interim orders and to rectify adverse effects of such orders as part of final order — Method of rectification for C.R.T.C. provided not un-

reasonable — One-time credit for existing customers reasonable albeit not perfect compensation.

In March 1984, BC applied to the C.R.T.C. for a general rate increase. Because of the time it was going to take to deal finally with that application resulting in allegedly severe prejudice to BC's fiscal situation, the C.R.T.C. responded favourably to its request for an interim rate increase. This was set at 2 per cent effective January 1, 1985. In the order allowing the interim rate increase, the C.R.T.C. indicated that it was subject to re-evaluation as part of any final order. Notwithstanding the concerns over profitability that had prompted the interim order, BC's financial situation improved dramatically thereafter. This prompted another interim order by the C.R.T.C. in 1985 which resulted in a roll back of BC's rates (also expressed to be interim) to those in place prior to the March 1984 application. Then, BC itself sought to withdraw its application for a general rate increase. In effect, the C.R.T.C. rejected this application in that it proceeded to a hearing into the financial situation of BC. The upshot of this was a finding that BC's revenues during 1985 and 1986 were $206 million more than were justified in terms of what was held to be an appropriate rate of return. As a result, the C.R.T.C. ordered that BC redistribute those excess revenues to certain classes of customer in the form of a one-time credit.

Under the *Railway Act* , BC's tolls were subject to approval by the C.R.T.C. as well as revision from time to time. Section 340(1) required that such tolls be "just and reasonable". Subsection 5 of that section also conferred on the C.R.T.C. authority to make orders with respect to tolls "[i]n all other matters not expressly provided for" in the rest of the section.

Under the *National Transportation Act* , s. 52 the C.R.T.C. was given authority to deal of its own motion with matters assigned to it under the *Railway Act* , while by s. 60(2) it was given power to make interim orders and reserve further directions for a subsequent hearing. Section 66 then clothed the C.R.T.C. with authority to review, rescind, change, alter or vary its orders and decisions. Finally, under s. 68(1), provision was made for an appeal with leave on law and jurisdiction from C.R.T.C. orders to the Federal Court of Appeal.

BC appealed against the order and the Federal Court of Appeal (Hugesson J. dissenting) allowed the appeal and set aside the credit to customers ((1987), [1988] 1 F.C. 296). The C.R.T.C. then obtained leave to appeal to the Supreme Court of Canada.

Held:

The appeal was allowed. The order of the C.R.T.C. was reinstated.

Where the relevant legislation created a right of appeal to a Court from the decision of an administrative tribunal, there was no place for curial deference to decisions of that tribunal associated with decisions of tribunals protected by privative or finality clauses. Moreover, while even here, the concept of specialization of duties indicated the need for some measure of deference to decisions of the C.R.T.C. within its area of expertise, that did not apply to issues of jurisdiction such as the scope of the authority of the C.R.T.C. to issue interim decisions. On such issues, the Court was entitled to simply disagree with the Tribunal. In contrast, however, on the issue of the choice of the most appropriate remedy from among those available to achieve just and reasonable rates, the C.R.T.C. was entitled to a measure of deference. This, rather than the interpretation of the *Railway Act* and the *National Transportation Act* , was what the C.R.T.C. had been established to do.

The statutory scheme of the powers conferred on the C.R.T.C. indicated that its authority to make interim orders was to be interpreted so as to facilitate its task of ensuring that telephone rates were always "just and reason- able".

It was a necessary incident of the authority to regulate tolls and tariffs that the C.R.T.C. could regulate BC's level of revenues and its return on its equity.

While the C.R.T.C.'s order of a one-time credit was not strictly retrospective in that it did not actually replace or substitute the rates that were charged during the interim period, nevertheless, it was retrospective in the sense that it was designed to remedy the excessive rates charged during that period. However, even accepting this characterization of the order, the C.R.T.C. had jurisdiction to make it. Indeed, the authority to review interim orders retrospectively was the key distinction between interim orders and final orders, given the authority of the C.R.T.C. to at any time review final orders prospectively. It was inherent in the nature of interim orders that they could, as here, be revised and modified in a retrospective manner by a final decision. This conclusion also followed from the fact that interim rate orders were not based on the same criteria as final orders. The intent of interim rate orders was not to afford a preliminary adjudication on the merits, but rather to relieve the applicant from the deleterious effects of lengthy proceedings. Such was the nature of the order made here. Moreover, throughout, the C.R.T.C. had indicated its intention as part of the final order to review the rates charged during the interim period.

While, unlike other statutes, the power to review interim orders retrospectively was not set out expressly in the legislation, it clearly existed by virtue of necessary implication from the statutory scheme and purpose. To deny the C.R.T.C. this authority would be to sterilize its powers through an overly technical interpretation. More specifically, the whole thrust of the legislation was in the direction of ensuring that rates charged were at all times just and reasonable. To deny the C.R.T.C. the authority to undo unjust or unreasonable interim rate orders would defeat that purpose. In this respect, it mattered not that the regulatory scheme involved was one involving positive approval on application rather than negative disallowance after complaint. The addition of a power to make interim orders as part of a positive approval scheme conferred on the C.R.T.C. the flexibility to make such an order from the date of the application had been made but, as a corollary, also involved the authority to remedy as part of the final order any discrepancy between the rate of return yielded by the interim order and that allowed in the final decision.

Given the C.R.T.C.'s authority to revisit the period during which the interim orders were in effect, this necessarily involved the authority to remedy any unjustness or unreasonableness in those interim rates. The statutory basis for such an order was to be found in the breadth of s. 340(5).

In so doing, the C.R.T.C. was not confined to the extra revenues generated by the 2 per cent interim rate increase but rather had authority with respect to all of BC's revenues generated from the date of the commencement of the proceedings.

While the order did not necessarily benefit the customers who were actually charged excessive rates, nevertheless, the nature and extent of such orders were within the C.R.T.C.'s jurisdiction and the particular order, while not effecting perfect compensation, was clearly reasonable given the difficulties associated with actually compensating all those who had paid excessive rates.

Cases considered:

A.U.P.E. v. Bd. of Governors of Olds College, [1982] 1 S.C.R. 923 — *referred to*

B.C. Electric Railway Co. v. Public Utilities Comm. of B.C., [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 — *considered*

Canadian Pacific Ltd. v. Canadian Transport Commn. (1987), 79 N.R. 13 (Fed. C.A.) — *considered*

City of Calgary v. Madison Natural Gas Co. (1959), 19 D.L.R. (2d) 655 (Alta. C.A.) — *distinguished*

Coseka Resources Ltd. v. Saratoga Processing Co.; Petrogas Processing Ltd. v. Pub. Utilities Bd. (1981), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541 (C.A.) — *applied*

Douglas Aircraft Co. of Can. v. McConnell, [1980] 1 S.C.R. 245, 29 N.R. 109, 23 L.A.C. (2d) 143n, 99 D.L.R. (3d) 385, (sub nom. *Douglas Aircraft Co. v. U.A.W., Loc. 1967)* 79 C.L.L.C. 14,221 — *referred to*

Eurocan Pulp & Paper Co. and B.C. Energy Commn., Re (1978), 87 D.L.R. (3d) 727 (B.C.C.A.) — *considered*

McCreary v. Greyhound Lines of Can. Ltd. (1987), 87 C.L.L.C. 17,018, 78 N.R. 192, 8 C.H.R.R. D/4184, 38 D.L.R. (4th) 724 (Fed. C.A.) — *referred to*

N.B. Liquor Corp. v. C.U.P.E., Loc. 963, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209 — *distinguished*

Northwestern Utilities Ltd. v. Edmonton, [1929] S.C.R. 186, [1929] 2 D.L.R. 4 — *considered*

Nova v. Amoco Can. Petroleum Co., [1981] 2 S.C.R. 437, [1981] 6 W.W.R. 391, 38 N.R. 381, 128 D.L.R. (3d) 1, 32 A.R. 384 — *referred to*

O.P.S.E.U. v. Forer (1985), 52 O.R. (2d) 705, 15 Admin. L.R. 145, 12 O.A.C. 1, 23 D.L.R. (4th) 97 — *referred to*

Ottawa (City) v. Ottawa Professional Firefighters' Assn. (1987), 58 O.R. (2d) 685, 24 Admin. L.R. 213, 19 O.A.C. 197, 36 D.L.R. (4th) 609 — *referred to*

R. v. Bd. of Commrs. of Public Utilities (N.B.); Ex parte Moncton Utility Gas Ltd. (1966), 60 D.L.R. (2d) 703 (N.B. C.A.) — *distinguished*

Trans Alaska Pipeline Rate Cases, Re (1978), 436 U.S. 631 — *considered*

U.S. v. Fulton (1986), 475 U.S. 657 — *referred to*

Statutes considered:

National Energy Board Act, R.S.C. 1985, c. N-7 —

s. 64

National Transportation Act, R.S.C. 1985, c. N-20 —

s. 47

s. 49

s. 52

s. 60(2)

s. 61

s. 66

s. 68(1)

Natural Gas Utilities Act, S.A. 1944, c. 4 —

s. 35a(3)

Public Utilities Act, R.S.B.C. 1948, c. 277 —

s. 16(1)(b)

Public Utilities Act, R.S.N.B. 1952, c. 186.

Public Utilities Board Act, R.S.A. 1970, c. 302 [now R.S.A. 1980, c. P-37] —

s. 52(2)

Railway Act, R.S.C. 1985, c. R-3 —

s. 334

s. 335

s. 336

s. 337

s. 338

s. 339

s. 340

Regulations considered:

National Transportation Act, R.S.C. 1985, c. N-20 C.R.T.C. Telecommunications Rules of Procedure, SOR/795-554 — Parts III, IV and VII

APPEAL from Federal Court of Appeal, reported at (1987), [1988] 1 F.C. 296 , allowing an appeal from an order of the C.R.T.C.

The judgment of the Court was delivered by *Gonthier J.*:

1 The present case is an appeal against a decision of the Federal Court of Appeal [reported at (1987), [1988] 1 F.C. 296], which quashed one of the orders made by the appellant in Telecom Decision C.R.T.C. ["Decision"] 86-17. The impugned order compelled the respondent to distribute $206 million in excess revenues earned in the years 1985 and 1986 through a one-time credit to be granted to certain classes of customers. The respondent does not contest the factual findings on which Decision 86-17 is based, nor does it claim that this order would unduly prejudice its financial position. None of the other orders made in Decision 86-17 are challenged.

2 The appellant claims that the purpose of the challenged order was to provide telephone users with a remedy against interim rates, which turned out to be excessive, on the basis of the findings of fact made by the appellant following a final hearing, held in the summer of 1986, for the purpose of setting rates to be charged by the respondent in the years 1985 and following. These findings of fact are reported in Decision 86-17. Since this case turns on the proper characterization of the one-time credit order made in Decision 86-17, it is important to describe the procedural history of the administrative proceedings which led to the order now contested by the respondent.

I — The Facts

3 On March 28, 1984, the respondent applied for a general rate increase under Part VII of the C.R.T.C. Telecommunications Rules of Procedure, SOR/79-554 [under the *National Transportation Act* , R.S.C. 1985, c. N-20], which provides for a summary public process to deal with special applications. The respondent claimed that the Canadian Government's restraint program restricting rate increases of federally regulated utilities to 5 per cent and 6 per cent was sufficient justification to dispense with the normal procedure for general rate increase applications set out in Part III of the C.R.T.C. Telecommunications Rules of Procedure. In Decision 84-15, the appellant rejected this application on the ground that the respondent had failed to use the appropriate procedure as set out in Part III of these rules. However, the appellant indicated that if the respondent was to suffer financial prejudice as a result of the delays involved in preparing for the more complex procedure set out in part III, it could always apply for interim relief pending a hearing and a decision on the merits, at pp. 8-9:

> The Commission recognizes that, in 1985 and beyond, in the absence of rate relief, a deterioration in the Company's financial position could occur. In this regard, if the Company should find it necessary to file an application for a general rate increase under Part III of the Rules, the Commission would be prepared to schedule a public hearing on such an application in the fall of 1985. *Should Bell consider it necessary to seek rate increases to come into effect earlier in 1985 than this schedule would allow, it may of course apply for interim relief* . In the event Bell were to seek such interim relief, it would be open to the Company to suggest that the Commission's traditional test for determining interim rate applications is overly restrictive in light of the Commission hearing schedule and to put forward proposals for an alternative test for consideration.

(Emphasis added.) On September 4, 1984, the respondent filed an application for a general rate increase based on 1985 financial data which would come into effect on January 1, 1986. At the same time, the respondent applied for an interim rate increase of 3.6 per cent.

4 In Decision 84-28, rendered on December 19, 1984, the appellant set out the following policy previously adopted in Decision 80-7 with respect to the granting of interim rate increases, at pp. 8-9:

> The Commission's policy concerning interim rate increases, enunciated in Decision 80-7, is as follows:
>
> The Commission considers that, as a rule, general rate increases should only be granted following the full

> public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. *Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase* .

(Emphasis added.) The respondent argued that its financial situation warranted an interim rate increase and did not question the reasonableness of this policy. The appellant agreed with the respondent's submission that, in the absence of interim rate increases, it might suffer from serious financial deterioration and awarded an interim rate increase of 2 per cent. In this decision, the appellant required the respondent to prepare for a hearing to be held in the fall of 1985 for the purpose of assessing the respondent's application for a final order increasing its rates on the basis of 2 test years, 1985 and 1986. Decision 84-28 also states the reasons why the interim rate increase was set at 2 per cent, at p. 10:

> In determining the amount of interim rate increases required under the circumstances, the Commission has taken into account the following factors:
>
> 1) While the company stated that an interest coverage ratio of 4.0 times is required, the Commission regards the maintenance of the coverage ratio of 3.8 times, projected by the Company for 1984, as sufficient for the purposes of this interim decision.
>
> 2) With regard to the level of ROE ['return on equity'], the Commission is of the view that, for 1985, *and subject to review in the course of its consideration of the Company's general rate increase application in the fall of 1985* , 13.7% is appropriate for determining the amount of rate increases to be permitted pursuant to this interim increase application.
>
> 3) With regard to the Company's 1985 expense forecasts, the Commission notes that the inflation factor used by the Company is higher than the current consensus forecast of the inflation rate for 1985 and considers that Bell's forecast of its 1985 Operating Expenses could be overestimated by approximately $25 million.
>
> Taking the above factors into account, the Commission has decided that an interim rate increase of 2% for all services in respect of which rate increases were requested by the Company in the interim application is appropriate at this time. This increase is expected to generate additional revenues of $65 million from 1 January 1985 to 31 December 1985. *To permit the review of the Company's 1985 revenue requirement by the Commission at the fall 1985 public hearing, Bell is directed to file its 4 June 1985 general rate increase application on the basis of two test years, 1985 and 1986* .

(Emphasis added.) The reasons set out in the appellant's decision indicate that the interim rate increase was calculated on the basis of financial information provided by the respondent without placing this information under the scrutiny normally associated with hearings made under Part III of the C.R.T.C. Telecommunications Rules of Procedure. Furthermore, the appellant clearly expressed the intention to review this interim rate increase in its final decision on the respondent's application for a general rate increase, on the basis of financial information for the years 1985 and 1986. Given the content of the appellant's final decision, it is also important to note that the 2 per cent interim rate increase was calculated on the assumption that the respondent's return on equity for 1985 should be 13.7 per cent subject to review in the final decision.

5 The respondent's financial situation later improved thereby reducing the necessity to proceed with an early

hearing for the purpose of obtaining a general and final rate increase. By a letter dated March 20, 1985, the respondent asked for this hearing to be postponed to February 10, 1986, suggesting however that the 2 per cent interim increase be given immediate final approval. In C.R.T.C. Telecom Public Notice 1985-30 dated April 16, 1985, the appellant granted the postponement but refused to grant the final approval requested by the respondent without further investigation into this matter. The Commission added that it would monitor the respondent's financial situation on a monthly basis and ordered the filing of monthly statements, at p. 4:

> In view of the improving trend in the Company's financial performance, the Commission further directs as follows:
>
> Bell Canada is to provide to the Commission for the balance of 1985, within 30 days after the end of each month, commencing with April 1985, a full year forecast of revenues and expenses on a regulated basis for the year 1985, together with the estimated financial ratios including the projected regulated return on common equity.
>
> The Commission will monitor the Company's financial performance during 1985, *in order to determine whether any further rate action may be necessary* .

(Emphasis added.) Again, the appellant clearly expressed its intention to prevent abuse of interim rate increases.

6 After a review of the July financial information filing ordered in C.R.T.C. Telecom Public Notice 1985-30, the appellant asked the respondent to provide reasons why the interim rate increase of 2 per cent should remain in force given its improved financial situation. The respondent was unable to convince the appellant that this interim increase remained necessary to avoid financial deterioration and was accordingly ordered to file revised tariffs effective as of September 1, 1985, at pp. 4-5 of Decision 85-18:

> In view of the improving trend in Bell's financial performance, the Commission is satisfied that the company no longer needs the 2% interim increases *which were awarded in Decision 84-28 in order to avoid serious financial deterioration in 1985* . Accordingly, Bell is directed to file revised tariffs forthwith, with an effective date of 1 September 1985, to suspend these increases.
>
> In arriving at its decision the Commission has estimated that, *with interim rates in effect for the complete year* , the company would earn an ROE ['return on equity'] of approximatively 14.5% in 1985, *a return well in excess of the 13.7% considered appropriate for determining the 2% interim rate increases* . The Commission also projected that interest coverage would be approximately 3.9 times. This would improve on the actual 1984 coverage of 3.8 times. These estimates are not significantly different from Bell's current expectation of its 1985 result.
>
> *The Commission will make its final determination of Bell's revenue requirement for the year 1985 in the general rate proceeding currently scheduled to commence with an application to be filed on 10 February 1986* .

(Emphasis added.) As a result of this decision, the respondent was forced to charge the rates effective before its application for a rate increase, filed on March 28, 1984. However, even though the rates effective as of September 1, 1985 were numerically identical to the rates in force under the previous final decision prior to the interim increase, these new rates remained interim in nature. In fact, the appellant reiterated its intention to review the rates actually charged during 1985 and 1986.

7 On October 31, 1985, the respondent decided not to proceed with its application for a general rate increase

and requested that its procedures be withdrawn. In C.R.T.C. Telecom Public Notice 1985-85, the appellant decided to review the respondent's financial situation and therefore the appropriateness of its rates, notwithstanding its request to withdraw its initial application for a general rate increase, at pp. 3-4:

> *In light of these forecasts and the degree to which the company's rate structure is expected to be considered in separate proceedings, Bell stated that it wished to refrain from proceeding with the application schedule to be filed on 10 February 1986* . Accordingly, the company requested the withdrawal of the amended Directions on Procedure issued by the Commission in Public Notice 1985-30.
>
> . . . . .
>
> The Commission notes that the appropriate rate of return for Bell has not been reviewed in an oral hearing since the proceeding which culminated in *Bell Canada — General Increase in Rates* , Telecom Decision CRTC 81-15, 20 September 1981 (Decision 81-15). *The Commission considers that, given Bell's current forecasts, it would be appropriate to review the company's cost of equity for the years 1985, 1986 and 1987 in the proceeding scheduled for 1986* . Such a review would allow consideration of the changing financial and economic conditions since Decision 81-15 and the impact of Bell's corporate reorganization on its rate of return. The Commission notes that other issues arising from the reorganization would also be addressed in the 1986 proceeding.

(Emphasis added.) This interim decision indicates that the appellant wished to continue the original rate review procedure initiated by the respondent in March 1984. Thus, the rates in force as of January 1, 1985 until the final decision now challenged by the respondent were interim rates subject to review.

8 The hearing which led to the final decision lasted from June 2 to July 16, 1986 and this final decision, Decision 86-17, was rendered on October 14, 1986. In this decision, the appellant first established appropriate levels of profitability for the respondent on the basis of its return on equity. The appellant then calculated the amount of excess revenues earned by the respondent in 1985 and 1986, along with the necessary reduction in forecasted revenues for 1987. It was found that the respondent had earned excess revenues of $63 million in 1985 and $143 million in 1986, for a total of $206 million, at p. 93:

> After making further adjustments for the compensation for temporarily transferred employees and including the regulatory treatment for non-integral subsidiary and associated companies, the Commission has determined that a revenue requirement reduction of $234 million would provide the company with a 12.75% ROE ['return on equity'] on a regulated basis in 1987. Similarly, the Commission has determined that $143 million is the required revenue reduction to achieve the upper end of the permissible ROE on a regulated basis in 1986, 13.25%. With respect to 1985, after making the adjustments set out in this decision, the Commission has determined that Bell earned excess revenues in the amount of $63 million, the deduction of which would provide 13.75%, the upper end of the permissible ROE on a regulated basis.

It is important to note that the evidence and the arguments presented by the interested parties as well as interveners were carefully scrutinized by the appellant, at pp. 77-92 of Decision 86-17. It is for all practical purposes impossible to engage in such a meticulous and painstaking analysis of all relevant facts when faced with an application for interim relief. Finally, it is also useful to note that the permissible return on equity of 13.7 per cent allowed by the appellant in its interim decision, Decision 84-28, was increased to 13.75 per cent in Decision 86-17. Thus, the appellant realized that the interim rates approved for 1985 yielded greater rates of return than initially anticipated, and that the rate of return actually recorded for that year even exceeded the greater allowable rate of return fixed in the final decision, Decision 86-17. Such differences between projected and actual

rates of return are common and certainly call for a high level of flexibility in the exercise of the appellant's regulatory duties.

9 The Commission decided that the respondent could not retain excess revenues earned on the basis of interim rates and issued the order now challenged by the respondent in order to provide a remedy for this situation. This order reads as follows, at pp. 95-96:

> *Concerning the excess revenues for the years 1985 and 1986, the Commission directs that the required adjustments be made by means of a one-time credit to subscribers of record, as of the date of this decision, of the following local services* : residence and business individual, two-party and four-party line services; PBX trunk services; centrex lines; enhanced exchange-wide dial lines; exchange radio-telephone service; service-system service and information system access line service. *The Commission directs that the credit to each subscriber be determined by pro-rating the sum of the excess revenues for 1985 and 1986 of $206 million in relation to the subscriber's monthly recurring billing for the specified local services provided as of the date of this decision* . The Commission further directs that the work necessary to implement the above directives be commenced immediately and that the billing adjustments be completed by no later than 31 January 1987. Finally, the Commission directs the company to file a report detailing the implementation of the credit by no later than 16 February 1987.
>
> *The Commission considers that 1987 excess revenues are best dealt with Gthrough rate reductions to be effective 1 January 1987* .

(Emphasis added.) Although the respondent always charged rates approved by the appellant, the appellant found it necessary to make sure that its assessment of allowable revenues for 1985 and 1986 would be complied with. The appellant argues that the order now challenged by the respondent was the most efficient way of redistributing these excess revenues to the respondent's customers even though they would not necessarily be refunded to those who actually had to pay the rates in force during that period.

10 It is therefore obvious that the appellant only allowed interim rates to be charged after January 1, 1985 on the assumption that it would review these rates in a hearing to be held in order to deal with an application for a general rate increase. Every interim decision which led to Decision 86-17 confirmed the appellant's intention to review the interim rates at the final hearing. Finally, the interim rates were ordered for the purpose of preventing any serious deterioration in the respondent's financial situation while awaiting for a final decision on the merits. Of necessity, these interim rates were determined on the basis of incomplete evidence presented by the respondent. It cannot be said that the purpose of the interim rate increase ordered by the appellant was to serve as a temporary final decision.

II — The Issue and the Arguments Raised by the Parties

11 In this Court, as well as in the Federal Court of Appeal, the parties have agreed that the only issue arising out of the facts of this case is whether the appellant had jurisdiction to order the respondent to grant a one-time credit to its customers. The appellant's findings of fact, its determination with respect to the respondent's revenue requirements for 1985 and 1986, and its computation of the amount of excess revenues earned during this period are not contested by the respondent. In my opinion, this issue can be divided in two subquestions:

1. Whether the appellant had the legislative authority to review the revenues made by the respondent during the period when interim rates were in force;

2. Whether the appellant had jurisdiction to make an order compelling the respondent to grant a one-time credit to its customers.

12 The main arguments raised by the appellant can be summarized as follows:

1. The *Railway Act* , R.S.C. 1985, c. R-3 and the *National Transportation Act* , R.S.C. 1985, c. N-20 grant the appellant the power to review the period during which a regulated entity was allowed to charge interim rates, for the purpose of comparing the revenues earned during this period to the appropriate level of revenues set in the final decision;

2. The power to make a one-time credit order is necessarily ancillary to the power to review the period during which interim rates were charged, and the appellant has jurisdiction to determine the most efficient method of providing a remedy in cases where excess revenues were made.

13 The main arguments raised by the respondent can be summarized as follows:

1. The power to set tolls and tariffs does not include the power to review and make orders with respect to the respondent's level of revenues;

2. The appellant has no power to make a one-time credit order with respect to revenues earned as a result of having charged rates which the respondent, by virtue of the *Railway Act* , was obliged to charge, whether these rates were set by an interim order or by a final order.

14 Counsel for the National Anti-Poverty organization ("N.A.P.O.") has also argued that the appellant's decisions concerning the interpretation of statutes which grant them jurisdiction to deal with certain matters are entitled to curial deference and cannot be reviewed unless they are patently unreasonable. This argument raises the issue of the scope of review allowed by s. 68(1) of the *National Transportation Act* and must be dealt with prior to any analysis of the relevant statutory provisions claimed to be the source of the appellant's jurisdiction to make the one-time credit order found in Decision 86-17.

15 The present case raises difficult questions of statutory interpretation and it will therefore be necessary to examine the relevant provisions of the *wRailway Act* and the *National Transportation Act* before moving to a detailed analysis of the decision of the Federal Court of Appeal and the arguments raised by the parties.

III — Relevant Legislative Provisions

16 The appellant derives its power to regulate the telephone industry from ss. 334 to 340 of the *Railway Act* ("Provisions Governing Telegraphs and Telephones") and from ss. 47 et seq. of the *National Transportation Act* ("General Jurisdiction and Powers in Respect of Railways"). The *Railway Act* sets out the general criteria concerning the setting of rates and tariffs to be charged by telephone utility companies, whereas the *National Transportation Act* sets out the appellant's procedural powers in the context of decisions concerning, amongst other matters, telephone rates and tariffs.

17 Sections 335(1), 335(2) and 335(3) of the *Railway Act* (formerly ss. 320(2) and 320(3)) state the principle upon which the appellant's regulatory authority rests, namely, that telephone rates and tariffs are subject to approval by the appellant, cannot be changed without its prior authorization, and may be revised at any time by the appellant:

335. (1) Notwithstanding anything in any other Act, all telegraph and telephone tolls to be charged by a

company, other than a toll for the transmission of a message intended for reception by the general public and charged by a company licensed under the *Broadcasting Act, are subject to the approval of the Commission, and may be revised by the Commission from time to time* .

(2) The company shall file with the Commission tariffs of any telegraph or telephone tolls to be charged, and the tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission by regulation or in any particular case prescribes.

(3) *Except with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in filing under subsection (2), or which is disallowed by the Commission ...*

(Emphasis added.) The most important requirement governing the appellant's power to set telephone rates is found in s. 340(1) of the *Railway Act* which provides that all such rates must be "just and reasonable":

340. (1) *All tolls shall be just and reasonable* and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

(Emphasis added.) Section 340 also prohibits discriminatory telephone rates and gives the appellant the power to suspend, postpone, or disallow a tariff of tolls which is contrary to ss. 335 to 340 and substitute a satisfactory tariff of tolls in lieu thereof.

18 Finally, s. 340(5) of the *Railway Act* gives the appellant the power to make orders with respect to traffic, tolls and tariffs in all matters not expressly covered by s. 340:

340....

(5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

Although the power granted by s. 340(5) could be construed restrictively by the application of the ejusdem generis rule, I do not think that such an interpretation is warranted. Section 340(5) is but one indication of the legislator's intention to give the appellant all the powers necessary to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.

19 Sections 47 et seq. of the *National Transportation Act* set out, from a procedural point of view, the appellant's jurisdiction with respect to the powers granted by the *Railway Act* . Section 49(1) gives the appellant jurisdiction over all complaints concerning compliance with the Act, while s. 49(3) gives the appellant jurisdiction over all matters of fact or law for the purposes of the *Railway Act* and of ss. 47 et seq. of the *National Transportation Act* . However, s. 68(1) provides an appeal to the Federal Court of Appeal, with leave, on any question of law or jurisdiction, and it is under this provision that the respondent has challenged Decision 86-17.

20 In many respects, ss. 47 et seq. of the *National Transportation Act* have been designed to further the policy objectives and the regulatory scheme set out in the *Railway Act* governing the approval of telephone rates and tariffs. Thus, s. 52 of the *National Transportation Act* gives the appellant the power to inquire into, hear or determine, of its own motion or upon request from the Minister, any matter which it has the right to inquire into, hear or determine under the *Railway Act* :

52. The Commission may, of its own motion, or shall, on the request of the Minister, inquire into, hear and

> determine any matter or thing that, under this part or the *Railway Act* , it may inquire into, hear and determine upon application or complaint, and with respect thereto has the same powers as, on any application or complaint, are vested in it by this Act.

Section 52 is therefore the corollary of the appellant's power to "revise [tolls] ... from time to time" found in s. 335(1) of the *Railway Act* . Thus, the appellant has the power to review, from time to time, its own final decisions on a proprio motu basis. Similarly, s. 61 provides that the appellant is not bound by the wording of any complaint or application it hears and may make orders which would otherwise offend the ultra petita rule:

> 61. On any application made to the Commission, the Commission may make an order granting the whole or part only of the application, or may grant such further or other relief, in addition to or in substitution for that applied for, as to the Commission may seem just and proper, as fully in all respects as if the application had been for that partial, other or further relief.

21 By virtue of s. 60(2) of the *National Transportation Act* , the appellant also has the power to make interim orders:

> 60. ...
>
> (2) The Commission may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

22 Finally, by virtue of s. 66 of the *National Transportation Act* , the appellant has the power to review any of its past decisions, whether they are final or interim:

> 66. The Commission may review, rescind, change, alter or vary any order or decision made by it or may rehear any application before deciding it.

23 It is obvious from the legislative scheme set out in the *Railway Act* and the *National Transportation Act* that the appellant has been given broad powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. The appellant may revise rates at any time, either of its own motion or in the context of an application made by an interested party. The appellant is not even bound by the relief sought by such applications, and may make any order related thereto provided that the parties have received adequate notice of the issues to be dealt with at the hearing. Were it not for the fact that the appellant has the power to make interim orders, one might say that the appellant's powers in this area are limited only by the time it takes to process applications, prepare for hearings and analyze all the evidence. However, the appellant does have the power to make interim orders and this power must be interpreted in light of the legislator's intention to provide the appellant with flexible and versatile powers for the purpose of ensuring that telephone rates are always just and reasonable.

24 The question before this Court is whether the appellant has the statutory authority to make a one-time credit order for the purpose of remedying a situation where, after a final hearing dealing with the reasonableness of telephone rates charged during the years under review, it finds that interim rates in force during that period were not just and reasonable. Since there is no clear provision on this subject in the *Railway Act* or in the *National Transportation Act* , it will be necessary to determine whether this power is derived by necessary implication from the regulatory schemes set out in these statutes.

IV — The Decision of the Court Below

25 In the Federal Court of Appeal, the respondent in this Court argued that in order to find statutory author-

ity for the power to make a one-time credit order, it was necessary to find that s. 66 (power to "review, rescind, change, alter or vary" previous decisions) or s. 60(2) (power to make interim orders) of the *National Transportation Act* provide powers to make retroactive orders. Of course, the respondent argued that these provisions did not grant such a power and the majority of the Federal Court of Appeal, composed of Marceau and Pratte JJ. agreed with this argument, Hugessen J. dissenting.

26 Marceau J. held that the appellant in this Court only had the power to fix telephone tolls and tariffs, and that it has no statutory authority to deal with excess revenues or deficiencies in revenues arising as a result of a discrepancy between the rate of return yielded from the interim rates in force prior to the final decision and the permissible rate of return fixed by this final decision. Marceau J. was of the opinion that the wording of s. 66 of the *National Transportation Act* is neutral with respect to retroactivity, and that the presumption against retroactivity should therefore operate. Marceau J. added that the power to make interim orders does not carry with it the power to remedy any discrepancy between interim and final orders because the respondent could not be forced to reimburse revenues earned by charging rates approved by the appellant. Thus, according to Marceau J., the regulatory scheme set out in the *Railway Act* and the *National Transportation Act* is prospective in nature and, in the context of such a scheme, the power to make interim orders only involves the power to make orders "for the time being".

27 Pratte J., who concurred in the result with Marceau J., rejected all arguments based on the retroactive nature of the powers granted by ss. 60(2) and 66 of the *National Transportation Act* . Pratte J. was of the opinion that the impugned order was not retroactive in nature since its effect was to force the respondent to grant a credit in the future rather than change the rates charged in the past in a retroactive manner. Pratte J. then stated that if legislative authority existed for Decision 86-17, it must be found in s. 60(2) of the *National Transportation Act* which provides for "further directions" to be made at a later date following an interim decision. However, Pratte J. was of the opinion that any "further direction" must be in the nature of an order which can be made under s. 60(2) in the first place. It follows from that reasoning that if no one-time credit order can be made by interim order, no "further direction" to that effect can be made under s. 60(2). Pratte J. then agreed with Marceau J. that the respondent could not be forced to reimburse revenues made by charging rates approved by the appellant whether by interim order or by a "further direction" made in a final order.

28 Hugessen J. dissented on the basis that, within the statutory framework set out in the *Railway Act* and the *National Transportation Act* , all orders whether final or interim can, by virtue of ss. 60(2) and 66 of the *National Transportation Act* , be modified by a further prospective order; thus, the proposed rule that interim orders can only be modified by a further prospective order would, in Hugessen J.'s opinion, effectively eliminate any distinction between final and interim orders and defeat the legislator's intention to provide the appellant with a distinct and independent power to make interim orders. In order to differentiate interim orders from final orders, Hugessen J. was of the opinion that the appellant in this Court must have the power to fix just and reasonable rates as of the date at which interim rates came into effect. Thus, only interim rates can be modified in a retrospective manner by a final order. Hugessen J. then stated that the interim rates in force in 1985 and 1986 must not be divided into the previous rate and the interim rate increase of 2 per cent: the resulting rate must be viewed as interim in its entirety because all the rates charged after January 1, 1985 were authorized by interim orders. Finally, Hugessen J. stated that the one-time credit order was a valid exercise of the power to set just and reasonable rates as of January 1, 1985 and that the choice of the appropriate remedy was an "'administrative matter' properly left for the Commission's determination". Hugessen J. also noted that the appellant's order was in substance, though not in form, a "matter relating to tolls and tariffs" within the meaning of s. 340(5) of the *Railway Act* .

V — Analysis

29

a) Curial deference towards the decisions of the C.R.T.C.

30 N.A.P.O. argues that the appellant's decisions are entitled to "curial deference" because of their national importance, and that these decisions should not be overturned unless they are patently unreasonable. N.A.P.O. cites the following cases as authority for this proposition: *N.B. Liquor Corp. v. C.U.P.E., Loc. 963*, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 24 N.R. 341, 79 C.L.L.C. 14,209 ("C.U.P.E."); *Douglas Aircraft Co. of Can. Ltd. v. McConnell*, [1980] 1 S.C.R. 245, 29 N.R. 109, 23 L.A.C. (2d) 143n, 99 D.L.R. (3d) 385, (sub nom. *Douglas Aircraft Co. v. U.A.W., Loc. 1967)* 79 C.L.L.C. 14,221 ; *A.U.P.E. v. Bd. of Governors of Olds College*, [1982] 1 S.C.R. 923 ; *O.P.S.E.U. v. Forer* (1985), 52 O.R. (2d) 705, 15 Admin. L.R. 145, 12 O.A.C. 1, 23 D.L.R. (4th) 97 ; *Ottawa (City) v. Ottawa Professional Firefighters' Assn.* (1987), 58 O.R. (2d) 685, 24 Admin. L.R. 213, 19 O.A.C. 197, 36 D.L.R. (4th) 609 ; *McCreary v. Greyhound Lines of Can. Ltd.* (1987), 87 C.L.L.C. 17,018, 78 N.R. 192, 8 C.H.R.R. D/4184, 38 D.L.R. (4th) 724 (Fed. C.A.) ; and *Canadian Pacific Ltd. v. Canadian Transport Commn.* (1987), 79 N.R. 13 (Fed. C.A.) ("Canadian Pacific").

31 With the exception of the *Canadian Pacific* case, supra, all these cases involved judicial review of decisions which were either protected by a privative clause or by a provision stating that no appeal lies therefrom. Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, Courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. Thus, this Court has decided in the *C.U.P.E.* case, supra, that judicial review cannot be completely excluded by statute and that Courts of original jurisdiction can always quash a decision if it is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237, S.C.R.). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the *C.U.P.E.* case, Dickson J., as he then was, described the legislator's intention as follows, at pp. 235-36 (S.C.R.):

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

However, it is important to stress the fact that the decision of an administrative tribunal can only be entitled to such deference if the legislator has clearly expressed his intention to protect such decisions through the use of privative clauses or clauses which state that the decision is final and without appeal. As formulated, N.A.P.O.'s argument on curial deference must therefore be rejected because it fails to recognize the basic difference between appellate review and judicial review of decisions which do not fall within the jurisdiction of the lower tribunal.

32 Although s. 49(3) of the *National Transportation Act* provides that the appellant has full jurisdiction to hear and determine all matters whether of law or fact for the purposes of the *Railway Act* and of Part IV of the *National Transportation Act* , the appellant's decisions are subject to appeal, with leave, to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1), which reads as follows:

> 68. (1) An appeal lies from the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave therefor being obtained from that Court on application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and on notice to the parties and the Commission, and on hearing such of them as appear and desire to be heard.

It is trite to say that the jurisdiction of a Court on appeal is much broader than the jurisdiction of a Court on judicial review. In principle, a Court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

33 However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. The *Canadian Pacific* case is an example of a situation where curial deference towards a decision of the Canadian Transport Commission involving the interpretation of a tariff was appropriate. The decision of the Canadian Transport Commission was appealed to a review committee and then to the Federal Court of Appeal. Urie J. held that the decision of the review committee must not be reversed unless it is unreasonable or clearly wrong, at pp. 16-17:

> On the appeal from that decision to this court, the appellant advanced essentially the same grounds and arguments which it had submitted to the R.T.C. As to the first ground, I am of the opinion that the R.T.C. correctly interpreted the two items from the tariff and since its view was confirmed by the Review Committee, that Committee did not commit an error in construction. No useful purpose would be served by my restating the reasons of the R.T.C. for interpreting the items as they did and I respectfully adopt them as my own. *This court should not interfere with an interpretation made by bodies having the expertise of the R.T.C. and the Review Committee in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong* . Neither situation prevails in this case.

(Emphasis added.) Although the very purpose of the review committee is to interpret the tariff, and although such questions of interpretation fall within the Review Committee's area of special expertise, it does not follow that its decisions can only be reviewed if they are unreasonable. However, the principle of specialization of duties justifies curial deference in such circumstances.

34 In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the *Railway Act* and the *National Transportation Act* . It is a question of law which is clearly subject to appeal under s. 68(1) of the *National Transportation Act* . It is also a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.

35 Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the

respondent is not a decision which falls within the appellant's area of special expertise and is therefore pursuant to s. 68(1), subject to review in accordance with the principles governing appeals. Indeed, the appellant was not created for the purpose of interpreting the *Railway Act* or the *National Transportation Act* but rather to ensure, amongst other duties, that telephone rates are always just and reasonable.

b) The power to regulate Bell Canada's revenues

36 The respondent argues that the appellant only has jurisdiction to regulate tolls and tariffs and that this power does not include the power to regulate its level of revenues or its return on equity.

37 The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity. This has been recognized by this Court interpreting provisions similar to s. 340(1) of the *Railway Act* which prescribe that "[a]ll tolls shall be just and reasonable". In *B.C. Electric Railway Co. v. Public Utilities Comm. of B.C.*, [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 , Locke J. said the following about para. 16(1)(b) of the *Public Utilities Act* , R.S.B.C. 1948, c. 277, which provided that in fixing a rate the Public Utility Commission of British Columbia should take into consideration the "fair and reasonable return upon the appraised value of the property of the public utility used ... to enable the public utility to furnish the service", at p. 848 (S.C.R.):

> I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant *these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered* . Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask.

(Emphasis added.) In *Northwestern Utilities Ltd. v. Edmonton*, [1929] S.C.R. 186, [1929] 2 D.L.R. 4 , Lamont J. described the relevant factors in the determination of what are just and reasonable rates as follows, at p. 190 (S.C.R.):

> In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.

Such provisions require the administrative tribunal to balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public.

38 Thus, it is trite to say that in fixing fair and reasonable tolls the appellant must take into consideration the level of revenues needed by the respondent. In fact, the respondent would be the first to complain if its financial situation was not taken into consideration when tolls are fixed. By so doing, the appellant regulates the re-

spondent's revenues, albeit in a seemingly indirect manner. I would therefore dismiss this argument.

c) The power to revisit the period during which interim rates were in force

i) Introduction

39 As indicated above, the appellant has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

40 This question involves a determination of whether rates approved by interim order are inherently contingent as well as provisional, or whether the statutory scheme established by the *Railway Act* and the *National Transportation Act* is so prospective in nature that it precluded such a retrospective review of interim rates approved by the appellant. Finally, it is also necessary to determine whether the appellant has jurisdiction to order the reimbursement of amounts which exceed the revenues actually collected as a direct result of the interim rates.

ii) The distinction between interim and final orders

41 The respondent argues that the *Railway Act* and the *National Transportation Act* establish a regulatory regime which is exclusively prospective in nature because all rates, whether interim or final, must be just and reasonable. Thus, if interim rates have been approved on the basis that they are just and reasonable, no excessive revenues can be earned by charging such rates; interim rates, by reason only of their approval by the appellant, are presumed to be just and reasonable until they are modified by a subsequent order. According to the respondent, interim orders are therefore orders made "for the time being" until a more permanent order is made.

42 In his dissenting reasons, Hugessen J. points out quite accurately that if interim orders are simply orders made "for the time being", it will be impossible to distinguish final orders from interim orders within the statutory scheme established by the *Railway Act* and the *National Transportation Act* since all final orders may be revised by the appellant of its own motion and at any time: s. 335(1) of the *Railway Act* and s. 52 of the *National Transportation Act* . It is therefore impossible to say that final orders made under these statutes are final in the sense that they may never be reconsidered. The on-going nature of the appellant's regulatory activities necessarily entails a continuous review of past decisions concerning tolls and tariffs. Thus, all orders, whether final or interim, would be orders "for the time being" within the statutory scheme established by the *Railway Act* and the *National Transportation Act* .

43 Both the appellant and Hugessen J. rely heavily on *Coseka Resources Ltd. v. Saratoga Processing Co.; Petrogas Processing Ltd. v. Pub. Utilities Bd.* (1981), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541 (C.A.) ("*Coseka* ") for the proposition that interim decisions must be distinguished from final decisions in that they may be reviewed in a retrospective manner. This distinction is based on the fact that interim decisions are made subject to "further direction" as prescribed by s. 60(2) of the *National Transportation Act* which, for con-

venience, I cite again:

> 60. ...
>
> (2) The Commission may, instead of making an order final in the first instance, make an interim order and *reserve further directions* either for an adjourned hearing of the matter or for further application.

(Emphasis added.) The statutory scheme analysed by the Alberta Court of Appeal in *Coseka* , supra, is substantially similar to though more clearly prospective than the statutory scheme established by the *Railway Act* and the *National Transportation Act* . Furthermore, s. 52(2) of the *Public Utilities Board Act* , R.S.A. 1970, c. 302, is identical in wording to s. 60(2) of the *National Transportation Act* . Laycraft J.A., as he then was, cited with approval by Hugessen J., wrote the following with respect to the possibility of revisiting the period during which interim rates were in force for the purpose of deciding whether those interim rates were in fact just and reasonable, at pp. 717-718 (D.L.R.):

> In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the Board from s. 52 beyond those already contained in either the *Gas Utilities Act* or the *Public Utilities Board Act* to make final orders. The Board is by other provisions of the statute empowered by order to fix rates either on application or on its own motion. *An interim order would be the same, and have the same effect, as a final order unless the 'further direction' which the statute contemplates includes the power to change the interim order. On that construction of the section the interim order would be a 'final' order in all but name* . The Board would need no further legislative authority to issue a further 'final' order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to correction to be made when the hearing is subsequently completed.
>
> It was urged during argument that s. 52(2) was merely intended to enable the Board to achieve 'rough justice' during the period of its operation until a final order is issued. However, the Board is required to fix 'just and reasonable rates' not 'roughly just and reasonable rates'. The words 'reserve for further direction', in my view, contemplate changes as soon as the Board is able to determine those just and reasonable rates.

(Emphasis added.)

44 I agree with Hugessen J. and with the reasons of Laycraft J.A. in *Coseka* where he made a careful review of previous cases. The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect, as well as any discrepancy between the interim order and the final order, may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act* , final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.

45 The importance of distinguishing final orders from interim orders is illustrated by the case of *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655 (Alta. C.A.) ("*Madison* "). In *Madison* , supra, the Public Utility Board (the "Board") was faced with an application by the City of Calgary for the reimbursement of amounts earned in excess of the rates of the rates of return allowed in orders 34 and 41 for the sale of natural gas. The Board had allowed a rate of return of 7 per cent but, due to its lack of useful information to predict the

effect of rates on the actual financial performance of the regulated entity, the rates per volume fixed by the Board actually yielded greater profits than anticipated. The Board refused to grant the demands made in the application because it felt it had no jurisdiction to revisit periods during which rates approved in a final decision were in force. This decision was confirmed by the Court of Appeal on the basis that, contrary to arguments made by the City of Calgary, orders 34 and 41 were final orders not governed by s. 35*a* (3) of the *Natural Gas Utilities Act* , S.A. 1944, c. 4, which read as follows:

> 35a ...
>
> (3) The Board is hereby authorized, empowered and directed, on the final hearing, to give consideration to the effect of the operation of such interim or temporary order and in the final order to make, allow or provide for such adjustments, allowances or other factors, as to the Board may seem just and reasonable.

Order 34 provided that the price was set at 9 cents per mcf and that "if it should turn out that there is a surplus, it can be dealt with when the time arrives" which led to the argument that this order was in fact an interim order. Johnson J.A. dismissed this argument in the following terms, at pp. 662-663:

> It is the submission of the appellants that O. 34 and O. 41 are interim or temporary orders and the Board can now deal with these surpluses in accordance with s-s (3). As I have mentioned, orders fixing interim prices were made while the Board was hearing the application and considering its report. These, of course, were superseded by the order now under consideration. Orders 34 and 41 are, of course, not final orders in the sense that judgments are final. The Act contemplates that subsequent applications will be made to change the price fixed by these orders. They are nonetheless final so far as each application is concerned.

It is useful to note that the respondent relies heavily on the *Madison* case for the proposition that a regulated entity cannot be forced to disgorge profits legally earned by charging rates approved by the relevant regulatory authority on the basis that they are just and reasonable. Since the City of Calgary sought to obtain the reimbursement of profits earned by charging rates approved by final order, this case does not support the respondent's position.

46 A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders. The appellant may make a wide variety of interim orders dealing with hearings, notices and, in general, all matters concerning the administration of proceedings before the appellant. Such orders are obviously interim in nature. However, this is less obvious when an interim order deals with a matter which is to be dealt with in the final decision, as was the case with the interim rate increase ordered in Decision 84-28. If interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as a preliminary decision on the merits as far as the rate increase is concerned. This, however, is not the purpose of interim rate orders.

47 Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision, and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings, are essential characteristics of an interim rate order.

48 In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of the following criteria which, for convenience, I cite again, at p. 9:

> The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase.

Decision 84-28 was truly an interim decision since it did not seek to decide in a preliminary manner an issue which would be dealt with in the final decision. Instead, the appellant granted the interim rate increase on the basis that such an increase was necessary in order to prevent the respondent from having serious financial difficulties.

49 Furthermore, the appellant consistently reiterated throughout the procedures which led to Decision 86-17 its intention to review the rates charged for the test year 1985 and up to the date of the final decision. Holding that the interim rates in force during that period cannot be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the appellant's order approving interim rates.

50 It is true, as the respondent argues, that all telephone rates approved by the appellant must be just and reasonable whether these rates are approved by interim or final order; no other conclusion can be derived from s. 340(1) of the *Railway Act* . However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for the interim decision. It would be useless to order a final hearing if the appellant was bound by the evidence filed at the interim hearing. Furthermore, the interim rate increase was granted on the basis that the length of the proceedings could cause a serious deterioration in the financial condition of the respondent. Only once such an emergency situation was found to exist did the appellant ask itself what rate increase would be just and reasonable on the basis of the available evidence and for the purpose of preventing such a financial deterioration. The inherent differences between a decision made on an interim basis and a decision made on a final basis clearly justify the power to revisit the period during which interim rates were in force.

51 The respondent argues that the power to revisit the period during which interim rates were in force cannot exist within the statutory scheme established by the *Railway Act* and the *National Transportation Act* because these statutes do not grant such a power explicitly, unlike s. 64 of the *National Energy Board Act* , R.S.C. 1985, c. N-7. The powers of any administrative tribunal must of course be stated in its enabling statute, but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although Courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the *Railway Act* and the *National Transportation Act* , the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.

52 I am bolstered in my opinion by the fact that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power

to make appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.

53 It is interesting to note that, in the context of statutory schemes which did not provide any power to set interim rates, the United States Supreme Court has held that regulatory agencies have both the power to impose interim rates and the power to make reimbursement orders where the interim rates are found to be excessive in the final order: see *U.S. v. Fulton* (1986), 475 U.S. 657 , at pp. 669-671; *Re Trans Alaska Pipeline Rate Cases* (1978), 436 U.S. 631, where Brennan J. wrote the following comments, at pp. 654-656:

> Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such a period ... In response, we note first that we have already recognized in *Chessie* that the Commission does have powers 'ancillary' to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in *Chessie* to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a 'direc(t) relat(ionship)' between the power asserted and the Commission's 'mandate to assess the reasonableness of ... rates and to suspend them pending investigation if there is a question as to their legality.' 426 U.S., at 514.
>
> Thus, here as in *Chessie* , the Commission's refund conditions are a 'legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation,' in that they allow the Commission, in exercising its suspension power, to pursue 'a more measured course' and to 'offe[r] an alternative tailored far more precisely to the particular circumstances' of these cases. Since, again as in *Chessie* , the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the *Interstate Commerce Act* should be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result.

This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expression of the wider rule that the Court must not stifle the legislator's intention by reason only of the fact that a power has not been explicitly provided for.

54 The appellant has also argued that the power to "vary" a previous decision, whether interim or final, found in s. 66 of the *National Transportation Act* , includes the power to vary these decisions in a retroactive manner. Given my conclusion based on the inherent nature of interim orders, it is unnecessary for me to deal with this argument.

iii) The relevance of the distinction between positive approval and negative disallowance schemes of rate regulation

55 Much was said in argument about the difference between positive approval schemes and negative disallowance schemes, with respect to the power to act retrospectively. The first category includes schemes which provide that the administrative agency is the only body having statutory authority to approve or fix tolls payable to utility companies; these schemes generally stipulate that tolls shall be "just and reasonable" and that the administrative agency has the power to review these tolls on a proprio motu basis, or upon application by an interested party. The second category includes schemes which grant utility companies the right to fix tolls as they wish, but also grant users the right to complain before an administrative agency which has the power to vary those tolls if it finds that they are not "just and reasonable". It has generally been found that negative disallow-

ance schemes provide the power to make orders which are retroactive to the date of the application, by the ratepayer who claims that the rates are not "just and reasonable". On the other hand, positive approval schemes have been found to be exclusively prospective in nature and not to allow orders applicable to periods prior to the final decision itself. A full discussion of this issue was made by Estey J. in *Nova v. Amoco Can. Petroleum Co.*, [1981] 2 S.C.R. 437 at 450-451, [1981] 6 W.W.R. 391, 38 N.R. 381, 128 D.L.R. (3d) 1, 32 A.R. 384 , and I do not propose to repeat or to criticize what was said in that case with respect to the power to review rates approved by a previous final order. I am of the opinion that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* is a positive approval scheme inasmuch as the respondent's rates are subject to approval by the appellant. However, the *Nova* case, supra, only dealt with the power to review rates approved in a previous final decision and, as I have said before, entirely different considerations apply when interim rates are reviewed.

56 It has often been said that the power to review its own previous final decision on the fairness and the reasonableness of rates would threaten the stability of the regulated entity's financial situation. In *R. v. Bd. of Commrs. of Public Utilities (N.B.); Ex parte Moncton Utility Gas Ltd.* (1966), 60 D.L.R. (2d) 703 , Ritchie J.A., as he then was, wrote the following comments on this issue, at p. 729:

> The distributor contends that in the absence of any express limitation or restriction or an express provision as to the effective date of any order made by the board, the jurisdiction conferred on the board by the Legislature includes jurisdiction to make orders with retrospective effect. Reliance is placed on *Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129 which it is contended must be applied when interpreting s. 6(1) of the Act.
>
> The clear object of the Act is to ensure stability in the operation of public utilities and the maintenance of just, reasonable and non-discriminatory rates. That object would be defeated if the board having, on November 14, 1962, made an order fixing the rates to be paid by the distributor for natural gas purchased from the producer, reduced those rates on February 19, 1966, more than three years later, and directed that the reduced rates be effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

and further at p. 732:

> In no section of the Act do I find any wording indicating an intention on the part of the Legislature to confer on the board authority to make orders fixing rates with retrospective effect or any language requiring a construction that such authority has been bestowed on the board. To so interpret s. 6(1) would render insecure the position of not only every public utility carrying on business in the Province but also the position of every customer of such public utility.

However, Ritchie J.A.'s comments deal with the *Public Utilities Act* , R.S.N.B. 1952, c. 186, which did not provide the Board with any power to make interim orders. I readily agree that Ritchie J.A.'s concerns about the financial stability of utility companies are valid when one is faced with the argument that a Board has the power to revisit its own previous final decisions. Since no time limit could be placed on the period which could be revisited, any power to revisit previous final decisions would have to be explicitly provided in the enabling statute. Furthermore, even if final orders are "for the time being", it does not necessarily follow that they must be stripped of all their finality through the judicial recognition of a power to revisit a period during which final rates were in force.

57 However, there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power, without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

58 Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in obiter in *Re Eurocan Pulp & Paper Co. and B.C. Energy Commn.* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.) , with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect, so as to achieve just and reasonable rates throughout that period.

iv) The power to make a one-time credit order

59 Once it is decided, as I have, that the appellant does have the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it would be absurd to hold that it has no power to make a remedial order where, in fact, these rates were not just and reasonable. I also agree with Hugessen J. that s. 340(5) of the *Railway Act* provides a sufficient statutory basis for the power to make remedial orders, including an order to give a one-time credit to certain classes of customers.

60 C.N.C.P. Telecommunications argues that the one-time credit order should be limited to the amount of revenues actually derived as a direct result of the 2 per cent interim rate increase and that these excess revenues should be refunded to the actual customers who paid them. The presumption behind this argument is that the portion of the interim rates corresponding to the final rates in force prior to the beginning of the proceedings cannot be held to be unjust or unreasonable until a final decision is rendered. As I have held that the appellant has jurisdiction to review the fairness and the reasonableness of these interim rates in their entirety because the rate-review process starts as of the date of the beginning of the proceedings, this argument must be dismissed.

61 Finally, it is true that the one-time credit ordered by the appellant will not necessarily benefit the customers who were actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect

way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside, and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement amongst its several classes of customers to determine just and reasonable rates, the appellant's decision was eminently reasonable and I agree with Hugessen J. that it should not be overturned.

VI — Conclusion

62 In my opinion, the appellant had jurisdiction to review the interim rates in force prior to Decision 86-17 for the purpose of ascertaining whether they were just and reasonable, had jurisdiction to order the respondent to grant the one-time credit described in Decision 86-17, and has committed no error in so doing.

63 I would allow the appeal and confirm the appellant's decision, with costs in all Courts.

Appeal allowed. Decision of Canadian Radio-Television Telecommunications Commission affirmed.

END OF DOCUMENT

TAB 2

2010 CarswellAlta 764, 2010 ABCA 132

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2010 CarswellAlta 764

ATCO Gas, Re

City of Calgary (Appellant / Applicant) and Alberta Energy and Utilities Board (Respondent / Respondent) and ATCO Gas and Pipelines Ltd. (Respondent / Respondent)

Alberta Court of Appeal

Constance Hunt J.A., Jean Côté J.A., and Marina Paperny J.A.

Heard: January 13, 2010
Judgment: April 23, 2010
Docket: Calgary Appeal 0801-0030-AC

Proceedings: Reversed, 2005 CarswellAlta 2255, [2007] A.W.L.D. 2449 (Alta. E.U.B.); Reversed, [2009] A.W.L.D. 2640, 2008 CarswellAlta 2238 (Alta. E.U.B.)

Counsel: B.J. Meronek, Q.C. for Appellant / Applicant, City of Calgary

J.P. Mousseau, P. Khan for Respondent / Respondent, A.E.U.B.

H.M. Kay, Q.C., L.E. Smith, Q.C., L.A. Goldbach for Respondent / Respondent, ATCO Gas and Pipelines Ltd.

Subject: Public; Civil Practice and Procedure

Public law.

Cases considered by *Constance Hunt J.A.*:

AltaGas Utilities Inc. (November 29, 2001), Doc. U2001-316 (Alta. E.U.B.) — referred to

ATCO Electric Ltd. v. Alberta (Energy & Utilities Board) (2004), 2004 ABCA 215, 31 Alta. L.R. (4th) 16, 361 A.R. 1, 339 W.A.C. 1, 2004 CarswellAlta 949, 18 Admin. L.R. (4th) 243, [2004] 11 W.W.R. 220 (Alta. C.A.) — con- sidered

ATCO Gas, Re (2007), (sub nom. *Calgary (City) v. Energy & Utilities Board (Alta.))* 394 W.A.C. 317, (sub nom. *Calgary (City) v. Energy & Utilities Board (Alta.))* 404 A.R. 317, 2007 CarswellAlta 487, 2007 ABCA 133 (Alta. C.A.) — considered

ATCO Gas, Re (2009), 2009 ABCA 150, 2009 CarswellAlta 550 (Alta. C.A.) — considered

ATCO Gas South, Re (2008), 2008 CarswellAlta 693, 91 Alta. L.R. (4th) 77, (sub nom. *ATCO Gas & Pipelines Ltd. v. Energy & Utilities Board (Alta.)*) 429 W.A.C. 183, (sub nom. *ATCO Gas & Pipelines Ltd. v. Energy & Utilities Board (Alta.)*) 433 A.R. 183, 2008 ABCA 200 (Alta. C.A.) — followed

ATCO Gas South, Re (2008), (sub nom. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*) 392 N.R. 392 (note), 2008 CarswellAlta 1891, 2008 CarswellAlta 1892, [2008] 3 S.C.R. vi (note) (S.C.C.) — referred to

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) — considered

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (2009), (sub nom. *Consumers Association of Canada v. Canadian Radio-Television and Telecommunications Commission*) 392 N.R. 323, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.) — considered

Coseka Resources Ltd. v. Saratoga Processing Co. (1980), 1980 CarswellAlta 136, 126 D.L.R. (3d) 705, 31 A.R. 541, 16 Alta. L.R. (2d) 60 (Alta. C.A.) — referred to

Edmonton (City) v. Northwestern Utilities Ltd. (1961), 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125, [1961] S.C.R. 392, 1961 CarswellAlta 25 (S.C.C.) — considered

Epcor Generation Inc. v. Alberta (Energy & Utilities Board) (2003), 346 A.R. 281, 320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.) — considered

Natural Resource Gas Ltd. v. Ontario (Energy Board) (2006), 2006 CarswellOnt 4458, 214 O.A.C. 236 (Ont. C.A.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

Northwestern Utilities Ltd., Re (1978), (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) [1979] 1 S.C.R. 684, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 7 Alta. L.R. (2d) 370, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 12 A.R. 449, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 89 D.L.R. (3d) 161, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 23 N.R. 565, 1978 CarswellAlta 141, 1978 CarswellAlta 303 (S.C.C.) — referred to

Northwestern Utilities Ltd., Re (March 18, 1988), Doc. E88018 (Alta. E.U.B.) — referred to

Northwestern Utilities Ltd., Re (1997), 1997 CarswellAlta 1334 (Alta. E.U.B.) — referred to

Cases considered by *Jean Côté J.A.*:

Alberta Power Ltd. v. Alberta (Public Utilities Board) (1990), 1990 CarswellAlta 15, 72 Alta. L.R. (2d) 129, 43 Admin. L.R. 238, 66 D.L.R. (4th) 286, 102 A.R. 353 (Alta. C.A.) — considered

ATCO Gas, Re (2007), (sub nom. *Calgary (City) v. Energy & Utilities Board (Alta.)*) 394 W.A.C. 317, (sub nom. *Calgary (City) v. Energy & Utilities Board (Alta.)*) 404 A.R. 317, 2007 CarswellAlta 487, 2007 ABCA 133 (Alta. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) — followed

Barrie Public Utilities v. Canadian Cable Television Assn. (2003), 2003 CarswellNat 1268, 2003 SCC 28, 2003 CarswellNat 1226, [2003] 1 S.C.R. 476, 304 N.R. 1, 49 Admin. L.R. (3d) 161, 225 D.L.R. (4th) 206 (S.C.C.) — considered

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) — referred to

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (2008), 80 Admin. L.R. (4th) 159, 2008 CarswellNat 544, (sub nom. *Consumers Association of Canada v. Canadian Radio-Television & Telecommunications Commission)* 375 N.R. 124, 2008 FCA 91, 2008 CarswellNat 2390, 2008 CAF 91 (F.C.A.) — considered

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (2009), (sub nom. *Consumers Association of Canada v. Canadian Radio-Television and Telecommunications Commission)* 392 N.R. 323, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.) — distinguished

Calgary (City) v. ATCO Gas & Pipelines Ltd. (2006), 2006 ABCA 180, 2006 CarswellAlta 868 (Alta. C.A. [In Chambers]) — referred to

Calgary (City) v. Home Oil Co. (1959), 28 W.W.R. 353, 80 C.R.T.C. 85, (sub nom. *Calgary (City) v. Madison Natural Gas Co.)* 19 D.L.R. (2d) 655, 1959 CarswellAlta 32 (Alta. C.A.) — considered

Coseka Resources Ltd. v. Saratoga Processing Co. (1980), 1980 CarswellAlta 136, 126 D.L.R. (3d) 705, 31 A.R. 541, 16 Alta. L.R. (2d) 60 (Alta. C.A.) — considered

Edmonton (City) v. Northwestern Utilities Ltd. (1929), [1929] 2 D.L.R. 4, [1929] S.C.R. 186, 1929 CarswellAlta 114 (S.C.C.) — considered

Edmonton (City) v. Northwestern Utilities Ltd. (1960), 25 D.L.R. (2d) 262, 34 W.W.R. 241, 1960 CarswellAlta 77 (Alta. C.A.) — considered

Edmonton (City) v. Northwestern Utilities Ltd. (1961), 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125, [1961] S.C.R. 392, 1961 CarswellAlta 25 (S.C.C.) — considered

Epcor Generation Inc. v. Alberta (Energy & Utilities Board) (2003), 346 A.R. 281, 320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.) — distinguished

Germain v. Saskatchewan (Automobile Injury Appeal Commission) (2009), 2009 CarswellSask 176, 2009 SKQB 106, [2009] 7 W.W.R. 509, (sub nom. *Germain v. Automobile Injury Appeal Commission)* 333 Sask. R. 116, 71 C.C.L.I. (4th) 185, 82 M.V.R. (5th) 234 (Sask. Q.B.) — considered

Kin Franchising Ltd. v. Donco Ltd. (1993), 7 Alta. L.R. (3d) 313, 14 C.P.C. (3d) 193, 1993 CarswellAlta 264 (Alta. C.A.) — considered

Newfoundland (Board of Commissioners of Public Utilities), Re (1998), 1998 CarswellNfld 150, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.)*) 164 Nfld. & P.E.I.R. 60, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.)*) 507 A.P.R. 60 (Nfld. C.A.) — distinguished

Northwestern Utilities Ltd., Re (1976), 1976 CarswellAlta 201, 2 A.R. 317 (Alta. C.A.) — considered

Northwestern Utilities Ltd., Re (1978), (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) [1979] 1 S.C.R. 684, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 7 Alta. L.R. (2d) 370, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 12 A.R. 449, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 89 D.L.R. (3d) 161, (sub nom. *Northwestern Utilities Ltd. v. Edmonton (City)*) 23 N.R. 565, 1978 CarswellAlta 141, 1978 CarswellAlta 303 (S.C.C.) — followed

Statutes considered by *Constance Hunt J.A.*:

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Generally — referred to

s. 15(1) — considered

s. 15(3)(a) — considered

s. 15(3)(d) — considered

s. 15(3)(e) — considered

s. 26(1) — considered

Gas Utilities Act, S.A. 1960, c. 37

Generally — referred to

s. 27 — considered

s. 27(a) — considered

s. 28 — considered

s. 28(1) — considered

s. 31 — considered

Gas Utilities Act, R.S.A. 2000, c. G-5

Generally — referred to

s. 36 — considered

s. 36(a) — considered

s. 36(e) — considered

s. 37(1) — considered

s. 38(1) — considered

s. 38(2) — considered

s. 40 — considered

s. 40(a)(i) — considered

s. 40(a)(ii) — considered

s. 40(a)(iii) — considered

s. 40(c) — considered

s. 40(d) — considered

Public Utilities Act, R.S.A. 1955, c. 267

s. 67(a) — considered

Public Utilities Act, R.S.A. 2000, c. P-45

Geneally — referred to

s. 36(1)(a) — referred to

s. 36(2) — referred to

s. 67(1) — considered

s. 67(2) — considered

s. 67(8) — considered

s. 89(a) — referred to

Statutes considered by *Jean Côté J.A.*:

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Generally — referred to

Alberta Utilities Commission Act, S.A. 2007, c. A-37.2

s. 11 — referred to

s. 29(1) — considered

s. 29(10) — considered

Gas Utilities Act, S.A. 1960, c. 37

Generally — referred to

s. 31 — considered

Gas Utilities Act, R.S.A. 1970, c. 158

s. 31 — referred to

Gas Utilities Act, R.S.A. 1980, c. G-4

s. 32 — referred to

Gas Utilities Act, R.S.A. 2000, c. G-5

Generally — referred to

s. 40 — referred to

s. 40(a)(i) — considered

s. 40(a)(ii) — considered

s. 40(b) — considered

s. 40(c) — considered

Public Utilities Act, R.S.A. 2000, c. P-45

Generally — referred to

s. 67(8) — considered

Railway Act, R.S.C. 1985, c. R-3

Generally — referred to

Telecommunications Act, S.C. 1993, c. 38

Generally — referred to

s. 7(a) — considered

s. 7(c) — considered

s. 7(d) — considered

s. 7(e) — considered

s. 7(f) — considered

s. 7(g) — considered

s. 7(h) — considered

s. 7(i) — considered

s. 35(1) — referred to

s. 42(1) — referred to

s. 46.5(1) [en. 1998, c. 8, s. 6] — considered

s. 47(a) — considered

Rules considered by *Jean Côté J.A.*:

Alberta Rules of Court, Alta. Reg. 390/68

R. 537.1 [en. Alta. Reg. 97/2008] — considered

***Constance Hunt J.A.*:**

1 I agree with Côté J.A. that the orders under appeal should be vacated, but reach that conclusion for different reasons. I would allow the appeal and return the matter to the Alberta Utilities Commission ("Board[FN1]") for reconsideration in accordance with this judgment.

Facts

History of Deferred Gas Accounts (DGA)

2 The modern origin of deferred gas accounts (formerly deferred gas accounting) ("DGA") is a 1988 decision which arose out of a utility's general rate application: *Northwestern Utilities Ltd., Re* [(March 18, 1988), Doc. E88018 (Alta. E.U.B.)], In the matter of an application to determine rate base and fix a fair return thereon for the test years 1987 and 1988, Decision E88018, (Public Utilities Board). The use of a DGA was proposed to deal with seasonal price differences in gas costs. It required segregating the sales rate into two components, gas and non-gas. The latter would be determined in a general rate application while the former, the Gas Cost Recovery Rate ("GCRR"), would be determined twice a year using a formal filing process, subject to Board monitoring or review by way of a hearing. Adjustments to actual and estimated costs of gas would be held in the DGA then reconciled for refund to or recovery from consumers.

3 In approving these procedures, the Board emphasized that the outcome would be "customers pay for no more or less than the price of gas actually incurred ... the shareholders would not gain or be penalized as a result of price variations ...": p. 325. The use of a DGA would be beneficial to customers: p. 326. The Board described the GCRR's gas cost component as "interim": p. 327. This early decision demonstrates that the Board intended to scrutinize the use of the DGA on an ongoing basis.

4 The principles from this decision were applied the same year to Canadian Western Natural Gas Company Limited, the respondent ATCO's predecessor: *Re Canadian Western Natural Gas Company Limited*, In the matter of an Application by Canadian Western Natural Gas Company Limited for approval of Deferred Gas Accounting and Reconciliation procedures respecting its gas supply costs, Order E88019, (Public Utilities Board, 1988). The DGAs at issue here were then created.

5 In 2001 ATCO and the appellant City of Calgary (Calgary) were both parties to a hearing that considered, *inter alia*, the methodology for determining the GCRR: Methodology for Managing Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate Unbundling (Unbundling) Proceeding, Part A: GCRR Methodology and Gas Rate Unbundling. Decision 2001-75 (Alberta Energy and Utilities Board, 2001). Its context was the transition to competitive retail gas service. The Board noted its general supervisory power over utilities and its power to fix just and reasonable rates as the basis of its authority to deal with the issues in the hearing: p. 10.

6 The Board described "GCRR/DGA Programs" as follows at p. 56:

> The effect of a Gas Cost Recovery Rate/Deferred Gas Account (GCRR/DGA) mechanism is to spread the cost of gas acquisition and management over a forecast period, keeping consumer gas prices stable during that period. The use of a DGA to keep track of differences between actual and forecast gas costs ensures that customers pay no more and no less than actual costs incurred on their behalf. However, the reconciliation between forecast and actual costs occurs over one or more seasons. [footnote omitted] During periods of rapid gas price increase, as experienced in the winter of 2000/2001, the accumulated balances in the DGA can become large. The current system of GCRRs/DGAs has defined tolerance limits on the size of the DGAs, requiring the utilities to file for gas rate adjustments when the variance between forecast and actual costs becomes too large.
>
> [emphasis added]

7 The Board determined that utilities no longer needed to "file formal GCRR applications with the Board, but would instead file ... on a monthly basis", and monthly adjustments would be made to the GCRR: p. 64. Interested parties would have an opportunity to raise concerns about the monthly GCRRs filed by the utilities. Reconciliation of DGA balances would be done on a three-month rolling basis. The Board set a date for the commencement of this system, "in conjunction with the revised interim rates noted elsewhere in this Decision": p. 64.

8 Since then, the use of DGAs has evolved. For example, in ATCO Gas South Jumping Pound Meter Station - Gas Measurement Adjustment Application No. 1314487, Decision 2004-013, the Board approved adjustments to an ATCO DGA balance to reflect measurement errors caused by equipment malfunction. Part of the Board's rationale was that the adjustment was made in accordance with approved DGA procedures. A related adjustment to the DGA (timing costs) was rejected by the Board because it was not a previously approved DGA adjustment.

9 In other DGA decisions, the Board considered factors such as the amount of the adjustment, the timeliness of the application, whether the utility had acted responsibly, the foreseeability of the problem, and whether consumers who received the service were bearing the cost of the adjustment, see e.g., Northwestern Utilities Limited, 1996/1997 Winter Period Gas Cost Recovery Rate, [*Northwestern Utilities Ltd., Re*, 1997 CarswellAlta 1334 (Alta. E.U.B.)] Decision U97053 97053; IN THE MATTER of a Gas Cost Recovery Rate Refund for the 2001 Summer Period for AltaGas Utilities Inc. Order U2001-316 [*AltaGas Utilities Inc.* (November 29, 2001), Doc. U2001-316 (Alta. E.U.B.)].

Origin of this Dispute

10 In May 2004, ATCO sought Board approval to correct balances in the DGAs for each of its south and north gas distribution service territories. The proposed adjustment to the DGA for northern Alberta was largely attributable to *overstated* gas costs from January 1998 to February 2004, whereas in southern Alberta the actual gas costs ATCO incurred from January 1999 to February 2004 were *understated*. ATCO proposed that its present southern Alberta consumers would pay the shortfalls and that it would refund excesses to its present northern Alberta consumers. Since this appeal concerns only the adjustment proposed to the southern DGA, I make no further reference to the northern DGA.

11 The adjustments were sought because there had been inaccurate reporting of gas being transported for other entities through ATCO's pipeline network ("transportation imbalances"). It appears the errors began when the administration of ATCO's gas transportation system was moved to a new system, the transportation information system ("System").

12 ATCO had included the transportation imbalances as prior period adjustments in the DGA as part of its December 2003 GCRR filings. While producing supplementary information requested by the Board, ATCO detected additional transportation imbalances. It then refiled its December 2003 GCRR *excluding* the transportation imbalance adjustments. ATCO engaged chartered accountants to review its re-calculation of the imbalances. The Board's treatment of ATCO's subsequent application to record the revised transportation imbalances in the DGA is at the root of this appeal.

Board Decisions

13 Three Board decisions are relevant. Each is described in more detail beginning at para. 16.

14 The first decision partly allowed ATCO's application to use the DGA/GCRR reconciliation process to record the transportation imbalances: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Imbalance and Production Adjustments - Deferred Gas Account Application No. 1347852, Decision 2005-036, ("DGA Decision"). In the second, the Board established a general rule that the DGA/GCRR reconciliation process has a two-year limitation period: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Deferred Gas Account Limitation Period, Decision 2006-042 ("Limitations Decision"). The third focused on the Board's jurisdiction to make the DGA and the Limitations Decisions: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Reconsideration of Decision 2005-036 Deferred Gas Account, Imbalance and Production Adjustments, Application No. 1524763 Proceeding ID. 5, Decision 2008-001 ("DGA Reconsideration Decision).

15 As to the DGA and DGA Reconsideration Decisions, Calgary obtained leave to appeal on the following question: "Whether the Board erred in law or in jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 199[9][FN2] and 2004.": *ATCO Gas, Re*, 2009 ABCA 150 (Alta. C.A.) at para. 9, (Alta. C.A.). ATCO has discontinued its application for leave to appeal the Limitations Decision.

DGA Decision (Decision 2005-036)

16 The Board defined the central issue as "whether or not it is appropriate for the DGA to be a vehicle of all and any updates and corrections other than for price and actual gas sales (or deliveries)": p. 10.

17 In reviewing the history of the DGA/GCRR process, the Board noted that the DGA/GCRR process was originally approved to provide a method for adjusting for gas price volatility and that, by April 2002, the process was refined so that monthly (not seasonal) reconciliations were made: p. 10. Over time, DGAs were used without complaint to adjust gas rates for reasons unrelated to price volatility, including measurement corrections. While it had become a "relatively common occurrence" for DGAs to be used for making prior period adjustments, most were made "within a reasonable time period": *Id.*

18 The Board was troubled by the evolution of DGAs into a 'catch all' method for fixing all possible gas cost errors and by the timing of the adjustments. It criticized ATCO for the design errors in the System report and its delay in detecting them, reinforcing its expectation that ATCO's internal controls should detect material errors in a timely way.

19 Notwithstanding these misgivings, the Board permitted ATCO to recover eighty-five percent of the amounts it sought through adjustments to its DGA.

Limitations Decision (Decision 2006-042)

20 The Board's concerns about ATCO's delay in applying for the imbalance adjustments led to a hearing to examine whether it ought to impose a general policy limiting the extent to which adjustments are made to DGAs.

21 In the resulting Limitations Decision, the Board considered its jurisdiction to establish limitation periods for the DGA/GCRR process in the context of its statutory mandate to set just and reasonable rates and court decisions approving their use. It concluded that setting the GCRR requires the use of DGAs. Moreover:

> the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter [citation omitted]. In *EPCOR Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.
>
> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.
>
> p. 4 (emphasis added).

22 The Board adopted a general limitation period of two years prior to the effective date of the proposed GCRR for refunds to and recoveries from consumers. It permitted applications for approval of an adjustment to the DGA, where the cause of the adjustment originates outside the two-year limitation period, provided the following conditions are met:

> (a) the adjustment sought exceeds the threshold value by being greater than 5% of the average monthly DGA gas commodity costs of the previous 12 months; and
>
> (b) the adjustment arose from special circumstances that were not within the utility's control.

p. 17

23 As regards possible 'inter-generational equity' issues (a concept discussed more fully at para. 48 that means utility consumers should pay the costs associated with *their* consumption of the service, and future consumers should not benefit from or be burdened by the cost of services consumed by past consumers), the Board said at p. 12:

> While intergenerational equity questions ... arise ... particularly in relation to deferral accounts, the Board believes in this case that the imposition of a limitation period for DGAs assists in addressing the intergenerational issue raised ... because it limits the adjustments in the ordinary course. [ATCO] is correct in pointing out that deferred accounts have an inherent intergenerational aspect; however, the Board considers that it is important to not allow too long a

period before dealing with adjustments.

[emphasis added]

DGA Reconsideration Decision (Decision 2008-001)

24 Calgary was granted leave to appeal the DGA Decision on the question of whether the Board was authorized under its governing legislation to approve any of the adjustments to the Deferred Gas Account applied for by ATCO Gas. Following a hearing, this Court concluded that since the issue of the Board's jurisdiction to grant ATCO's May 2004 application had not been raised before the Board, the evidentiary record necessary for an appeal was lacking: *ATCO Gas, Re*, 2007 ABCA 133, 404 A.R. 317 (Alta. C.A.). The Court returned the matter to the Board, which then considered whether it was "authorized under its governing legislation to approve adjustments to the ATCO Gas DGA in 2005 for costs and expenses incurred between 199[9] and 2004": p. 2.

25 Calgary argued that the Board's jurisdiction was limited by section 40 of the *Gas Utilities Act* (see para. 27) such that "the Board's jurisdiction to consider prior period financial activity of a utility is limited to a 12-month period, even when the financial activity occurs in a deferral account approved by the Board": p. 7. The Board disagreed, partly because of its interpretation of its broad statutory mandate to fix just and reasonable rates. The Board reasoned that DGAs would serve no purpose under Calgary's interpretation because section 40 specifically authorizes the Board to take into account excess revenues or losses in "the whole of the fiscal year" of the rate application (ss. 40(a)(i)) and in any consecutive two-year period thereto (ss. 40(a)(iii)).

26 The Board reiterated its Limitations Decision's conclusion on jurisdiction, found above at para. 21.

Legislation

27 When ATCO applied for this DGA adjustment in 2004, the relevant legislation provided (with emphasis):

Alberta Energy and Utilities Board Act, R.S.A. 2000. c. A-17

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ... PUB that are granted or provided for by any enactment or by law.

. . . . .

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ... PUB may make under any enactment;

. . . . .

(d) with respect to an order made by the Board ... in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

. . . . .

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

Gas Utilities Act, R.S.A. 2000, c. G-5

The word "Board" is defined as the Public Utilities Board in section 1(b).

Powers of Board

36 The Board ... may ...

(a) fix just and reasonable ... rates, ...

. . . . .

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs....

Rate base

37(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base. ...

Schedule of rates

38(1) For the purpose of fixing the just and reasonable rates that may be charged to consumers of gas by an owner of a gas utility who purchases gas pursuant to a contract under which provision is made

(a) for the progressive increase in the price of gas to the owner of the gas utility,

(b) for an increase in the price of gas to the owner of the gas utility by reason of changes in any prices received by the owner on resale of the gas,

(c) for an increase in the price of gas to the owner of the gas utility by reason of the payment of higher prices by any purchaser of gas in any gas producing area, or

(d) for the redetermination of the price of gas to the owner of the gas utility either by agreement of the parties or pursuant to arbitration,

the Board ... may receive for filing a new schedule of rates that are alleged by the owner to be occasioned by the rise in the price required to be paid by the owner for purchased gas.

(2) The new schedule may be put into effect by the owner of the gas utility on receiving the approval of the Board to it ....

. . . . .

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges ...,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated ...,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive, and need not consider the allocation of those revenues and costs to any part of that period,

. . . . .

(c) the Board may give effect to that part of ... any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates ... that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

(a) to deal with public utilities and the owners of them as provided in this Act; ....

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute ....

. . . . .

Fixing of rates

89 The Board ... may ...

(a) fix just and reasonable ... rates ...

Chronology of Legislation

28 Some of the following discussion refers to judicial interpretations of predecessor legislation. An understanding of those decisions requires an appreciation of the interaction between the earlier and current legislation.

29 Subsection 67(a) of the *Public Utilities* Act, R.S.A. 1955, c. 267 provided:

> 67. The Board ... may ...,
>
> (a) fix just and reasonable individual rates ....

30 Section 67 of the *Public Utilities Act* was amended in April 1959 by S.A. 1959, c. 73, s. 9 as follows:

> (a) by renumbering the present section as subsection (1), ... [in other words, s. 67(a) became s. 67(1)]
>
> (d) by adding immediately after the renumbered subsection (1) the following subsections:
>
> . . . . .
>
> (2) In fixing just and reasonable rates, ... the Board shall determine a rate base for the property of the proprietor ... and fix a fair return thereon.
>
> . . . . .
>
> (8) ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

31 In 1960, the *Gas Utilities Act*, S.A. 1960, c. 37 was enacted and provided:

> **Powers of the Board**
>
> 27. The Board ... may ...
>
> (a) fix just and reasonable individual rates ...
>
> **Rate base**
>
> 28.(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner that is used or required to be used in his services to the public within Alberta and fix a fair return thereon.
>
> **Excess revenue or losses**
>
> 31. ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of an application.

32 To summarize, the predecessor of present section 36 of the *Gas Utilities Act* (the power to set just and reasonable rates) is section 27 of the S.A. 1960 version of the *Gas Utilities Act*. The latter's predecessor is subsection 67(a) of the *Public Utilities Act* (later subsection 67(1)). The present section 37 of the *Gas Utilities Act* (fixing just and reasonable rates by determining rate base and fixing a fair return thereon) was section 28 in the S.A. 1960 version and it, in turn, was based on section 67(2) of the 1959 amendments to the *Public Utilities Act*. The predecessor to the present section 40 of the *Gas Utilities Act* is section 31 of S.A. 1960, which took its wording from ss. 67(8) of the 1959 amendments to the *Public Utilities Act*.

Discussion

33 Calgary sees the central issue as the extent to which the Board can engage in retroactive ratemaking. ATCO says the appeal concerns an exercise of discretion by the Board. In my view, the appeal raises the following issues:

(1) What is the source of the Board's jurisdiction over DGAs?

(2) Did the Board retroactively change rates or did its decision have a prohibited effect?

(3) What standard applies to this Court's review of the Board's decisions?

(4) Against that standard, do the Board's decisions to allow ATCO to use the DGA to record transportation imbalances for 1999 to February 2004 warrant this Court's intervention? The first two are threshold issues; if the decision under appeal falls because of the answer to either of them, the subsequent issues do not arise.

Issue 1. What Is the Source of the Board's Jurisdiction Over DGAs?

34 Calgary acknowledges "the Board has jurisdiction to set up a DGA or what classes of costs or recoveries are to be included or how they are to be allocated.": Factum at para. 43. This Court implicitly approved the use of deferral accounts in regulated utility rate setting: *ATCO Electric Ltd. v. Alberta (Energy & Utilities Board)*, 2004 ABCA 215 (Alta. C.A.) at para. 26, (2004), 361 A.R. 1 (Alta. C.A.) ("*ATCO Electric*").

35 That said, it is critical to identify the source of the Board's jurisdiction over deferral accounts. If it is section 40 of the *Gas Utilities Act*, time limits apply. If, as ATCO argues, it is sections 36 and 37, that legal impediment disappears.

A. Nature and Function of Deferral Accounts in Utility Regulation

36 A consideration of the nature and function of deferral accounts provides context: Deferral accounts allow a utility to accumulate variances between a utility's approved rate based on forecasted costs and the utility's actual costs for a given period. Typically, at the end of the period, a utility will then collect from customers through a rate rider any balances in the deferral accounts owing by them and refund any balances owing to them.

ATCO Electric at para. 26.

In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000

. . . . .

Epcor Generation Inc. v. Alberta (Energy & Utilities Board), 2003 ABCA 374 (Alta. C.A.)) at para. 2, (2003), 346 A.R. 281 (Alta. C.A.) ("*Epcor*").

[D]eferral accounts ... are accepted regulatory tools, available as a part of ... rate-setting powers ... [they] ...'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year' [citation omitted]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.

Bell Canada v. Canadian Radio-Television & Telecommunications Commission, 2009 SCC 40, [2009] 2 S.C.R. 764

(S.C.C.)at para. 54 ("*Bell Aliant*").

37 To summarize to this point, descriptions of the general purpose of deferral accounts and the history of this DGA shows that DGAs in gas utility regulation exist to ensure that consumers pay the cost of the gas they consume, with no resulting profit or loss to the utility's shareholders. This general objective has been fully supported by the courts: *ATCO Electric, Epcor, Bell Aliant, City of Edmonton, infra.*

B. Source of the Board's Authority

38 What, then, is the source of the Board's jurisdiction to permit the use of DGAs as a regulatory tool? As outlined above at para. 3, the DGA at issue was approved in 1988. Nevertheless, before 1988 the Board employed tools with a similar function to regulate gas utilities. Judicial views about the source of the Board's authority to use those tools are instructive.

39 In the late 1950s the Board proposed a "purchased gas adjustment clause". It would permit the utility to recoup from consumers in the future amounts the utility had to pay for gas that proved more expensive than the utility's estimates, and to refund amounts to consumers if the estimates proved to be greater than the actual cost: *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.), at 396-397, (1961), 28 D.L.R. (2d) 125 (S.C.C.) ("*City of Edmonton*"). The Board's jurisdiction to approve such a device was upheld by the Supreme Court, which said that its purpose was to:

> ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in [s. 67(2)] and to comply with the Board's duty ... to permit this to be done. How this should be accomplished...was an administrative matter for the Board to determine ... under the powers ... to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).
>
> *Id* at 406-407 with emphasis added.

The counterparts to the section referred to in this passage are the present sections 36(a) and 37 of the *Gas Utilities Act.*

40 In *Bell Aliant*, the telecommunication regulator, the Canadian Radio Television and Telecommunications Commission's ("CRTC") source of authority to establish deferral accounts was held to be the combined effect of sections 27 and 37(1) of the *Telecommunications Act*, S.C. 1993, c. 38: para. 37. Section 27(1) concerns setting just and reasonable rates, while section 37(1) permits the CRTC to require carriers to adopt any method of identifying the costs of providing services and to adopt any accounting method. The Court added that the "guiding rule of rate-setting under the *Telecommunications Act* is that the rates be 'just and reasonable', a longstanding regulatory principle.": para. 30. The authority to establish the accounts "necessarily includes the disposition of the funds they contain.": *Ibid.*

41 These cases suggest that the Board's authority over DGAs flows from its power to set just and reasonable rates and a fair rate of return on rate base found in sections 36 and 37 of the *Gas Utilities Act.* Underlying that mandate is the "regulatory compact":

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.
>
> *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140("*Stores Block*")

at para. 63.

42 I agree with ATCO that the Board's authority over DGAs does *not* come from section 40. Although that provision uses broad language, its function is limited. It permits, among other things, consideration of utility's revenues and costs for the whole fiscal year in which an application for rates is made. It also authorizes adjustments for regulatory lag, that is, the difference between rates the utility seeks when its general rate application is made, and those appropriate when the rates are approved. But it does not limit the Board's general authority to employ other tools (such as the gas purchase adjustment clause and DGAs) that assist in the discharge of its obligation to set just and reasonable rates.

43 It is worth repeating that this principle flows from *City of Edmonton*, where the Supreme Court considered the newly enacted section 67(8) of the *Public Utilities Act* (section 40's predecessor) in conjunction with the recovery of 1959 transitional losses which arose as a result of the 15-month delay between the utility's rate application (June 1958) and the rate approval (September 1959). As to the second issue before the Court, the Board's jurisdiction to permit the establishment of the gas purchase adjustment clause (the DGA's predecessor), the Court referred to "s. 67(2) of the 1959 amendment" (which the Court of Appeal found did *not* grant the Board the necessary jurisdiction to permit the gas purchase adjustment clause) and held at 407 (emphasis added):

> With great respect, however, the proposed order [establishing the gas purchase adjustment clause] would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.
>
> ... the Board ... propose[s] to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

44 Calgary argues against reliance on sections 36 and 37 as the source of the Board's authority because of the Supreme Court's admonition against employing general statutory authority to ground the exercise of overly-broad Board powers, see e.g., *Stores Block* at para. 50. Elsewhere in the same decision, however, the Court emphasized the need to determine whether the exercise of the proposed power is a "practical necessity for the regulatory body to accomplish the object prescribed by legislation": para. 77. According to the majority, such necessity was lacking in *Stores Block*. Here, for reasons outlined above at paras. 36-37, the use of DGAs is required if the Board is to regulate utilities effectively. Moreover, in *Bell Aliant*, Abella J. explained at paras. 51 - 53 that *Stores Block* did not "preclude the pursuit of public interest objectives through rate-setting". She contrasted *Stores Block* by pointing out that in *Bell Aliant*, the CRTC's rate-setting authority and its ability to establish deferral accounts for that purpose were at the very core of its competence. The same holds true in this case.

Issue 2. Did the Board retroactively change rates or did its decision have a prohibited effect?

45 Calgary argues that by permitting ATCO to use the DGA to make adjustments going back several years the Board engaged in prohibited ratemaking because, in the result, ATCO's present consumers must make up for a past shortfall. I do not agree. I have already explained why I think its power to set just and reasonable rates allowed it to authorize the use of DGAs. It follows that its further orders about *how* to use a DGA did not constitute prohibited ratemaking. As discussed at paras. 69-71, however, this does *not* mean that the effect of its decision on future ratepayers is irrelevant in determining whether the Board reasonably exercised its powers over the DGA.

46 A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retro-

spective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 31 A.R. 541 (Alta. C.A.) at para. 29, (1980), 16 Alta. L.R. (2d) 60 (Alta. C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684 (S.C.C.), at 691 and 699 (*"Northwestern Utilities"*).

47 Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*), [1989] 1 S.C.R. 1722 (S.C.C.), at 1749 (*"Bell Canada 1989"*). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.

48 Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same). "[T]oday's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers": Yvonne Penning, *"The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled"* (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).

49 Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive: *City of Edmonton* at 402.

50 In this case, the proposed accounting adjustments had retrospective effect: past costs would be borne by ATCO's present southern Alberta consumers, not the 1999 - 2004 consumers who received gas utility services when ATCO's gas costs were incurred.

51 In summary, whether termed retrospective or retroactive ratemaking, imposing gas cost shortfalls or surpluses incurred by past consumers on future consumers is generally prohibited. Although this prohibition against retroactive and retrospective ratemaking is relatively clear, how to apply it in practice is less so. A review of key cases illustrates the complexity.

52 A one-time credit order for consumers was upheld despite the fact that it was "retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive": *Bell Canada 1989* at 1749. Although the Board's review was retrospective in manner, the credit order was approved through an adjustment to interim rates. The Supreme Court stressed that the regulator had consistently stated its intention to review the interim rates: at 1755. Gonthier J. stated at 1752:

> ... one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order... the words "further directions" do not have any magical, retrospective content. ... It is the interim nature of the order which makes it subject to further retrospective directions.
>
> [emphasis added]

53 In *Bell Aliant*, the Supreme Court also upheld a CRTC decision to order the disposition of funds that had accumu-

lated in a deferral account. The Court rejected the argument that this constituted retrospective rate-setting because the rates had already been finalized. Abella J. pointed out that it was known at the outset that the CRTC would make subsequent orders about how to use the balance in the deferral accounts. At para. 63 she added (citations omitted and emphasis added):

> In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting ...

54 Calgary argues that cases such as *Bell Canada 1989, Coseka* and *Bell Aliant* are distinguishable. The first two involved interim rather than final rates. In *Coseka*, it was pointed out at para. 36 that consumers must be aware that interim rates may be subject to change. As for *Bell Aliant*, all the parties knew in advance that the telecommunications companies would be obliged to use the balance of the deferral accounts in accordance with subsequent regulatory decisions: para. 61.

55 Calgary suggests that gas rates here had long been finalized because the DGA had been reconciled in accordance with the Board's earlier orders that required forecast and actual gas costs to reconciled on a three-month rolling basis (see Decision 2001-75 at p. 64). It adds that when the seasonal or monthly DGA/GCRR process was approved it was not expressed to involve interim rates, therefore by definition the rates must be final: Factum at para 67.

56 In *Epcor* Fruman J.A. opined that whether deferred accounts are interim or final depends on the facts: para. 15. The material before the Court makes such a determination impossible. Language in the 1988 decision quoted above at para. 4 suggests that the use of the DGA involved interim rates, but that language is vague. In the DGA Decision, the Board noted in section 4.2 ATCO's argument that deferral accounts are by nature interim and therefore not retroactive. Unfortunately, the Board did not express its views on this topic.

57 Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: were the affected parties aware that the rates were subject to change? If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant.

58 Were these parties aware that gas rates were potentially subject to change through the use of the DGA? If so, whether the rates are characterized as interim or final, the principles in *Bell Aliant* govern.

59 The history of DGAs demonstrates that affected parties knew they would be used from time to time to alter gas rates based on later, actual gas costs. Indeed, the Board so found as a fact in the Limitations Decision at p. 4. It adopted the reasoning from that decision in the Reconsideration Decision. The Board's fact findings are not appealable: *Alberta Energy and Utilities Board Act*, s. 26(1).

60 Reconciliation of the DGA/GCRR would sometimes benefit consumers and sometimes not. Gas rates sometimes changed because of the lack of predictability (volatility) in gas prices and sometimes from other factors such as measuring errors. Whatever the cause, the objective was to ensure that the consumer paid the actual cost of the gas. This legit-

imate object was accepted by all parties. It strengthened the utility regulatory system by ensuring that the utility received a fair rate of return on its rate base.

61 Therefore, whether the rates should be characterized as final or interim, the use of the DGA in this case did not involve prohibited ratemaking.

Issue 3 - What standard applies to this Court's review of the Board's decisions?

62 The conclusion that the Board had jurisdiction to make the orders about the use of the DGA, and did not thereby engage in prohibited ratemaking, suggests that the reasonableness standard of review should be applied.

63 Abella J. employed this standard in *Bell Aliant* because, in her view, the issues went to the heart of the CRTC's specialized expertise, "the methodology for setting rates and the allocation of proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake.": para. 38, see also para. 56. The same point applies here.

64 Reinforcing this conclusion are the reasons given for applying the reasonableness standard in *ATCO Gas South, Re*, 2008 ABCA 200, 433 A.R. 183 (Alta. C.A.) at paras. 15 - 18 (leave to appeal refused (S.C.C.)). See also *ATCO Electric*, where the Court determined in its standard of review analysis that "[w]ith ... the widespread use of deferral accounts, determining the appropriate methodology to be used in calculating prudent costs of financing these deferral accounts engages the Board's specialized expertise.": para. 63. Reasonableness is also the standard applied to a gas regulator's decision to permit a utility to recover material and previously unrecorded costs for the provision of gas services: *Natural Resource Gas Ltd. v. Ontario (Energy Board)*) (2006), 214 O.A.C. 236, 149 A.C.W.S. (3d) 889 (Ont. C.A.).

Issue 4. Has the reasonableness standard been breached ?

65

> Reasonableness is a deferential standard ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. ... [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.)at para. 47.

In my view, this standard has been breached.

66 The Board's sole justification for permitting ATCO to recoup eighty-five percent of the gas costs it sought from present consumers is found in the following passage of the DGA Decision at p. 11:

> ... the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years. Accordingly, the Board is inclined to allow [ATCO] substantial recovery of the applied for prior period adjustments.

Stripped to its essentials, two reasons emerge: the nature of the DGA as a deferral account and the fact that the DGA had been used in the past to make adjustments over several years.

67 Presumably the "nature of the DGA" point refers to the Board's historical assessment of the DGA contained in section 2.3, entitled "Nature of DGA Adjustments & Recovery Period". In that section, the Board examined the purpose

of the DGA when approved in 1988: "reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR, i.e. the rate it used to recover the commodity costs of gas from sales customers." In describing the change made in 2001 (altering the reconciliation period from a seasonal to a monthly basis), the Board repeated that the purpose of DGA adjustments was "to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred". It is manifest that the costs approved in the decisions under appeal did not fall within the original purpose of the DGA, namely, adjusting for gas price volatility.

68 That brought the Board to its second point, that "during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines.": *Id* at p. 10. Usually those adjustments were made within a reasonable time, although sometimes the periods exceeded one year. This observation boils down to "we previously permitted adjustments over longer periods, so we will do so here".

69 Set against these two rationales for granting the bulk of ATCO's application are the Board's many other com- ments:

- DGAs have evolved into a vehicle to fix all possible gas cost errors and pass them on to consumers;
- when first implemented reconciliations of the DGA were not expected to go back further than 12 months. Longer periods were sometimes accepted under special circumstances
- the DGA "was never set up with the intention of permitting all prior period accounting errors, particularly those that would have been subject to ATCO's management and control";
- accounting errors should typically be absorbed by the utility's shareholders;
- the DGA should not be treated as a catch-all for fixing errors, including those with a long history or resulting from human error, when adequate processes have not been in place to capture and correct the problem at an early stage;
- seven years represents a significant lag presenting obvious inter-generational equity issues;
- ATCO had an onus to ensure the System was working properly and was providing correct data;
- it did not appear that ATCO implemented an appropriate and timely review process for System design;
- there was no evidence of actual internal or external audits being performed to ensure the design was valid as the System was being put into service; and
- between 1998 and 2002 there was a lack of oversight by ATCO to test and develop appropriate controls to ensure that the System output generated was as intended.

70 Mirroring these observations were the Board's reasons for concluding that ATCO should bear fifteen percent of the costs claimed:

- it doubted whether it could rely on ATCO's revised imbalance amounts;
- little on the record demonstrated the extent to which the numbers were faulty, perhaps partly because of ATCO's unilateral actions in destroying data;
- there was no demonstration that the System report was adequately tested at the time of inception;

- the System lacked audits;
- ATCO lacked adequate internal controls and supervisory systems;
- there was inadequate proof of corrections and opening balances; and
- there was a lengthy delay in discovering the errors.

71 In summary, the Board's own analysis highlights the accumulation of factors that make unreasonable its decision to allow ATCO to recover eighty-five percent of the transportation imbalances through the DGA. Unlike most previous uses of DGAs, these charges did not result from gas price volatility. Nor did they resemble other past uses of DGAs where errors were attributable to measuring equipment problems and where there had been no suggestion of utility fault. Here the failure to levy appropriate gas charges was entirely due to deficiencies within ATCO's own system, exacerbated by a long delay in discovering the problem. ATCO's destruction of data made data verification impossible. As a result of the delays, at least some who were not consumers when the problems originated would have to absorb the costs of ATCO's carelessness. Even though this was not prohibited ratemaking *per se*, the long delays gave rise to inter-generational equity issues which lie at the heart of the prohibition against retrospective ratemaking.

72 As outlined in para. 9, previous DGA decisions took account of matters such as the amount of the adjustment, the timeliness of the application, the extent to which the utility acted responsibly, foreseeability of the problem, and whether consumers who received the service would bear the cost of the adjustment. When such factors are applied to this case, it is apparent why the Board's decision is not defensible on its facts.

73 As the Board intimated, there are compelling reasons why this sort of loss should be borne by shareholders rather than long-after-the-fact consumers. Shareholders have the ability to control or at least influence ATCO's management practices. Consumers do not. Requiring consumers rather than shareholders to bear most of the loss does not encourage utilities to conduct operations in a careful, time-sensitive way. The Board itself appropriately observed at p. 5 of the DGA Decision that allowing ATCO (full) recovery "could be considered ... a reward for poor management".

74 The Board's Limitations Decision at least partly addresses the above concerns because it generally limits DGA claims to a two-year period, except in special circumstances not within the utility's control. That decision is not subject to appeal and it would be inappropriate to comment on it further here. Nevertheless, it seems unlikely that the present DGA adjustments would have passed muster under the Board's criteria in the Limitations Decision.

Procedural Matters

75 I agree with Côté J.A's suggestion at para. 238 that the efficient disposition of an appeal can be hindered if parties neglect to provide sufficient copies of Extracts of Key Evidence in appeals like this that require only one copy of the Tribunal's record to be filed. In this case, that difficulty was largely alleviated because the key Board decisions were included in the parties' Books of Authorities.

Conclusion

76 The appeal is allowed, the orders under appeal vacated and the matter returned to the Board for consideration in accordance with these reasons.

Marina Paperny J.A.:

I concur.

Jean Côté J.A.:

A. Introduction and Issues

77 This is an appeal from what was the Alberta Energy and Utilities Board, the rate-regulating tribunal for natural gas utilities. (Its name has changed over the years and is not up-to-date in the style of cause, but I will call it "the Commission".) The issue is whether that tribunal could let the utility company recover a lump sum from present consumers because of mistakes in accounting for past gas purchases by the utility company extending back about six years.

78 Here is an overview of this judgment. Part B describes the odd and lax way in which the respondent utility's problem arose, and the Commission's three decisions about how to handle the utility's ensuing request, and agrees that the Commission's treatment is unreasonable. Part C describes how the Supreme Court of Canada and our Court of Appeal have consistently interpreted the governing statutes and barred retroactive rate-making; and the very limited amendments which the Legislature made in response. Part D describes Alberta's rate-making procedure and law, and shows how the decision under appeal is illegal because retroactive. Part E shows how the deferral accounts used here were created for very different purposes and long since reconciled, remaining almost by oversight. Part F describes the recent *Bell* decision and how it does not apply here. Part G similarly distinguishes two other decisions. Part H is about the standard of review. Part I is about the conclusion and remedy, and Part J makes some requests about procedure.

B. Facts

1. ATCO Finds Significant Error

79 An outsider might suppose that it would not be particularly difficult for a gas public utility to keep track of how much gas it bought, sold or transported, particularly when it does not store any significant amount. Similarly, one supposes that the utility would have accounting records reliably keeping track of what it paid for the various amounts of gas which it got. This case suggests that at some times and places it may not be that easy or straightforward.

80 One reason might be that the respondent ATCO divides its operations. A second reason may be that gas supply to consumers in Alberta has become more complex in the last generation. No longer is the owner of a pipe necessarily the owner of the gas flowing through it, and no longer is the owner of a local gas distribution pipe running under a street necessarily the vendor of the gas being bought by the consumers located on that street.

81 The Commission found a bigger third reason. ATCO had set up some inappropriate accounting systems to handle this situation, inconsistently administered them for years, and throughout made inadequate checks of their operation or adequacy. The Commission so finds in its 2005 decision (pp. 4-5, 7-8, 11-12 A.B. pp. F7-8, F10-11, F14-15).

82 For many years, ATCO seems not to have realized the depth of these problems. Helped by some gentle prodding by the Commission in late 2003, ATCO and its outside accountants investigated their accounting problem more deeply. By early 2004, they recognized fairly serious accounting errors that ATCO had made in northern Alberta for all of the years 1998, 1999, 2000, 2001, 2002, 2003, and for early 2004. In the south, the problem started a year later than in the north, but also lasted until early 2004.

83 The amounts were significant. ATCO's recalculations suggested that in southern Alberta its gas costs from 1999 to 2004 had in fact been a total of $11.6 million higher than it had recorded in any of its books or its regular filings with

the Commission. In the north, they were almost $2 million lower for 1998 to 2004.

84 In its first (2005) decision on the subject, the Commission (then the Alberta Energy and Utilities Board) explained the errors as follows.

> AG [ATCO Gas] submitted that there were two distinct aspects of imbalances: the management, control and reporting of other gas owners' imbalances that result from the shipment of other owners' gas through the pipeline network (collectively referred to herein as Transportation Processes), and the recognition of the effect that other gas owners' imbalances have on regulated gas supply procurement and the timing of cost recovery from regulated sales customers (DGA/GCRR Processes).
>
> AG submitted that other gas owners' imbalances were made up of transportation imbalances and exchange imbalances. Transportation imbalances are associated with active transportation contracts, which reflect the physical movement of gas through ATCO's pipeline system. AG described Transportation Processes as including, without limitation, measurement, nomination, allocation, reporting, preparing statements, invoicing and receiving payment from other gas owners who contract for transportation service. AG also noted that exchange imbalances are those associated with active exchange contracts, which reflect a physical swap of gas between ATCO and a counterparty and in which there are no monthly imbalance settlement provisions. (§ 2.1, p. 3, A.B. p. F6)
>
> The Board [now the Commission] agrees with AG that this Application concerns the disconnection that occurred between the true and correct imbalances reported in the Transportation Processes. . . .
>
> (*id.* at p. 4, A.B. p. F7)
>
> . . . In addition, the Board notes that ATCO did not appear to take the appropriate action to modify the functionality of the TIS system with respect to Rate 11 delivery input which ultimately led AP [ATCO Pipelines] employees to input inaccurate delivery data in order to 'quiet' an error message.
>
> (*id.* at p. 5, A.B. p. F8)

2. ATCO Proposed to Pass on the Shortfall

85 As a result of its belated discoveries, ATCO filed with the Commission's predecessor Application #1347852 of May 31, 2004. ATCO proposed a simple solution: to make ATCO's problem the consumers' problem. The rates for gas delivered from 1998 to 2003 had long since been fixed, charged, and paid, and the gas in question long since sold, delivered, billed, and paid for. Yet ATCO now wanted to turn its old long-undiscovered $11.6 million southern shortfall into a new additional lump-sum charge to present southern customers. Conversely, ATCO volunteered to give a rebate of almost $2 million to present northern customers.

3. The Commission's Three Decisions

86 The Commission responded to ATCO's "error-correction" application in three decisions.

(a) "Imbalance Adjustments" April 2005 Decision # 2005-036

87 In this decision, the Commission made fact-findings about the causes of the errors, which findings are not challenged on appeal by Calgary or ATCO. They reveal ATCO's multifold and long-lasting accounting inadequacies (pp. 7-8, 12 A.B. pp. F10-11, F15). The Commission found as follows:

> . . . The Board [now the Commission] considers that the error in the design of the TIS Report along with the management practices related to process control, including those related to the TIS Report, are of concern.
>
> . . . The Board, however, notes a lack of documented audit evidence that would support the correctness of the imbalances reporting systems in the present case, and is thus concerned with the degree of accuracy that AG [ATCO Gas] contends exists for the present imbalances adjustments. Moreover, the Board is concerned with the amount of time, dating back to 1998, that it took ATCO to find, and ultimately make, the imbalances corrections.
>
> (2005 decision, p. 4, A.B. p. F7)
>
> The Board is troubled by what it considers to be **an apparent lack of diligence exhibited by either of AG or AP or both** of them over the reporting of imbalances in as much as the errors included in the review had occurred since at least 1998.
>
> (*id.* at p. 5, A.B. pp. F8, Emphasis added)
>
> . . . The Board notes that AG stated in the Application that "ATCO found that the original design specification for the monthly TIS Report was not correct." This acknowledgment would indicate that before the imbalances problem was identified there had been a **lack of system control over, and audit of, the design**.
>
> . . . It appears to the Board that if AP employees had not entered the inaccurate Rate 11 delivery data, the incorrect TIS Report may not have been noticed by AG in the normal course of business, given that **it does not appear that ATCO tested or planned to test the integrity of the report** . . .
>
> (*id.* at p. 5, A.B. p. F8, Emphasis added)

88 Yet the Commission did little about the utility's various longstanding accounting inadequacies. It merely deducted 15% as a penalty for them. Subject to that deduction, the Commission did as ATCO asked; it ordered the current southern customers to top up ATCO's profits by an amount equal to ATCO's past bookkeeping errors for those five or more past years.

89 The Commission also allowed ATCO to give the current northern customers a rebate. The Commission did not mention the suggestion that the northern refund bear interest for all the years the utility company had had the funds (January 21, 2005 argument, Commission Record Tab 47, p. 29). Instead, the Commission did the reverse: it dictated that that consumer rebate would be *reduced* by 15% (p. 12, A.B. p. F15). There was no explanation for the reduction, and I cannot think of any logical one. It might have been the Commission's desire for aesthetic facial symmetry between north and south. It seems most unlikely that the Commission intended to penalize the northern consumers for ATCO's shortcomings. Maybe it was just an oversight. After various adjustments, on August 23, 2005 the Commission fixed the northern refund at $541,000, and the leave to appeal does not cover the northern errors or rebate. No one in the north has appealed.

90 The Commission noted that since 1987, ATCO has maintained a deferral account. It was originally set up to allow quick reconciliation of unpredictable fluctuating future gas purchase cost estimates, with actual costs for the same period. The Commission said the purpose for the account has nothing to do with the type of errors in question here, and that the accounts were never designed for purposes such as the current errors. See Part E below for details and citations.

91 Though all the reconciliations of that deferral account had been completed years before, the Commission decided that the new error charge (and rebate) described above would be done through or because of that deferred account.

92 Apart from background and recitals, the actual reasoning of the Commission in this 2005 decision was brief, and contained little or no explanation beyond that summarized here.

93 In particular, these 2005 reasons said nothing about the rule against retroactivity, nor whether the governing legislation permits this sort of retroactive adjustment (going back some six or so years). However, the Commission did seem to suggest that such steps are retroactive rate adjustment for past years' errors: (2005 decision, § 2.8, first para., p. 14, A.B. p. F17).

94 It is probably idle to speculate on the reasons for that significant omission.

95 The Commission's later 2008 Decision says that no one raised the rule against retroactivity during this first (2004) application (2008 Decision §4.3, p. 7, A.B. p. F31). The Commission may have got that idea from allegations in ATCO's October 5, 2007 argument (Commission Record on present appeal, Tab 60, pp. 2, 5, 6). ATCO also alleged the same thing to this Court in 2007: see ATCO's February 22, 2007 factum filed for that previous appeal (pp. 1, 4, 7, 8, 9, 11; cf. p. 10). And cf. similar allegations in the Commission's February 21, 2007 factum (pp. 5, 6). The Commission evidently did not recall its own file (though its 2004-2005 record was consolidated with its 2007-2008 record).

96 In fact, the various statements by ATCO and by the Commission alleging Calgary's silence are not correct. Calgary *did* argue the retroactivity issue during the first hearing, especially in its reply written argument of January 28, 2005 (Tab 50 of the Commission's Record). See especially pp. 2-3, quoting s. 40 of the *Gas Utilities Act*, the key legislation. The date, application number, and title of that written argument all confirm that it was filed for this first application which led to this first Commission decision in April 2005. The Commission's 2008 decision says that all argument to the Commission on this first 2004-2005 application had been written, not oral (pp. 2-3, A.B. pp. F5-F6).

97 ATCO's inaccurate allegations of Calgary's silence are puzzling. Maybe counsel relied on memory alone. Maybe they interpreted Calgary's written 2004-2005 argument in some unreasonable narrow fashion. And ATCO's 2007 factum may have used terms like "jurisdiction" in a narrow way (e.g. excluding non-jurisdictional Calgary arguments). (See Part D.9. below.) In any event, this is an appeal from the Commission's rehearing, and the "alleged silence" point no longer influences the result (if it ever did).

98 The City of Calgary sought leave (May 30, 2005) and got leave (July 6, 2006: see 2006 ABCA 180 (Alta. C.A. [In Chambers])) to appeal from this 2005 Commission decision. The Court of Appeal allowed the appeal. It said the question could not be decided on the record before the court, doubtless relying on ATCO's erroneous factum. The Court sent the matter back to the Commission to rehear and to reconsider: see 2007 ABCA 133, 404 A.R. 317 (Alta. C.A.).

99 On August 23, 2005, the Commission gave decision 2005-093 approving ATCO's computation of the precise amounts ATCO would collect and refund under the April 2005 decision.

(b) "Limitation Period" May 2006 Decision #2006-042

100 Meanwhile, the Commission itself was properly troubled by the implications of its 2005 precedent. If carried to its logical extreme, it could leave gas rates charged to consumers and payments by past customers forever open to alteration, approaching the lengthy uncertainties in Lord Eldon's Court of Chancery. The Commission therefore ordered a second application about whether the Commission should impose its own limitation period, maybe two years. (It proceeded under a further application which the Commission ordered ATCO to make.) Little was said about the existing limitation period (beginning of the fiscal year of application) found in the *Gas Utilities Act*, and described in Part C be- low.

101 The Commission's decision on this limitation-period hearing was that the utilities statutes did not matter or apply, because of the old deferral account. So the Commission thought that the extent of retroactivity was more or less a matter of its own discretion. The Commission ordered that henceforth (not retroactively) there would sometimes be a new two-year limitation period for retroactive rate changes. I say "sometimes", because the two-year time limit would not apply where the adjustment sought was large and there were "special circumstances" not within the utility's control.

102 It is not clear whether the "special circumstances" phrase referred to what caused the initial problem, or why the application was made after the expiry of two years.

103 I note that ATCO's limitation-period application was filed after Calgary moved for leave to appeal from the Commission's first decision. And the Commission's reasons on that in May 2006 were almost a year after such leave was sought. The Commission likely knew of those events. But we have to look at the 2006 reasons because they are incorporated into the 2008 decision.

104 ATCO filed a motion in the Court of Appeal for leave to appeal this 2006 decision, but by agreement that motion was adjourned from time to time over the years, and was never heard (see 2008 Commission decision, p. 1). That motion was discontinued recently (February 12, 2010). ATCO later argued before the Commission that Calgary's not trying to appeal this 2006 decision somehow estopped it from questioning the 2005 Commission decision which it has twice appealed (October 5, 2007 argument, p. 6, para. 12, Commission Record Tab 60). I cannot see the logic of that, nor do I recall any law to support it (and none was cited). In any event, no such argument was put to the Court of Appeal on this appeal.

(c) "Reconsideration" January 2008 Decision #2008-001

105 This third Commission decision is the fruit of the rehearing directed by the Court of Appeal, as mentioned above (end of subpart (a)), and the consequent reconsideration application.

106 The Commission refused to let Calgary file any more evidence, despite the Court of Appeal's 2007 direction. (That point is discussed further in Part E.4 below.)

107 The Commission reached the same conclusion as it had in 2005. The key issue was retroactivity.

108 Almost the only significant thing which the Commission said in 2008 about retroactivity was to quote what it had said on the subject in its 2006 limitations decision (subpart (b) above). That is two short paragraphs which read as follows:

> With regard to the issue of retroactive rate-making raised by Calgary, the Board [now the Commission] does not accept the position advanced by Calgary. The Board has broad discretion to set just and reasonable rates and, in the case of setting gas cost recovery and flow-through rates, sets these rates in accordance with the use of DGAs. In doing so, the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter. In *Epcor Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.

> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact, the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.
>
> (p. 4 of 2006 decision, § 3.1 near end, and quoted on pp. 7-8 of 2008 decision, A.B. pp. F31-32)

A Commission footnote says that the Supreme Court of Canada approval referred to in the quotation is in *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.).

109 I am not certain, but the Commission's next 2008 paragraph seems to be about retroactivity as well. So I quote it:

> The provisions of the GUA and PUBA relied on by Calgary authorize the Board [now the Commission] to take into account financial information for the whole of the year in which a tariff application is filed in the event that the Board intends to approve a tariff effective prior to the date on which the tariff application is made. The "prior period" is limited to some period in the calendar year before the date of the application, depending on when the application might be filed in the calendar year. Strictly speaking, deferral accounts are unnecessary to account for financial activity in this period, so the Board does not find Calgary's argument persuasive on this basis.
>
> (p. 8, A.B. p. F32)

One curious feature of that paragraph is discussed at the end of Part D.6 below.

110 There is another paragraph in the decision immediately after that one. I am not entirely certain how to interpret it. It contains some assertions and conclusions. But the only actual reason which I can find in it is one. I read it as saying that the Commission has often acted this way, and if it refused to do so now, it would bring into question its previous decisions.

111 To sum up, the basic real reason given by the Commission was the idea that a deferred account bypasses the ordinary rule against retroactivity.

112 Martin J.A. gave leave to appeal this 2008 Decision (order of July 2, 2009). That is the present appeal.

4. Unreasonable Decision

113 Hunt J.A. concludes that the Commission's decision here is unreasonable. I agree with that conclusion, and with the reasons which she gives for finding unreasonableness. Many other things discussed in my reasons would also help to support that conclusion.

C. Legislative History

1. Introduction

114 The question of whether the impugned Commission decision violates the law forbidding retroactivity requires examining a number of aspects of the nature and policy of that law. I can best start with the history of the relevant legislation and the court decisions about it. That is what this Part C does.

115 A half-century's dialogue between courts and the Legislature is outlined in subpart 2. It reveals a very clear pic-

ture. The courts found firm legislative limits which the Legislature adjusted only slightly, and otherwise confirmed, basically keeping them to the present day.

2. Chronology

(a) The *Public Utilities Act*, R.S.A. 1955 c. 267, s. 67 gave the Commission (then the Board of the Public Utilities Commissioners) general powers to fix utility rates, but said little express about time limits or retroactivity.

(b) March and August 1959 saw Commission decisions which were then appealed to the Court of Appeal, whose decision is described in (e) below.

(c) April 1959 the Legislature amended (c. 73, s. 9(d)) the *Public Utilities Act*, adding s. 67(8). Undue delay in hearing and deciding an application henceforth lets the Commission give effect to excess revenues or losses, incurred after filing a utility's rate application, when the Commission fixes just and reasonable rates.

(d) Legislature passed new *Gas Utilities Act* as 1960 c. 37. In its s. 31 has identical wording to the *Public Utilities Act* s. 67(8) just discussed (with one trivial exception).

(e) September 22, 1960 Appellate Division decided ***Edmonton (City) v. Northwestern Utilities Ltd.*** (1960), 34 W.W.R. 241 (Alta. C.A.), considering items (b) and (c) above. The Supreme Court of Canada varied this decision on April 25, 1961 on other grounds (allowing a purchased-gas adjustment clause): [1961] S.C.R. 392, 34 W.W.R. 600. The Supreme Court of Canada held that utility rates must be based on an estimate of future expenses (p. 612 W.W.R.). It apparently accepted the proposition that until the 1959 amendment, the Commission had no power at all to make retroactive rates or allowances, not even for regulatory delay.

(f) Adoption of *Gas Utilities Act* R.S.A. 1970, c. 158, s. 31, which merely reenacted 1960 c. 37, s. 31 (item (d) above) with no change.

(g) December 9, 1976: Appellate Division decided ***Northwestern Utilities v. Edmonton*** 2 A.R. 317 (Alta. C.A.). Its decision was not novel, and is similar to ***Calgary (City) v. Madison Nat. Gas Co.*** (1959) 28 W.W.R. 353, 360. The ***N.W.U.L.*** decision reversed a Commission decision, and held that unexpected shortfalls in revenue or unexpected expenses incurred by a utility before the date of the rate application cannot be considered (paras. 6, 25-26, 34). The Supreme Court of Canada affirmed the Appellate Division in late 1978: (1978), [1979] 1 S.C.R. 684, 12 A.R. 449 (S.C.C.). The Supreme Court explained the 1959 amendment: its scope is narrow.

(h) 1977: Legislature amended s. 31 of the *Gas Utilities Act*: see c. 9, s. 5(1), (2). That did not affect pending cases. Old s. 31 became new s. 31(c). The rest of the section was new.

(i) That new s. 31 (of 1977) became R.S.A. 1980, c. G-4, s. 32, with no significant change.

(j) That section became the present R.S.A. 2000, c. G-5, s. 40, with only minor changes in drafting style. The *Public Utilities Act*, R.S.A. 2000, c. P-45, s. 91 contains virtually identical words. Section 40 of the *Gas Utilities Act* now reads as follows:

> 40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,
>
> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion **applic-**

able to a period consisting of

(i) the whole of **the fiscal year of the owner in which a proceeding is initiated for the fixing of rates** , tolls or charges, or schedules of them,

(ii) **a subsequent fiscal** year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecut- ive, and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner that is in the Board's opinion applicable to the **whole of the fiscal year of the owner** in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner **after the date on which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them, that the Board determines has been **due to undue delay in the hearing and determining** of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

(Emphasis added)

(Presumably the last three lines should be indented more, but I quote them the way that they appear in the Revised Statutes of Alberta. The equivalent lines are indented more in the *Public Utilities Act*.)

3. Conclusion

116 That legislative history shows that current s. 40 of the *Gas Utilities Act* is the Legislature's limited response to the decisions of the Court of Appeal and Supreme Court of Canada described above (in subpart 2). So the principle of the Court decisions has not changed. The only small change was that the time limits were extended slightly. Though *later* years' expenses or excess revenue can be considered (if they are consecutive), shortfalls or excesses in *previous* years' expenses or excess revenue are still off-limits (as always). Only shortfalls or excesses of revenues and costs back to the beginning of the fiscal year in which the application is filed, can be considered. That was the precise point in issue in the Court of Appeal decision of 1976 (and Supreme Court of Canada affirmation). That is the only legislative amendment to the Court decisions. New para. (d) on methods and periods is vague, but seems to be purely ancillary (on which see the *Stores Block* decision discussed in Part D.5 below).

117 Given this history, this Alberta legislation is incompatible with any Commission power to take into account to

base, or adjust, rates on actual shortfalls or excesses of revenues or expenses in a year earlier than the year in which the application by the utility is filed.

118 Precedent is not the only reason for such rules. The Supreme Court of Canada's and this Court's decisions are based on fairness, certainty and logic. That is explained further below in Part D, which describes those court decisions more fully.

D. The Decision Appealed is Retroactive

1. Introduction

119 This Part D approaches the whole topic of retroactivity from several directions. All these subtopics interlock. Retroactivity cannot be properly described without showing the basics of setting utility rates.

2. Final Prospective Rate-Making

120 There are two ways in which one could regulate how much consumers pay for gas from public utilities. The usual and traditional way is to have rates fixed for a period, at least part of which period is in the future. Then one forecasts all the likely expenses (including cost of capital), and sets rates accordingly. There is some risk to the utility company, as it may get fewer revenues or higher expenses than forecast (or both). Conversely, the company also enjoys the chance of making a higher profit, if costs are below forecast, or revenues higher than forecast. That is the traditional way of making utility rates. (See further subpart 6 below.)

121 That is also the practice with respect to Alberta natural gas rates, and the law requires that procedure. The Supreme Court of Canada explains that clearly in *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684, 12 A.R. 449 (S.C.C.), on pp. 452 ff. (A.R.). I quote from that judgment (using A.R. para. numbers):

> [4] The Board [now the Commission] is by the [Gas Utilities Act] directed to "fix just and reasonable . . . rates, . . . tolls or charges . . ." which shall be imposed by the Company . . . The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. . . . It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. . . .
>
> [5] While the Statute does not precisely so state, **the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 [now s. 40] there is nothing in the *Act* to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application** (*vide: City of Edmonton et al. v. Northwestern Utilities Limited*, [1961] S.C.R. 392, *per* Locke J. at 401, 402).
>
> [6] The rate-fixing process was described before this Court by the Board as follows:
>
> > The PUB approves or fixed utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. . . . The revenue required to pay all reas-

> onable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. . . .
>
> [7] The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that **the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the *Act* which make this clear** . . . Section 32 likewise refers to rates "to be imposed thereafter by a gas utility".
>
> [22] It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. **It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in**
>
> **any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods**.
>
> (emphasis added)

See also Netz, "Price Regulation: a (Non-Technical Overview)", in *Encyclopedia of Law and Economics* 396 (2000), at 401-03. (A version of that paper is cited in the *Stores Block* decision of the Supreme Court of Canada, *infra*.)

122 The word "losses" above is ambiguous. In such discussions of retroactivity, it does *not* have its ordinary meaning of a business not so much as breaking even and running at a loss. Instead, the "losses" referred to in this particular context mean actually making less money in a period than had been forecast for that period, because expenses proved larger than anticipated, or revenues proved smaller than anticipated. See *N.W.U.L. v. Edmonton* (1979), *supra* (p. 455 A.R. para. 10, p. 693 S.C.R.). So it can readily refer to a company which is operating at a profit and making a significant return on its investment.

123 The above shows that even the small degree of retrospectivity permitted by the 1959 and 1977 *Gas Utilities Act* amendments is more limited than it sounds. Rates come into force in the future, and are intended to reflect estimates of *future* costs revenues and conditions when they are in force. The rule against looking at losses (or extra profits) which occurred before the application date is not arbitrary; in part it reflects that rule of future rate-making. Past ongoing expenses can be looked at when predicting future ones, but past unexpected shortfalls (one-time events) in general can never be recovered. I return to the stages of the rate-making process, and some confusion about it in subpart 6 below.

124 That is orthodox and traditional rate-making law: see 1 Priest, *Principles of Pub. Util. Regulation* 75, including n. 102 (1969); Netz, *loc. cit. supra*. And see subpart 4 below. The legislation confirms that law. What was referred to in the earlier court decisions as s. 31 or s. 32 of the *Gas Utilities Act* is now s. 40. It requires "rates, tolls or charges . . . *to be* imposed, observed and followed *afterwards* by an owner of a gas utility." (emphasis added)

125 The Supreme Court of Canada's 1979 *N.W.U.L.* decision then quoted with approval another decision of this Court also explaining the 1959 amendment to the legislation:

> . . . It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board [now the Commission] retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.
>
> - ***Calgary (City) v. Madison Nat. Gas Co.*** (1959) 28 W.W.R. 353, 19 D.L.R. (2d) 655, 661 (quoted at end of para. 7 (A.R.) of the Supreme Court of Canada's 1979 ***N.W.U.L.*** decision)

126 The Supreme Court also quoted with approval another decision of this Court on the unfairness of retroactive rate hikes:

> One effect of this ruling is that future consumers will have to pay for their gas a sum of money which equals that which consumers prior to August 31, 1959 ought to have paid but did not pay for gas they had used. In short, the undercharge to one group of consumers for gas used in the past is to become an overcharge to another group on gas it uses in the future. When the Board capitalized this sum, it made all the future consumers debtors to the company for the total amount of the deficiency, payable ratably with interest from their respective future gas consumption.
>
> - ***Re N.W.U.L.*** (1961) 34 W.W.R. 241, 25 D.L.R. (2d) 262, 290 (quoted in para. 21 (A.R.) of Supreme Court of Canada's 1979 ***N.W.U.L.*** decision)

127 That danger is acute here, with 2005 customers asked to pay what 1999 customers consumed but allegedly did not pay. And Calgary has a very mobile population and grew rapidly through the early 2000s.

3. Cost-Plus Billing

128 If one were to ignore all the law above, in theory gas utilities could instead use a different system. Consumers could pay them for gas on a cost-plus basis. Cost-plus is the way that government contractors like to be paid, and that law firms often charge. In theory, one could simply set rates for each year after the fact, once all the gas had been consumed, and all the consumption and expense figures were in and verified. In the meantime, consumers would merely pay something on account, and have the actual final figure adjusted later by a refund or extra charge.

129 Such a full cost-plus system would be novel in public utilities. And probably unworkable if done openly. But, in my view, ATCO's request which the Commission approved here is perilously close to that in all but name. That is not just my speculation. The Commission more or less said so itself, in its 2005 decision (p. 10, A.B. p. F13), and its 2006 decision (p. 2), both quoted in Part E.2 below.

130 The cost-plus system has dangers. Of course one is the intergenerational expropriation referred to by this Court, and by the Supreme Court of Canada (in its *N.W.U.L.* 1979 para. 21 quoted at the end of subpart 2 above).

131 When I discuss incentives at various places in this judgment, I am not imputing improper motives. A utility company is not a charity, and its directors and officers have a duty to its shareholders to maximize its profits (to the extent that the regulatory bodies and law and honesty permit).

132 Here is another danger. If the utility ends by making a profit, and there is no automatic adjustment at year end, the utility can hope that no consumer group will make a fuss, and so the company can hang on to the profit. If consumers do apply to the Commission, the utility can suggest that it is too early to tell, and to wait a few years to see if arguable offsetting losses turn up elsewhere. So what revenues to offset against what expenses becomes almost arbitrary. Conversely, if the utility makes a loss at year end, it can apply immediately for an additional payment by consumers. The utility will have recourse to the regulator only when the facts mean that it will win and the consumers will lose. On the

evils of changing the rules in mid-game, see MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 238. Recall that the Alberta deferred rate account is just a number written in a book. It is not a trust account in a bank, or any other type of segregation of funds; nor is it even funds.

133 And of course cost-plus billing contains no incentive to be economical. Cf. Netz, *loc. cit. supra*, at 403 ff.

134 Therefore, routing later claims immediately through an old deferred account to give refunds or extract higher rates, in respect of profits or losses years before, in substance is no fixed rate at all (and so clearly illegal). At best it is simply basing rates to be paid in the future on failure to forecast expenses in past fiscal years. As noted above in Part C.2 and in Part D.2, the legislation forbids that. Section 40 of the current *Gas Utilities Act* (quoted in Part C.2) only lets that process look back to the beginning of the fiscal year in which the rate application was filed. I see no exception there for different accounting methods.

4. Commission Powers are Confined by Legislative Aims

135 In Parts C and D.2 above, I showed that the Supreme Court of Canada and this Court consistently barred retroactive rate-making in general, and banned increasing present rates to cover a past unexpected shortfall in particular, and showed how the Legislature affirmed that (with only small changes).

136 The justice, consistency, and policy underlying those legal rules have since been explained by the Supreme Court of Canada. It also shows how to interpret such legislation. Its latest decision on the Alberta régime in general, and gas utilities in particular, is the "*Stores Block*" decision, cited as *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (S.C.C.). It clearly sets out the Commission's proper approach.

137 The Supreme Court there says that how much discretion utilities or other regulatory tribunals have varies from board to board, but each board must respect the limits of its jurisdiction, and can only act in areas where the Legislature has given it authority (paras. 2 and 35). Utilities regulators regulate rates to protect consumers from natural monopolies (para. 3).

138 The Supreme Court of Canada says that though Alberta's *Alberta Energy and Utilities Board Act* and *Public Utilities Board Act* and *Gas Utilities Act* contain seemingly broad powers, that legislation must be interpreted within the entire context of the statutes, which balance need for consumer protection against owners' private property rights. The main function of the Commission is to fix just and reasonable rates, so ensuring dependable supply (paras. 7, 60). Therefore, imprecise undefined wide statutory provisions letting the Commission make any order, or impose any condition necessary in the public interest, do not give an unfettered discretion. They must be limited to the purpose of the legislation and the context of the regulatory scheme and principles generally applicable to regulatory matters (paras. 46, 48, 49, 50, 51, 60, 61, 64, 73-77). The "power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates" (para. 60).

139 The Supreme Court then examines the history of the Alberta legislation, which is based on similar American traditional utilities rate-regulation legislation (para. 54). Such "public utilities are very limited in the actions they can take" and the Commission has no "discretion . . . to interfere with ownership rights" (para. 58). The 1995 (temporary) merger of the Public Utilities Commission and the Energy Resources Conservation Board (as the Alberta Energy Utilities Board) did not change that, says the Supreme Court (para. 59).

5. Shareholders' Risk

140 The law's time restrictions are neither mechanical, nor trivial. They are bound up with who enjoys windfall profits, and who risks losses or low returns on investment. The Supreme Court of Canada begins by describing the rate-making process:

> The [Commission] approves or fixes utility rates which are **estimated** to cover expenses plus yield the utility a fair return or profit. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined . . . In Phase II rates are set, which, under normal temperature conditions are **expected** to produce the estimates of '**forecast** revenue requirement'. These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.
>
> ("***Stores Block***", 2006 SCC 4, para. 65, quoting the Supreme Court of Canada's 1979 ***N.W.U.L. v. Edm.*** decision, emphasis added)

141 Then the Supreme Court shows that the object is to leave key risks to the equity holders, the utility shareholders:

> Despite the consideration of utility assets in the rate-setting process, **shareholders are the ones solely affected** when the actual profits or losses of such a sale are realized; the **utility absorbs losses and gains**, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. (*id.* at para. 69, emphasis added)

142 Therefore, the Commission cannot act retroactively and offload risk onto consumers:

> . . . the Board [now Commission] was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. . . . **The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by the ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates** [citing ***N.W.U.L.***, ***Coseka***, and ***Dow*** cases]. But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility.
>
> (*id.* at para. 71, emphasis added)

143 Striking for the present appeal is the Supreme Court's discussion shortly before that quotation. It says that the utility is not guaranteed a profit, nor a return on its assets, and is merely given a chance to earn them. The utility company owns the assets, and profits or losses accrue to the company (i.e. shareholders), not to the consumers.

> The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to ratepaying customers, undermines that investment process . . .
>
> (*id.* at para. 67)

The customers have no ownership or equity; only shareholders do:

> Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only 'the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator'.
>
> (*id.* at para. 68)

144 The long history of that policy and system are confirmed by an article (also quoted by the Supreme Court): MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 235, 237, 241-42, 243-44, 245-46.

145 This traditional prospective fixed rate-making provides very healthy incentives for the utility company and its shareholders and management. If the utility company can find ways to hold its expenses below those which were forecast, all the extra profit accrues to the shareholders and cannot later be confiscated. In the long run, that approach will benefit both the shareholders and the consumers. For a useful discussion of incentives, see Kahn, *The Economics of Regulation: Principles and Institutions*, v. 1, pp. 47-54, 101-09 (repr. MIT Press 1998).

146 Besides incentives, that system also gives fairness to the utility company's shareholders. If applied consistently, it is just for everyone.

147 Calgary's initial January 21, 2005 argument to the Commission (Tab 47, p. 3), pointed out that ATCO's 2004 error-correction application was in effect a request for a backstop guarantee against unexpected shortfalls in profit, citing previous Commission decisions. The Commission's 2005 decision does not mention that concern. The quotations from the Supreme Court of Canada above show the fundamental error in the Commission's 2008 decision now under appeal. And it is also virtually cost-plus billing, as noted in subpart D.3 above.

148 Indeed, the Commission's own 2005 decision (being reconsidered here) admits that ATCO's proposal "replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder" (p. 11, A.B. p. F14).

6. Stages of a Rate Hearing

149 The term "retroactive" is misleading or confusing in some respects. It is conceivable that it led to some of the unexplained aspects of the present situation. Compounding the problem is the fact that several different things are involved. So expanding on what the Supreme Court of Canada said in *Stores Block* will increase clarity.

150 I will outline simply the traditional and proper process to set or amend rates for a public gas utility in Alberta. (Legal authorities are found above, especially in Part C.2 and subparts D.2 and 5.)

> Step A: Utility completes fiscal years #1 and 2, and routinely files or publishes its financial results for those years.
>
> Step B: During fiscal year #3, Utility files an application to the Commission to increase its existing rates to consumers.
>
> > (1) This application always includes (and must include) an **estimate** of what expenses, taxes and rate base will be during the (current) fiscal year #3, and during (upcoming) fiscal year #4.
> >
> > (2) If the Utility wishes, it may choose also to show the Commission that in the past, some of its expenses have been higher than had previously been forecast, or that some of its revenues have been lower than had previously been forecast. However, legislation and case law (see Part C above) allow the Commission to rely upon such discrepancies between past estimates and actual figures (revenue or expenses), only for two possible time periods:
> >
> > > (a) the current fiscal year, during which the application was filed (i.e. fiscal year #3);

(b) any period during which the current rate hearing is still going on, or the rate decision is standing reserved and not yet decided (i.e. fiscal year #3, and also year #4 up to date of decision).

Step C: In Phase I, the Commission sets its own estimate of the expenses and taxes which the Utility will incur, e.g. in year #4, plus a reasonable rate of return on its investments (rate base) for the foreseeable period after the application date. That is a lump sum of future needed gross revenue per year (or month). Then in Phase II, the Commission estimates future gas consumption, and designs a set of rates which it estimates will produce that lump sum of needed gross revenue.

It will be seen from this outline that all rates are future.

151 Typically, the word "retroactive" is used in this context to refer to something very specific. That is going outside the time limits in step B(2) above. For example, the Commission cannot set a rate which will yield more than the estimated *future* expense, taxes, and return on investment. It cannot do so even if it is proven that the utility earned much less in year #1 (or earlier) than had been estimated, or than the old rates were designed to cover. That is a past loss and is unrecoverable. Similarly, the Commission cannot set future rates which will yield less than estimated future expenses etc. on the ground that in the past year #1 (or earlier) the utility earned more than had been forecast.

152 Those forbidden acts would not be "retroactive" (or retrospective) in all the common non-technical senses of the word. The common term "retroactive" is appropriate in two senses only. First, all rates should be for the future and known at the time that the consumer decides to consume some (or more) gas. Rates come into force only on the day they are announced (or a later day). (Interim rates are a partial exception, and ignored above for simplicity.) On any given day, a consumer knows what rates apply.

153 The second meaning of "retroactive" is that already described above: that deviation between past estimates and past actual performance is no ground to change future rates for a later period.

154 Therefore, one must not confuse two different topics:

(1) First topic: whether *future* consumption or expenses will be the same as forecast now;

(2) Second topic: whether *past* expenses were the same as previously forecast some years ago.

The first topic (future uncertainty) is sometimes handled by purchased-gas adjustment clauses or deferred gas accounts for gas (raw material) expenses or allied topics. It is in effect a type of temporary interim rate. But the second topic (past discrepancies from budget) is never legitimately allowed for, so long as it is for a previous fiscal year. *A fortiori*, past accounting errors are even less legitimate a topic for later adjustment of rates (even by later surcharges to consumers or refunds to consumers).

155 In my respectful view, what the Commission did here (at ATCO's request) is therefore forbidden by binding case law and statute in two respects.

156 Written argument to the Commission was not exhaustive, and may not have spelled out every implication of these points. Possibly the Commission did not distinguish the "first topic" from the "second topic". Its actual reasons on this topic were not lengthy, but I note two things. In Part B.3(c), I quoted the middle paragraph of the Commission's 2008 reasons ("The provisions of the GUA and PUBA relied on . . ." p. 8, A.B. p. F32.) In the mention of retroactivity, note the phrase there "in the event that the [Commission] intends to approve a tariff effective prior to the date on which the tariff application is made." But no such condition or qualification exists in s. 40 or the case law. The time limit about past

under-recoveries applies just as much to rates to come into effect later (as rates almost always do). Parts C and D show that at length. Little in the Commission's 2006 or 2008 reasons reviews or applies the full force of the law recited here in Parts C and D. And the original purpose of the deferred gas accounts (step B(1) above) morphed in 2005 into a repeal of the restrictions in step B(2) above.

7. Interim Rates

157 For all the reasons above, the only legitimate exception to the bar on retroactivity which I see as even arguable, is interim rates.

158 An interim order must later be replaced by a final order, and the rate will no longer be open to change. See *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 31 A.R. 541 (Alta. C.A.) , and *Calgary (City) v. Home Oil Co.* (*supra*, Part D.2) at 662-63 (D.L.R.) cited with approval by the Supreme Court of Canada in *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.), 1752h-1754f; and also see p. 17600g-1761a.

159 ATCO's October 5, 2007 argument (Tab 60, paras. 23-26, p. 9) is about *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.). But that argument acknowledges that the rates dealt with there which were subject to the "purchased gas adjustment clause" were interim. Note Calgary's reply argument of October 12, 2007 (Tab 65) pp. 6-8.

160 The term "interim" is ambiguous. But the traditional meaning is just that a full rate hearing would take too long, and the company cannot afford to go on that long under the old rates (especially in inflationary times). So a quick and approximate rate increase is put in, in the expectation these new rates will soon be replaced by more careful ones. That usefully leads to an overlapping topic, the purpose of deferral accounts.

161 In Parts D.8 and E below, I show why the rates in question here were not interim, still less permissibly interim.

8. Function of Deferred Accounts

162 The legitimate use of deferred gas accounts fits best here. I will discuss the history of these particular accounts below in Part E.

163 Is a deferred account any exception to all the law given above? Only to a very limited degree. If the Commission sets an *interim* rate which must be later adjusted and made final, then everything done in the meantime under that interim rate is tentative. That creates two needs. First, the utility company's accounts must be flagged to show that. Second, it may be informative and useful to keep track of and total any discrepancies building up in the meantime, such as the difference between anticipated gas costs and actual gas costs. There are doubtless several methods which would meet those two needs; one method is a temporary deferred account to be adjusted and closed out when the final rate is set.

164 Therefore, a legitimate deferred account is a result, not a cause; a mere tool, not an objective. Such an account does not cause or legitimize rate changes any more than fur hats cause or legitimize winter.

165 It is one thing to create a deferred account at the outset of an *interim* rate, to specify what amounts it is to record during that period, and then at the end to reconcile and clear out the account by the final rate, in the way ordained at the outset.

166 It is quite another thing to return later to a fixed *final* rate and change it after the fact by ordering premium pay-

ments by (or refunds to) consumers, and then to try to justify that by *creating* for the purpose a *new* deferred account, into which sums will be put retroactively and immediately be removed (by the premium or refund). And in substance it would be the same to find an old page still in the ledger, which had been created for a different specific purpose but long since closed out and reconciled, and then use it. In other words, retroactively to put into that page (account) the new sum and immediately take it out. That is wrong in principle and in law. It is just changing a final rate after the fact, even after the consumption. See Calgary's argument to the Commission of January 21, 2005, p. 2 (Commission Record, Tab 47).

167 Any deferred account which is mere memorandum (calculation) by itself changes nothing, excuses nothing, and is at best a result, not a cause. But if it is regarded as unallocated funds whose later ownership depends on profits or losses, then it likely violates the Court of Appeal and Supreme Court of Canada rulings in *Stores Block* and similar decisions (in Parts D.2 and D.5 above). The refund here to the consumers of the unexpected profits plainly falls within that. And the reverse, recouping unexpected profit shortfalls in the deferred accounts, is an even bigger violation of that case law. So for those reasons, I do not see a deferred account as any licence to violate the usual legal rules barring retroactive rates or use of expense overruns too far back.

168 What if the utility (with or without the permission of the Commission) were ahead of time to set up an unrestricted all-purpose "deferred account" intended to last indefinitely and to permit any rate to be adjusted later because of old events? In my view, that would be tantamount to a purported repeal of s. 40 and the Supreme Court of Canada decisions. No one but the Legislature has power to do that.

169 ATCO suggested to the Commission that the 1987-1988 deferred gas accounts were not "closed" but "left open" (para. 28, p. 10, ATCO's October 5, 2007 argument, Comm. Record, Tab 60). The words "left open" are ambiguous. The account was still there, but the relevant years had been reconciled (cleared out) years ago. See Part E below, and the Appendix to this judgment. So in the meaningful sense, ATCO's submission was incorrect. It had some accuracy only in an irrelevant sense.

170 ATCO's same argument (para. 31, p. 11) said that past rates are not changed by the DGA. In a sense, that is of course so. But it says that "future rates reflect, *inter alia*, prior period adjustments occurring . . . in the setting of future rates." That is precisely what the *Gas Utilities Act* and Supreme Court of Canada and Court of Appeal decisions all forbid. See Parts C and D.1-8 above.

171 I stress that using a deferred account is the only real reason which the Commission gave for its 2008 Decision now under appeal.

9. Jurisdiction

172 First, I put to one side a red herring. In its reasons under appeal, the Commission states (without citing authority) that there are no fixed rules about retroactivity, only discretion. The Commission says that such issues "are not, however, jurisdictional impediments" (second last para., p. 8, A.B. p. F32). That seems to echo part of what ATCO had argued (October 12, 2007 argument, p. 4, para. 8, Record Tab 64).

173 The Commission's statement is irrelevant. Errors of law and errors of jurisdiction yield the same result on appeal (if clear and unreasonable). As shown above at great length, retroactivity violates a clear rule of law. This is an appeal, and this Court is not confined to questions of jurisdiction. It has power to reverse decisions of the Commission for errors of law: *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 29(1).

174 Now I turn to another topic. I should emphasize that the above portions of my reasons do not find want of juris-

diction or power on the part of the Commission. The preceding parts of my judgment are not a search for a power. So it cannot be a power which existed somewhere else. My suggestion is not a power, or jurisdiction. Instead, I find a legal statutory prohibition (statutory and judge-made).

175 That distinction imports two things. The first is that powers are very different from rights, and lack of power (technically called a "disability") is very different from a duty. A prohibition and a lack of power operate in different spheres entirely. A power is the *ability* to affect other people's legal position. A right or duty has to do with what the law *requires* or *forbids*.

176 One can have a power but be under a legal duty not to use it, or not to use it a certain way. See *Dias on Jurisprudence*, 53-54, 56-57, 64 (4th ed. 1976) or pp. 33-34, 36-38, 43-44 (5th ed. 1985); *Salmond on Jurisprudence* 229-30 (12th ed. 1966). An example is an agent making a contract forbidden by the principal, but within the agent's authority. Another is a divorced spouse who cuts the children out of his will contrary to a contract with his ex-wife. (Of course, we must remember that the Commission is a tribunal, not a litigant.)

177 The second thing flowing from rights vs. powers in this case is easy to overlook. I find an applicable statutory (and precedential) prohibition, not mere non-existence of a grant of power. In other words, I rely on the presence of an actual thing, not the absence of something. Silence in one place does not contradict an express statutory provision in another (whether the issue is powers or duties).

178 Probably that is the key point. Existence of even one relevant statutory grant of power *upholds* a positive power; even one statutory provision *prevents* legal action if the statutory provision is a negative prohibition. So if the issue were whether a tribunal or person had *power* to do something, only one source of the power would be necessary, and would suffice. That the power came only from one source or location, would be irrelevant; one source or many would make no difference. If instead the issue is whether there is a statutory *prohibition*, then again it need only be found in one place. Even one such statutory provision means that the tribunal or person has *no* right, and the law forbids it to act. And the provisions on which I rely bar rates based on past losses or optimistic forecasts, not approve it.

179 But there is one difference between the two situations. A statutory grant of power permits effective action; a restriction makes action illegal.

180 An appeal from a tribunal's act will succeed if the tribunal lacked power, *or* if it contravened a statutory or judge-made legal prohibition, *or* both. So a tribunal acting within jurisdiction and with power, must be reversed if it violated a rule of law. The Court of Appeal must quash it.

181 Here the Commission had and has *power* to regulate rates, to enter into a hearing of some sort, to prescribe accounting methods, and to grant a wide variety of remedies. The remedies which the Committee granted here were familiar and within its *powers*. None of that is the issue.

182 The whole issue is what legal rules that hearing was to follow, what considerations or facts were relevant or irrelevant, times for acting, and the limits on reversing earlier decisions. Violation of those legal rules likely produced no nullity. But such violation is illegality, and permits, indeed mandates, appellate reversal.

10. Conclusion

183 This charge to the southern customers to reimburse ATCO for its various accounting deficiencies is illegal retroactive rate-making for ten reasons.

(a) It is all based on events long before the beginning of the fiscal year of the application, indeed totally outside any rate application. That contravenes all the law set out in Part C (history) and in subparts D.2 to D.6 above. If the adjustment application is even a rate application, it is a May 2004 application, but the adjustments go back to 1998 or 1999.

(b) The rates were final years ago, at the latest when the DGAs were reconciled monthly.

(c) The DGAs themselves were thus reconciled years before.

(d) The DGAs were never intended nor ordered to be used for this purpose. See Part D.8 above, and Part E below.

(e) ATCO's and even the Commission's reasoning would imply that the existence of this one continuous deferred account going back to 1987 or 1988 would leave open all future gas rates back to those years! That would be absurd.

(f) This is just errors from lax accounting, discovered belatedly.

(g) The Commission never even discussed the implications of the fact that on its own fact statements, this is basically cost-plus charges, not fixing rates. The essence of that is at best retroactive rates, at worst no rates at all. See Parts D.2, D.3, and D.5.

(h) The Commission shuffles the risk of shortfalls in profit onto the consumers (or rather different later consumers). See Parts D.3 and D.5.

(i) The Commission's reasons seem to contain errors on their face. See the end of Part D.6.

(j) This is clear and unreasonable error of law. See Part D.9.

E. History of Deferred Gas Accounts

1. Introduction

184 Since the Commission later saw deferred accounts as a way to bypass the retroactivity rule, the nature and history of the accounts in question here is important.

185 These accounts are so old that they were set up 22 years ago for different companies which once had the gas franchises which ATCO now enjoys.

2. Creation and Purpose

186 I quote the Commission's own history of these accounts, to show that they were never intended for the present purposes, and had long since been reconciled (cleared out) for the years in question.

> DGA [deferred gas account] procedures were initially approved by the Board [now Commission] in 1987 and finally approved in 1988 **for the purpose of reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR [Gas Cost Recovery Rate], i.e. the rate it used to recover the commodity costs of gas from sales customers**. These procedures ensured that customers paid only the actual cost of gas consumed by them. In addition, they ensured that the utility neither profited from nor suffered losses in the course of selling the gas. This premise currently remains in effect for the sale of gas under a regulated rate.

Initially, reconciliation of the DGA was made on a winter and summer seasonal basis when the application for the respective period's GCRR was filed. **In 2001, the Board approved a change in the methodology for determination of a GCRR from a seasonal to a monthly basis**. This change in methodology was implemented in April 2002. The purpose of allowing prior period adjustments in the DGA was to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred, that would have otherwise impacted the determination of a GCRR.

(2005 decision at p. 8, A.B. p. F11, emphasis added)

The Board concluded from this prior decision that the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas in the DGA process the differences fell to the account of the customer.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.

(2005 decision at p. 10, A.B. p. F13)

. . . the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years.

(2005 decision at p. 11, A.B. p. F14)

Decision E88018, dated March 18, 1988 stated:

The DGA procedure was proposed [by AG's predecessors] to be in place until gas costs could be forecast with a reasonable degree of certainty.

and in a later section also stated:

[AG's predecessor] contended that once gas prices attain some stability and can be forecast with some degree of accuracy, there likely will be no need for a DGA type account. If a DGA mechanism is not approved, [the predecessor] suggested that there would be significant swings to its earnings. [The predecessor] confirmed that when the first reconciliation proceedings are held, the Board and the Intervenors may examine not only the projected gas costs for the next reconciliation period but also those costs that are related to the period under review. (Tr. p. 488) And fur- ther:

> There's no attempt in the deferred gas account mechanism that's been proposed to bypass the Board's ability to rule on the prudence of a cost.(Tr. p. 489)

The Board concludes from this prior decision that **the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased** to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas **in the DGA process the differences fell to the account of the customer**.

> It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas. (*id.* at pp. 9-10, A.B. F12-13, emphasis added, footnotes omitted)
>
> In some cases, . . . prior period adjustments have been specifically approved for imbalances resulting from measurement errors that have related to periods of over one year.
>
> (2005 decision at pp. 10-11, F13-14)
>
> Previous to the establishment of the DGAs, a utility treated all estimates for its gas supply, both volume and price, as prospective in its General Rate Application (GRA). The establishment of the DGA provided a means by which a utility could make corrections and adjust for the actual price of the gas supplied and thereby correct the customer rates. The regulated sales rate used to recover the cost of gas was called the gas cost recovery rate (GCRR). Use of the DGA takes into account that, under a regulated gas sales rate, customers pay only the actual costs of the gas consumed by them and **the utility is neither to incur a profit nor suffer a loss** in the course of procuring and selling the gas.
>
> **In 1987 parties believed that the DGA would be a temporary feature because the continuing volatility of gas prices was not anticipated**. However, contrary to these expectations, the purpose and need for the use of DGAs has continued. Initially, the DGAs were reconciled twice a year on a winter/summer seasonal basis. During the period from 1987 to March 2002, the Board allowed prior seasonal adjustments to be made in reconciliation of the DGA in respect of the preceding same season.
>
> (2006 decision, p. 2, emphasis added, footnote omitted)

187 More examples are found in the Appendix.

3. Loose Later Practices

188 However, ATCO's practices later became lax in a number of respects, and sometimes small adjustments of other types were made in the deferral accounts. That had never been the purpose of the accounts. The Commission described that:

> . . . However, the Board [now Commission] is aware that, during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines. Prior period adjustments for various types of corrections have been relatively common occurrences. While the Board and interested parties may not have previously taken issue with these types of corrections, the Board is concerned that the DGA seems to have evolved into a vehicle to fix all possible errors as a cost of gas to be charged to sales customers under a regulated rate.
>
> (2005 decision at p. 10, F13)
>
> . . . **The Board believes that, normally, reconciliations were not expected to look back further than 12 months.** As the process evolved, some prior period adjustments were made which extended back further than 12 months. Under special circumstances, for example, involving measuring equipment malfunctions, prior period adjustments involving longer periods have been accepted by the Board. However, the Board considers that **the DGA was never set up with the intention of permitting all prior period accounting errors**, particularly those that would have been subject to ATCO's management and control, **to be processed and rectified through the DGA.**

> **The Board is troubled by the evolutional use of the DGA. The DGA replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder.** It now appears that the DGA is being treated as a catch-all for fixing errors, including those that have a long history, or appear to be the result of human error, where adequate processes have not been in place to capture and correct the problem at an early stage. Notwithstanding that some prior period adjustments previously approved by the Board may have covered an extended period of time, the Board considers that **seven years represents a significant lag presenting obvious intergenerational equity issues.**
>
> (*id.* at p. 11, F14, emphasis added)

4. Calgary's Argument

189 Calgary's factum and book of authorities cite or quote past Commission orders fully confirming the Commission's recitals quoted above (in subparts 2, 3). The appellant also shows that those accounts were promptly reconciled to allow for errors in prediction, and that the Commission gave orders replacing the interim rates initially established with final rates reflecting the reconciliations. After some years, that was done monthly (based on a three-month rolling aver- age).

190 In written argument filed with the Commission on its 2008 application, ATCO had objected that the Commission should not see a full history of its own orders governing the deferred gas account. That objection is hard to reconcile with the arguments which ATCO had made to the Court of Appeal in the 2007 appeal (need for a fuller record). However, ATCO did not object to that evidence in this new appeal. (ATCO's original argument to the Commission that ATCO lacked time to check old Commission decisions was not made again to the Court of Appeal, and of course became moot long ago.)

191 Old Commission decisions are not exactly evidence (not really fact) and are not much (if at all) law. They are previous process, and are all about the same utility (or its two predecessors). They are not tendered here to prove facts, but for their directions and decisions.

192 In the present appeal, the appellant Calgary, the respondent ATCO, and the Commission itself, all reproduced old Commission decisions in their various books of authorities.

193 Any court can look at its own previous decisions and records. See *Kin Franchising Ltd. v. Donco Ltd.* (1993), 7 Alta. L.R. (3d) 313 (Alta. C.A.), 316 (para. 7); *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 42. Additional authorities are found in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 45-54 (ch. 45, Pt. Z.3) (2003). I see no reason to withhold that power from a formal tribunal like this Commission (with all its powers). See the *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 11, and cf. *Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106, [2009] 7 W.W.R. 509 (Sask. Q.B.). Especially when the tribunal is an ongoing regulator with constant applications over the rates and accounts of the same handful of companies. This Commission has looked at its previous decisions for many many years. A classic decision of the Supreme Court of Canada says that the Commission can get its information in whatever mode it sees fit: *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), 193. And if the Commission can take notice, why cannot the Court of Appeal take such judicial notice on appeal from the Commission?

194 Furthermore, it was ATCO itself which began all this, and its application to that end expressly submitted that the Commission should make the "adjustments" (surcharges) to consumers by looking back to the Commission's old approval of DGAs. (See ATCO's application of May 31, 2004, § 4.1 "History", present Commission Record Tab 1, pp. 4-5.)

195 Therefore, it is not surprising that the Commission did *not* decline to look at any previous decisions by itself. Instead it recited and quoted a number of them in its 2005 original decision, and in its 2008 decision reconsidering that. The Commission did *not* say (in 2005 or 2008) that it (or Calgary) lacked evidence about this.

196 The Commission's public website gives ready access to some decisions from 1996 to 1999, and many thereafter. Quicklaw also reports its decisions from 2002. Print copies of all Commission decisions (to 1999) are available in one Law Society Library and (to 2008) in the Alberta Government Library. (The University of Alberta law library has some Commission decisions.) The Commission will supply copies on request. So the text of past decisions is not open to doubt. Anyone can access them to check the accuracy of quotations or summaries.

197 Therefore, the Commission was correct to inspect its past decisions on DGAs. I have amplified my recitals of this history by quoting two or three additional passages from old Commission decisions (pointed out by ATCO in its October 12, 2007 argument, Tab 64, p. 3, quoting decision 2005-036). I have also described some additional passages from Calgary's argument of October 5, 2007 to the Commission (Tab 61): see an Appendix to this judgment. The description has been checked against the original Commission decisions.

198 In any event, the old controversy about taking notice of the former Commission orders has no effect on the result, because those additional references to past orders reinforce but do not change the factual picture painted by the Commission itself in the 2008 decision now under appeal.

F. The Bell Telephone Decision of the Supreme Court of Canada

1. Introduction

199 Counsel cited *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, [2009] 2 S.C.R. 764 (S.C.C.). It involved telephone companies' infrastructure under federal legislation.

2. Legislation

200 The Canadian Radio-television and Telecommunications Commission no longer regulates telephones under traditional rate-regulating legislation. Now it must follow Canada's *Telecommunications Act*, 1993 c. 38, whose objectives, duties, and powers are vastly broader, and cover more than telephones.

201 I will outline some features of the *Telecommunications Act*, which have no equivalent in Alberta's 1999-2007 legislation applicable to gas utilities or their rates (the *Alberta Energy and Utilities Board Act*, the *Gas Utilities Act*, and the *Public Utilities Act*.)

202 The *Telecommunications Act* imposes on the C.R.T.C. a mandatory duty to implement a number of very wide and deep policy objectives when it exercises any of its powers or performs any of its duties (s. 47(a)). Among those mandatory objectives are to

- safeguard, enrich and strengthen the social and economic fabric of Canada . . . (s. 7(a))
- enhance . . . efficiency and competitiveness, at the national and international levels . . . (s. 7(c))
- promote . . . ownership and control . . . by Canadians. (s. 7(d))
- promote the use of Canadian transmission facilities . . . within Canada . . . and points outside . . . (s. 7(e))

- foster increased reliance on market forces . . . (s. 7(f))
- stimulate research and development . . . and encourage innovation . . . (s. 7(g))
- respond to the economic and social requirements of users . . . (s. 7(h))
- contribute to the protection of . . . privacy (s. 7(i))

203 The C.R.T.C. also has unusual statutory powers. It can require any telecommunications company to provide any service in any manner (s. 35(1)) or to construct any facility (s. 42(1)). And (most apposite here), the Commission can require the company to "contribute . . . to a fund to support continuing access by Canadians." (s. 46.5(1)). Therefore the C.R.T.C. has positive proactive duties going far beyond fair prices (rates), reliability of service and supply, or even safety, of one company.

3. The Supreme Court's Decision

204 The Supreme Court of Canada (and the Federal Court of Appeal) confirmed the C.R.T.C.'s decision to follow a scheme which it ordered a few years before. That was not to reduce excessive phone rates (for competition reasons), but instead to hold a portion of the revenue in profitable urban markets in a special account to be later spent on infrastructure improvements to benefit consumers.

4. Is the Supreme Court of Canada Decision Distinguishable?

205 I have concluded that the *Bell* decision can and should be distinguished here, for the following eight reasons.

(a) Different Legislative Objectives and Powers and History

206 The Supreme Court of Canada itself expressly distinguished Alberta's *Gas Utilities Act* and said that the federal C.R.T.C. has broader objectives and power than does Alberta's Commission. See the *Bell* case, paras. 17, 22, 36, 39-43, 45-48, 50-53, 55, 57, 72, 74-75 and 77. The Supreme Court of Canada even distinguishes decisions about the C.R.T.C. in earlier years when that tribunal was governed by the more traditional type of rate-of-return regulation like the Alberta system. (In those days the old system was mandated for telephone companies by the *Railway Act*.) See the *Bell* decision at paras. 39-46, and 62. See subpart 2 above. To the same effect is para. 41 of the Federal Court of Appeal decision (2008 FCA 91 (F.C.A.)) which the Supreme Court of Canada affirmed.

207 In particular, the Supreme Court of Canada pointed out that traditional rate regulation is a two-way contest between the interests of the utility company and its particular consumers. The C.R.T.C. (on the other hand) has to meet objectives for all Canadians in all parts of Canada, e.g. fostering competition: see paras. 45 and 47. What is in issue in the present dispute between Calgary and ATCO is the limited traditional type of rate-making power. See the precise passages in Court of Appeal and Supreme Court of Canada decisions, describing and mandating that Alberta scheme, quoted in Parts C and D above.

208 The present ATCO appeal is about a price (rate or revenue) fair as between the utility and the consumer; nothing more. Though the *Bell* decision's origin had a little to do with such questions, the actual *Bell* decision was about increasing access and competition, and dictating to the various telephone companies compulsory long-term infrastructure competition.

209 See also subpart (b) below, on "price-cap regulation".

210 There is an even more striking distinction between the C.R.T.C. and Alberta's Commission. For most of its history, the Commission has been separate from the Energy Resources Conservation Board. The rate regulator, the Alberta Utilities Commission, is now again separate. The broader policy about the industry and its physical form is no part of the Commission's functions, as illustrated by the Genesee power plant decision: *Alberta Power Ltd. v. Alberta (Public Utilities Board)* (1990), 102 A.R. 353 (Alta. C.A.). Though the Energy Resources Conservation Board had decided that the new second Genesee power plant was needed and gave a permit to build it, after the plant was built, the Public Utilities Board (now the Commission) could and properly did exclude it from the rate base as not "used or required to be used".

211 Alberta's two tribunals were temporarily merged effective February 15, 1995 (by 1994 c. A-19.5). But the merger ended effective January 1, 2008 (by 2007 c. A-37.2), before the decision under appeal. Furthermore, the *legislation* for the two tribunals remained separate even during the period of the merged tribunal, 1995-2007.

212 See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (S.C.C.), (paras. 9-19).

(b) Different Purposes for Setting Up Deferred Accounts

213 I must stress that in *Bell*, the C.R.T.C. was using an entirely new type of utility regulation (invented in the United Kingdom in the 1980s). It is called price-cap regulation. Unlike traditional rate (price) regulation, this does *not* fix rates; in order to give incentives, it merely sets a maximum and makes sophisticated allowances for the result. The difference between the two types of regulation is explained by Netz, *loc. cit. supra*, at 417 ff., especially p. 425-28.

214 One cannot just look at the title of an account, or fixate upon a name like "deferred". One must find the purpose and operation of the account in question. See Part D.8 above.

215 From the outset, the account described in the *Bell* decision was designated expressly to decide later who would own or use the money contained in it. See the Supreme Court of Canada decision, paras. 6, 8-9, 22 (and the Federal Court of Appeal's paras. 43 and 52.) That surplus sum was expected to arise, and did arise, from continuing to charge high urban rates, despite a new theoretical or tentative cap on rates. The difference (surplus) was to be collected and held in the new fund (account) (para. 6). That was a scheme very different from the Alberta fixed-rate scheme. Too many such statements in the Supreme Court's *Bell* decision emphasize the fund's very different purpose to list them fully; some are found in its paras. 37, 57, 61, 63, 64, 66, and 67.

216 The Alberta accounts (DGAs) had very different purposes. They came from an old short-term system for handling very unpredictable raw material costs (gas field prices). It seems to have been an accident, oversight or happenstance (not a Commission order) that they lasted for years. See the detailed history above in Part E.

(c) Alberta Balance Was Largely the Product of a Single "Adjustment" Entered After the Fact Years Later, not an Ongoing Thing

217 Alberta's deferral account had already been reconciled years earlier, i.e. settled. I doubt that it still "existed" in any real sense in 2004, still less that the 1998 or 1999 parts did. Revisiting the old Alberta deferral account was just a device invented years later when a longstanding and ongoing error was finally discovered: see Parts B.1, 2 and 3(a), and D.3 and D.8 above. Here the Commission let the utility use an old account which had been set up for one temporary purpose to be used for a totally different purpose than that contemplated before.

218 Conversely, in the *Bell* case, the C.R.T.C. managed an existing fund of money growing steadily. The C.R.T.C.

largely and in principle confirmed its original purpose.

(d) Encumbered Fund vs. Deficit

219 The *Bell* judgment and C.R.T.C. order were a final decision about ownership of surplus funds which previously had encumbered or provisional ownership. See the Supreme Court of Canada decision, paras. 63, 65.

220 However, ATCO's account was on balance (and entirely in the south) a deficit, not a surplus. A deficit cannot have an owner, nor be encumbered. Still less was any deficit intended or ordered to have either here.

(e) Limited Term in Bell

221 The *Bell* account had a definite beginning and end, forecast at the outset (2001-7 but later ended early, in 2006). See the Supreme Court of Canada decision, para. 9, cf. paras. 10-13.

222 In *Bell*, the rates were confirmed and adjusted once and for all, to prevent any further accumulations of reserve funds. The fund (account) was to be closed out and cease to exist: see the Supreme Court of Canada decision, paras. 13 and 15 end.

223 But the Alberta Commission's 2005, 2006, and 2008 decisions allowed the old gas companies' deferred accounts to be available in future to do it all again (though usually not beyond two years). See Part B.3 above.

(f) The Bell Rates Were in Effect Interim, Whereas ATCO's Were Final

224 This is stated by the Federal Court of Appeal's decision, paras. 50-52, and by the Supreme Court of Canada's decision, para. 61.

(g) Bell was Confined to Certain Geographic Areas

225 The funds in the telephone companies' deferred accounts were confined to excess revenue in geographic areas where more competition was needed. Structural changes were needed and so the C.R.T.C. authorized them. Those areas were residential local services in non-high-cost serving areas basket (mostly urban): see *Bell* paras. 4, 6, 10. But in the present ATCO appeal, all (later) gas customers simply got a retroactive rate increase (or refund).

(h) Bell Refunds were Incidental

226 In principle, the C.R.T.C. ordered the telephone companies to spend all the reserved segregated funds on service improvements (handicapped services and more broad-band capacity). Refunds to customers were just incidental amounts which could not be spent: see the Supreme Court of Canada's decision, paras. 14, 15, and 20.

227 But the only use or remedy even suggested before Alberta's rate-making Commission was a second charge (or refund) to the customers for the same old gas long since consumed.

G. Other Distinguishable Decisions

228 The Commission's decision and some factums cited *Epcor Generation Inc. v. Alberta (Energy & Utilities Board)*, 2003 ABCA 374, 346 A.R. 281 (Alta. C.A.) (one J.A.). Note that a power to change rates retroactively there was conceded; here it is in issue. The rate was agreed there to be interim (paras. 12, 14, 15), not final as here. Calgary's argument to the Commission in the present case (October 12, 2007, Tab 65, p. 2) quotes statements by the Commission in *Epcor*

confirming that. The proposed dispute on which leave was sought was only over details, indeed unique sharing ratios (*Epcor*, para. 13), not retroactivity itself as here (paras. 9-10). That motion dealt with a defined time and topic only: the 2000 pool price of electricity. And many issues were factual (paras. 23 ff.). It was a decision by only one Justice of Appeal on a motion for leave, not an appeal. *Epcor* is not on point.

229 One other case cited is *Newfoundland (Board of Commissioners of Public Utilities), Re* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.). This was a split decision. It involved Newfoundland legislation on regulation of electric utilities. Except for the broad outlines, that legislation bears no resemblance to Alberta legislation regulating gas activity rates.

230 The majority of the Newfoundland Court of Appeal held that setting a rate of return for a utility was not just a step in calculations leading to fixing rates (prices). They held that it set a ceiling for rate of return, and if the later actual rate of return exceeded that ceiling, the Commission could later adjust rates to offset that. Such a rate-of-return ceiling enforced later is emphatically not the Alberta practice or legislation. Nor can I reconcile that view with the Supreme Court of Canada's later decision in the *Stores Block* case, *supra*. Indeed the Newfoundland Court of Appeal largely proceeded on its own interpretation of its legislation, and scarcely mentioned any of the Supreme Court of Canada decisions cited above (and none of the Alberta Court of Appeal decisions). I do not find the majority decision persuasive. It is distinguishable, in any event.

H. Standard of Review

1. Conflicting Precedents on This

231 First, the Supreme Court of Canada held that the standard of review was correctness: *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (S.C.C.), (paras. 9-19). Then it gave a somewhat different decision, as follows. Whether the Commission has a given power is determined on appeal on the standard of correctness, but if it is found to have that power, the actual method used to carry out the power attracts a more deferential approach: "*Stores Block*" case, *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (S.C.C.) .

232 I am reluctant to try to create my own *Pushpanathan* analysis here, and then use it to decide which Supreme Court of Canada decision to follow, or to try to distinguish one of the Supreme Court of Canada decisions.

2. Standard Does Not Matter Here

233 Nor need I do so here, for it would not affect the result. Even on the reasonableness tests, the decision of the Commission under appeal is unreasonable and does not survive. That is so for the reasons given in Part D.10 ("Conclusion") and Part F above. None of those topics is discretionary. The legal limits here are statutory or based on binding precedent, and go to the very nature of the process. The errors are fundamental, and ones of basic principle. Parts D.4, D.5 and D.6 show that. The Commission cannot be acting reasonably when it departs from the fundamental principles laid down by the Legislature and the courts for the Commission to follow. It did depart seriously here, and its decision is unreasonable. See also Part D.9 above.

I. Conclusion

234 It is now about 12 years since the accounting errors in question began, and about six years since ATCO sought relief from the Commission. The Commission has held three hearings on the topic and has declined to hear more evid-

ence. I would fear denying justice by delaying justice, were we merely to tell the Commission to reconsider the topic in yet a fourth hearing.

235 I would have allowed the appeal, and vacated so much of the Commission's 2005 and 2008 orders as allows the (southern) recovery of former costs or expenses. I would have directed the Commission under the *Alberta Utilities Commission Act* s. 29(14), that the law requires it to dismiss that part of ATCO's application entirely. There was no appeal, nor leave to appeal from the (northern) rebate to consumers.

236 I would have awarded costs of the appeal to the City appellant payable by ATCO. There should be no costs to or from the Commission, even though its factum went rather far into the merits. But I would caution the Commission that doing that endangers its position in various respects. See *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684 (S.C.C.), 708-09, paras. 36-37.

J. Procedure

237 The appeal book contains a fuzzy scan of the three Commission decisions in question, and of some court orders. In future, documents should either be printed from electronic copies, or sharp photostats should be made from originals. In contrast, the Commission's filed record has perfect clarity.

238 The Commission filed one copy of its record, as directed by s. 29(10) of the *Alberta Utilities Commission Act*. Rule 537.1 then contemplates that counsel for the appellant will file multiple copies of Extracts of Key Evidence to supplement the Appeal Digest, reproducing only those parts of the full record that are needed (by all parties) to dispose of the appeal. If the appellant overlooks including something, the respondent can also file Extracts of Key Evidence. No party filed any extracts here. A panel contains three justices, usually based in two different cities, so the absence of individual sets of Extracts hinders the efficient disposition of the appeal.

239 The appellant's citations of court cases included no reported citation. That violates the Consolidated Practice Directions, para. D.1(b). In future it would help this Court to have at least one publisher's (or website) citation (as well as the neutral cite).

Appendix — Appendix

More History of Deferred Gas Accounts

N.W.U.L. = Northwestern Utilities

C.W.N.G. = Canadian Western Natural Gas

1987 Orders E87051 and E87052 (July 3): Commission approved in principle applications by ATCO's predecessors to establish a Deferred Gas Accounting and Reconciliation procedures, to be in place until cost of buying gas could be forecast with reasonable certainty.

1988 Decision E88018 and Order E88019 (March 18): Commission held (on N.W.U.L. and C.W.N.G. rates) that the Gas Cost Recovery Rate was interim and would change at least two times/year. Seasonal rates were to be established, but the Commission would monitor the reconciliations more frequently: monthly. The actual review and finalization would be done two times each year. The cumulative actual balance in the DGA on each March 31 and each

October 31 would be refunded to or collected from customers through the GCRRs in the ensuing season.— Thereafter in 1988 further Commission orders did reconcile those accounts two times/year for each gas company.

1989-1991 Further Commission orders also in effect reconciled the accounts. Decision C90041 (December 7, 1990) confirmed the system. Some of these orders said that the rates remained subject to review. Interim Order— E89020 (April 4, 1989) said that DGA balances should be minimized, and so any significant increase in gas supply costs between normal application dates should lead to an application by C.W.N.G. for a change in the GCRR.

1994-1997 By Decision 94072 (October 28, 1994) DGA reconciliations for C.W.N.G. were to be annual, not semi-annual. GCRRs were from time to time approved. Order U97010 (January 16, 1997) quoted and reiterated Order 89020 (of April 4, 1989), which in turn summarized Order 88018. Order U97052 (May 7, 1997) re C.W.N.G. said that the DRA calculation method meant that under- or over-recovery in one-half year cumulated in the DGR would be collected or refunded in the next one-half year's period, given normal weather and accuracy of sales forecasts. This would substantially maintain intergenerational equity. Order U97053 (May 7, 1997) for N.W.U.L. gave final approval of the company's GCRR for 2-1/2 months. Decisions U97129 and U97130 (October 31, 1997): Commission reconciled C.W.N.G.'s and N.W.U.L.'s actual gas cost recoveries.

1998 Decision U98067 (April 13) accepted C.W.N.G.'s reconciliation and refused requests to re-examine the DGA process. Order U98071 (May 4) confirmed C.W.N.G.'s summer GCRR as final.

1999-2000 Various interim orders. Order U2000-161 (April 17) made ATCO Gas-South's GCRR final. More interim orders made for both companies. Order U2000-308 (October 27) deferred acceptance of ATCO North's (former N.W.U.L.'s) reconciliation and set a new interim rate.

2001 Order U2001-001 (January 24) left GCRR rates for ATCO South as interim. Order U2001-002 (January 24) was similar for ATCO North. Order U2001-061 (March 28) was similar; as were Orders 2001-062 (March 28) and U2001-448 (December 14).— In 2001 the Commission held a hearing re methods to set the GCRR. Decision 2001-075 (October 30) (on methodology) described the existing procedures (reconciliation two times/year) (pp. 3-4), but noted the DGA balances had become large. The Commission decided (p. 64) to switch to monthly written reconciliations to minimize DGA balances. A three-month rolling period would be used for reconciliations.

2002 Decision 2002-026 (April 18) (p. 3) recited the Commission's duty and power to fix "the appropriate final share of the deferral account balances due from each customer class". On p. 4 the Commission said it had been hoped under- and over- recoveries in the DGA would balance out but unexpectedly they had not. But in principle, rates should be established prospectively.

2003 Decision 2003-106 (December 18) (p. 135) said that for the DGA and reconciliation the GCFR would be revised monthly.

FN1 "Board" means the regulator of Alberta's gas industry which has, over time, been the Public Utilities Board, the Energy and Utilities Board and the Alberta Utilities Commission.

FN2 Calgary did not challenge the adjustments the Board approved to ATCO's northern territory DGA arising from

transportation imbalances for the 1998 - 2004 period (Board factum at para. 14). Accordingly, 1999 (not 1998, as was stated in the leave decision) is the appropriate starting point.

END OF DOCUMENT

TAB 3

BLACK'S LAW DICTIONARY®

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

BY

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dredges, floating derricks and barges equipped for special purposes or operations are "vessels" within meaning of Jones Act, and persons regularly employed aboard such a vessel in aid of its purposes are "seamen." Hill v. Diamond, C.A.Va., 311 F.2d 789, 791, 792. On the other hand, however, everything that floats is not necessarily a "vessel," in purview of Jones Act. Bennett v. Perini Corp., C.A.Mass., 510 F.2d 114, 116. For example, a floating dry dock which was moored by chains and cables to shipyard dock at time of injury to shipyard employee and which was in use as a dry dock was not a "vessel" and therefore no warranty of seaworthiness arose. Keller v. Dravo Corp., C.A.La., 441 F.2d 1239, 1244.

Foreign vessel. A vessel owned by residents in, or sailing under the flag of, a foreign nation.

Public vessel. One owned and used by a nation or government for its public service, whether in its navy, its revenue service, or otherwise.

Vest. To give an immediate, fixed right of present or future enjoyment. Baldwin v. Fleck, Tex.Civ.App., 168 S.W.2d 904, 909. To accrue to; to be fixed; to take effect.

To clothe with possession; to deliver full possession of land or of an estate; to give seisin; to enfeoff. *See also* Vested.

Vesta /véstə/. The crop on the ground.

Vested. Fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute "vested right." Vaughn v. Nadel, 228 Kan. 469, 618 P.2d 778, 783. *See also* Accrue; Vest, and specific types of vested interests, *infra*.

Vested devise. *See* Devise.

Vested estate. An interest clothed with a present, legal, and existing right of alienation. Chaison v. Chaison, Tex.Civ.App., 154 S.W.2d 961, 964. Any estate, whether in possession or not, which is not subject to any condition precedent and unperformed. The interest may be either a present and immediate interest, or it may be a future but uncontingent, and therefore transmissible, interest. Estate by which present interest is invariably fixed to remain to determinate person on determination of preceding freehold estate. An estate, when the person or the class which takes the remainder is in existence or is capable of being ascertained when the prior estate vests, Commissioner of Internal Revenue v. Kellogg, C.C.A.3, 119 F.2d 54, 57; or when there is an immediate right of present enjoyment or a present right of future enjoyment.

Vested gift. A gift that is absolute and not contingent or conditional. A gift is vested if it is immediate, notwithstanding that its enjoyment may be postponed. A future gift when the right to receive it is not subject to a condition precedent.

Vested in interest. A legal term applied to a present fixed right of future enjoyment; as reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests as are not referred to, or made to depend on, a period or event that is uncertain.

Vested in possession. A legal term applied to a right of present enjoyment actually existing. *See* Vest.

Vested interest. A present right or title to a thing, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future, as distinguished from a future right, which may never materialize or ripen into title, and it matters not how long or for what length of time the future possession or right of enjoyment may be postponed, if the present right exists to alienate and pass title. Fugazzi v. Fugazzi's Committee, 275 Ky. 62, 120 S.W.2d 779, 781. A future interest not dependent on an uncertain period or event, or a fixed present right of future enjoyment. When a person has a right to immediate possession on determination of preceding or particular estate. One in which there is a present fixed right, either of present enjoyment or of future enjoyment. Painter v. Herschberger, 340 Mo. 347, 100 S.W.2d 532, 535. It is not the uncertainty of enjoyment in the future, but the uncertainty of the right of enjoyment, which makes the difference between a "vested" and a "contingent" interest. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

Vested legacy. A legacy given in such terms that there is a fixed, indefeasible right to its payment. A legacy payable at a future time, certain to arrive, and not subject to conditions precedent, is vested, where there is a person in esse at the testator's death capable of taking when the time arrives, though his interest may be altogether defeated by his own death. A legacy is said to be vested when the words of the testator making the bequest convey a transmissible interest, whether present or future, to the legatee in the legacy. Thus a legacy to one to be paid when he attains the age of twenty-one years is a vested legacy, because it is given unconditionally and absolutely, and therefore vests an immediate interest in the legatee, of which the enjoyment only is deferred or postponed.

Vested pension. Said of a pension plan when an employee (or his or her estate) has rights to all the benefits purchased with the employer's contributions to the plan even if the employee is not employed by this employer at the time of retirement. One in which the right to be paid is not subject to forfeiture if the employment relationship terminates before the employee retires. Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705, 708. Vesting of qualified pension plans is governed by the Employees

Retirement Income Security Act (ERISA). *See also* Vesting.

Vested remainder. *See* Remainder.

Vested rights. In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Such interests as cannot be interfered with by retrospective laws; interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice. American States Water Service Co. of California v. Johnson, 31 Cal.App.2d 606, 88 P.2d 770, 774. Immediate or fixed right to present or future enjoyment and one that does not depend on an event that is uncertain. A right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy. State ex rel. Milligan v. Ritter's Estate, Ind.App., 46 N.E.2d 736, 743.

Vestigial words /vestíjəl wə́rdz/. Those contained in a statute which by reason of a succession of statutes on the same subject-matter, amending or modifying previous provisions of the same, are rendered useless or meaningless by such amendments. They should not be permitted to defeat the fair meaning of the statute. Saltonstall v. Birtwell, 164 U.S. 54, 70, 17 S.Ct. 19, 41 L.Ed. 348.

Vestigium /vestíj(iy)əm/. Lat. In the law of evidence, a vestige, mark, or sign; a trace, track, or impression left by a physical object.

Vesting. Right that employee acquires to various employer-contributed benefits (*e.g.*, pension) after having been employed for requisite number of years. Federal laws (*e.g.*, ERISA) govern vesting rights. *See also* Vested pension.

Vesting order. In English law, an order which may be granted by the chancery division of the high court of justice (and formerly by chancery), passing the legal estate in lieu of a conveyance. Commissioners also, under modern statutes, have similar powers.

Vestry. In ecclesiastical law, the place in a church where the priest's vestures are deposited. Also an assembly of the minister, church-wardens, and parishioners, usually held in the vestry of the church, or in a building called a "vestry-hall," to act upon business of the church.

Vestry-cess /véstriykès/. A rate levied in Ireland for parochial purposes, abolished by St. 27 Vict., c. 17.

Vestry-clerk /véstriyklərk/°klark/. An officer appointed to attend vestries, and take an account of their proceedings, etc.

Vestry-men /véstriymən/. A select number of parishioners elected in large and populous parishes to take care of the concerns of the parish; so called because they used ordinarily to meet in the vestry of the church.

Vestura /vest(y)úrə/. A crop of grass or corn. Also a garment; metaphorically applied to a possession or seisin.

Vestura terræ /vest(y)úrə téhriy/. In old English law, the vesture of the land; that is, the corn, grass, underwood, sweepage, and the like.

Vesture /véstyər/. In old English law, profit of land. "How much the *vesture* of an acre is worth."

Vesture of land /véstyər əv lænd/. A phrase including all things, trees excepted, which grow upon the surface of the land, and clothe it externally.

Veteran. In general, any honorably discharged soldier, sailor, marine, nurse, or army field clerk, who has served in military service of the United States.

Veterans Administration. An independent federal agency that administers a system of benefit programs for veterans and their dependents. These benefits include compensation payments for disabilities or death related to military service; pensions; education and rehabilitation; home loan guaranty programs; burial, including cemeteries, markers, flags, etc.; and a comprehensive medical program involving a widespread system of nursing homes, clinics, and hospitals. Effective in 1989 the former Veterans Administration became the Department of Veterans Affairs, and was elevated to cabinet level status. *See also* Court of Veterans Appeals.

Veterans Affairs Department. *See* Veterans Administration.

Veterans Appeals Court. *See* Court of Veterans Appeals.

Vetera statuta /víytərə stət(y)úwtə/. Lat. Ancient statutes. The English statutes from *Magna Charta* to the end of the reign of Edward II are so called; those from the beginning of the reign of Edward III being contradistinguished by the appellation of *"Nova Statuta."*

Veterinarian. One who practices the art of treating diseases and injuries of domestic animals, surgically or medically.

Vetitum namium /víytətəm néym(i)yəm/. L. Lat. Where the bailiff of a lord distrains beasts or goods of another, and the lord forbids the bailiff to deliver them when the sheriff comes to make replevin, the owner of the cattle may demand satisfaction in *placitum de vetito namio.*

Veto (Lat. I forbid.) The refusal of assent by the executive officer whose assent is necessary to perfect a law which has been passed by the legislative body, and the message which is usually sent to such body by the executive, stating such refusal and the reasons therefor.

TAB 4

1980 CarswellAlta 136, 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541

H

1980 CarswellAlta 136

Coseka Resources Ltd. v. Saratoga Processing Co.

COSEKA RESOURCES LIMITED v. SARATOGA PROCESSING COMPANY LIMITED et al.; PETROGAS PROCESSING LTD. v. PUBLIC UTILITIES BOARD et al.

Alberta Court of Appeal

Clement, Laycraft and Stevenson JJ. A.

Judgment: July 20, 1980
Docket: Calgary Appeal Nos. 13147, 13166

Counsel: *D. P. McLaws, Q.C.*, for Coseka Resources Ltd.

J. B. Ballem, Q.C., and *L. L. Fryers*, for Saratoga Processing Company and Westcoast Transmission.

J. R. Smith, Q.C., for Husky Oil Operations Ltd.

A. L. McLarty, for Petrogas Processing Ltd.

No one for the Public Utilities Board.

Subject: Natural Resources

Oil and Gas --- Statutory regulation — Provincial boards — Jurisdiction.

Mines and minerals — Oil and gas — Exploration and operating agreements — Miscellaneous agreements — Public Utilities Board — Rate fixing — Possible for final order to leave retroactive effect to date of interim or- der.

W. purchased raw gas from H. and processed it through a plant operated by S., a wholly owned subsidiary of W. In 1974, the plant, not being used to capacity, was directed by the Public Utilities Board to process gas from C. In May 1975, the board issued an interim order as to rates to be charged, reserving a final order until various unknown costs and factors could be determined. In 1980, a final order was given, adjusting rates back to 1st September 1977. C. appealed the decision, contending that rate adjustment could not be retroactive and that the rates set were applicable only from the date of the final order.

Held:

Order quashed in part.

The board had jurisdiction to make an interim order under s. 52 of the Public Utilities Board Act. While rates or adjustments could not be made to apply to dates prior to an application, the board had power to amend its interim order and to make adjustments for the period between the interim and final orders. The question of the effective date of the final order was referred back to the board. In making the effective date a date other than that of the interim order, the board had erroneously considered matters outside its jurisdiction.

Cases considered:

Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Ltd., [1980] 3 W.W.R. 1, 20 A.R. 384 Alta. (C.A.) — *considered*

Calgary and Home Oil Co. Ltd. (1959), 28 W.W.R (N.S.) 353, 19 D.L.R. (2d) 655 (Alta. C.A.) — *con- sidered*

Edmonton v. Northwestern Utilities Ltd., Re, [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125 — *considered*

Northwestern Utilities Ltd. v. Edmonton, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 23 N.R. 565, (sub nom. *Northwestern Utilities v. Edmonton)* 12 A.R. 449 — *considered*

Trans Mountain Pipe Line Co. Ltd. v. Nat. Energy Bd., [1979] 2 F.C. 118 (C.A.) — *applied*

Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd., [1980] 3 W.W.R. 313, (sub nom. *Re Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd.)* 109 D.L.R. (3d) 698, 22 A.R 24 (C.A.) — *referred to*

Western Decalta Petroleum Ltd. v. Alta. Public Utilities Bd. (1978), 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600, 9 A.R. 175 (C.A.) — *considered*

Statutes considered:

Alberta Gas Trunk Line Company Act, 1954 (Alta.), c. 37.

Gas Utilities Act, R.S.A. 1970, c. 158, ss. 2(*f*)(iii), 5.1 [en. 1976, c. 21, s. 2; am. 1980, c. 21, s. 5], 21, 24 [am. 1980, c. 21, s. 9], 27 [since am. 1980, c. 21, s. 10], 31 [am. 1977, c. 9, s. 5], 35 [am. 1980, c. 21, s. 13], 49.

Natural Gas Pricing Agreement Act, 1975 (2nd Sess.) (Alta.), c. 38.

Public Utilities Board Act, R.S.A. 1970, c. 302, ss. 52, 54.

Appeal from decision of the Public Utilities Board.

The judgment of the court was delivered by *Laycraft J. A.*:

1 The issue raised by these related appeals [from 10 Alta. L.R. (3d) 193 (sub nom. *Re Saratoga Processing Co.* Ltd.)] from the Public Utilities Board of Alberta is the effective date of a board order fixing the charge by

Saratoga Processing Company Limited for processing natural gas produced from the North Coleman gas field. In the Coseka appeal the issue is whether the Public Utilities Board ("P.U.B.") exceeded its powers when, in replacing an interim order with a final order, it made the rates in the final order effective on 1st September 1977, a date nearly three years prior to the date of the final order. In the Petrogas appeal the issue is whether the effective date of the final order should have been 2nd May 1975, the date of the interim order which it replaced.

2 These cases have a lengthy and complex history which it is necessary to review in order to follow the dispute which has now arisen. A large number of producers of natural gas in the North Coleman field and in nearby Savanna Creek gas field are affected by the appeals. Those from the Savanna Creek field are represented by Husky Oil Operations Ltd., and those from the North Coleman field are represented by Coseka Resources Ltd., as the operators of the respective fields. The actions subsequently referred to in this case as being those of Husky or Coseka were on behalf of all the producers represented.

3 In August 1957 Westcoast Transmission Company Limited contracted with Husky to purchase raw, unprocessed natural gas at a central point in the Savanna Creek gas field. Such a transaction was relatively rare, if not unique, in Alberta. Producers usually process the gas themselves in a plant before selling it to a buyer. In this case Westcoast, having purchased raw gas, required a gas processing plant and incorporated Saratoga Processing Company Limited as a wholly owned subsidiary to build the plant and operate it.

4 In September 1960 Westcoast entered into a gas sales agreement with a United States buyer, El Paso Natural Gas Company, which took delivery of the gas at the international boundary. El Paso undertook to pay a fixed price for the gas plus all processing and transportation charges related to it. The stream of gas sold to El Paso included gas from Savanna Creek as well as gas produced from another gas field by Petrogas Processing Limited. Petrogas sold its gas already processed and so its gas did not go through the Saratoga plant. The Savanna Creek producers provided approximately 10 per cent of Westcoast gas volume in its southern Alberta system, and Petrogas approximately 90 per cent.

5 The field volumes of gas from the Savanna Creek field were overestimated. The field never produced the expected volumes of gas, so that the Saratoga plant, built in anticipation of that volume, had excess capacity. In October 1960 Westcoast agreed with its subsidiary, Saratoga, to reimburse it for all costs incurred in the processing plant. Westcoast then recovered all such costs from El Paso, which apparently raised no issue as to costs arising from the excess plant capacity.

6 In 1973 and early 1974 the North Coleman gas field was discovered near the Savanna Creek field. On behalf of the producers of that field, on 2nd May 1974 Coseka made a complaint in writing to the P.U.B. pursuant to the Gas Utilities Act, R.S.A. 1970, c. 158, asking the board to require Saratoga to process its gas, constructing such plant additions as might be required for that purpose. The P.U.B. at that time found that the Saratoga plant had sufficient excess capacity to enable it to process the gas produced by the Coseka producers without major plant additions. The board heard considerable evidence on the share of plant costs which should be borne by Coseka. This was a complex matter since the acid gas content and other specifications of the North Coleman gas were expected to differ considerably from the Savanna Creek gas. On 2nd May 1975, the board issued reasons for judgment in some 14 pages. Under the heading "Interim Order" the board stated:

> As mentioned at the outset of this Decision, the Board was requested to confine its decision to matters stated to be in issue between the parties. Many ancillary questions remain to be resolved, either by agreement to be presented to the Board for incorporation in the final Order or by further direction of the Board at the time of

granting a final Order. Most of these questions are outlined in the draft agreement presented with Saratoga's submission. Coseka advised that it had not made a detailed review of such agreement at the time of the hear- ing.

Furthermore, without a reasonable trial period of actual operations, it is impossible to determine with any real precision the myriad factors, such as capital cost of additions, operating expenses, deliverability of Raw Gas, actual operating capacity of the plant to meet the needs for Residue Gas, and the determination of the actual Acid Gas content together with its effect on plant capacity. The answers to these questions, and to others of equal importance, are fundamental to any attempt to make an exact determination of a rate and the terms relating thereto.

The Board will therefore exercise its powers under Section 52 of The Public Utilities Board Act and issue an Interim Order directing that commencing with the first delivery of gas by Coseka for processing, the charges to be paid by Coseka will consist of a fixed unit charge per Mcf of 14.4 cents for each Mcf of gas processed with a minimum annual charge of $245,000 payable as previously described. Failing such agreement, the parties may apply to the Board for further direction.

The Interim Order will remain in effect until further application following an adequate period during which reasonable volumes of gas have been processed for Coseka. Direction on the many matters with respect to which the Board has made no decision and which are the subject of uncertainty between the parties is reserved to such further application.

7 Prior to the introduction of the North Coleman gas into the plant the average cost of processing gas was 45 cents per Mcf. The initial charge to Coseka of 14.4 cents per Mcf. was later raised to 15.6 cents per Mcf. by agreement between Saratoga and Coseka. Though contrary to s. 35 [am. 1980, c. 21, s. 13] of the Gas Utilities Act, the change was not submitted to the board for approval.

8 The arrangement whereby El Paso reimbursed Westcoast for all costs of processing and transportation continued until 1st January 1975. On that date Westcoast's license to export natural gas from Canada was amended by the National Energy Board to require Westcoast to charge El Paso a much higher fixed border price, related to the "commodity value" of natural gas as compared to other fuels in the United States. This border price included all costs of processing and transportation of the gas. In the same year the Natural Gas Pricing Agreement Act, 1975 (2nd Sess.) (Alta.), c. 38. was enacted by the Legislative Assembly of Alberta and amendments were also made in 1976 to the Gas Utilities Act. I will refer in more detail to some portions of this legislation later.

9 The general scheme of the new system for sales of natural gas, which was to apply despite contractual provisions to the contrary, was that American buyers of gas paid a price at the United States border fixed by the National Energy Board and computed by reference to the "commodity value" of gas in the United States. Original buyers of gas in Alberta were allowed to recover their "cost of service" including costs of processing and transportation attributable to the gas. These costs deducted from the border price became the field price of gas received by producers. Thus the producers of the gas rather than the consumers were, for the first time, in effect paying processing and transportation charges.

10 The administration of the new system of gas sales was, by the Natural Gas Pricing Agreement Act, entrusted to a new administrative board established by that Act, the Alberta Petroleum Marketing Commission ("A.P.M.C."). It was required to determine the cost of service of an original buyer of gas subject to an appeal to

the P.U.B. In May 1977 regulations enacted under the Act specified an appeal procedure to be followed on such appeals.

11 A gas processing plant is a "gas utility" as defined by the Gas Utilities Act. The P.U.B. is authorized by s. 27 [since am. 1980, c. 21, s. 10] of that Act to fix the just and reasonable rates, tolls and charges of a gas processing plant either on its own motion or upon receipt of a complaint. As part of the new scheme of marketing gas, the P.U.B. was forbidden by s. 5. 1 [en. 1976, c. 21, s. 2; am. 1980 c. 21, s. 5], added to the Gas Utilities Act effective 19th May 1976, to hold hearings under a number of sections of the Act, including s. 27, unless authorized to do so by the Lieutenant-Governor in Council of Alberta. The addition of s. 5.1. meant that the P.U.B. was forbidden to hold a further hearing to fix finally the reasonable rates, tolls and charges for processing the North Coleman gas until some party affected applied for and obtained an order of the Lieutenant-Governor in Council permitting the hearing to be held. Until that order was obtained the interim order of 2nd May 1975 would remain in effect.

12 The A.P.M.C. administered the Westcoast cost of service as one single all-inclusive item for all of its operations in southern Alberta. The result was that, in effect, Petrogas with 90 per cent of the volume of gas in the Westcoast southern Alberta system paid 90 per cent of the cost of the Saratoga plant remaining after payments by Coseka were deducted, though none of its gas was processed in that plant. Very large sums of money were involved. For September 1977 the Westcoast cost of service was determined by the A.P.M.C. to be $439,298 before adjustments for prior months, of which $206,669 was the processing cost passed on to Westcoast by Saratoga. That charge to Westcoast was simply the total plant cost less the sums recovered from Coseka.

13 Not unnaturally, Petrogas objected. Soon after the appeal procedure was established under the Natural Gas Pricing Agreement Act it filed with the A.P.M.C. a statement of objection for the month of September 1977, requesting a separate cost of service determination for Savanna Creek production and a further collective cost of service for all other areas. The A.P.M.C. allowed this objection and made the order requested, thus relieving Petrogas from paying for the operation of a gas plant it didn't use.

14 While Petrogas indirectly paid a substantial part of the costs of the Saratoga plant, the Savanna Creek Producers had, apparently, not concerned themselves with the processing costs attributed to their gas. When that situation ended with the A.P.M.C. decision for September 1977, the Savanna Creek Producers became concerned that a large portion of the Saratoga processing costs charged to them really related to gas supplied by the Coseka producers. They appealed the A.P.M.C. ruling as to September 1977 to the P.U.B. They also appealed a further A.P.M.C. determination of Westcoast's cost of service for Savanna Creek gas for the month of December 1977.

15 Sitting as an appellate tribunal from the A.P.M.C., the P.U.B. then needed to determine what portion of the Saratoga costs was attributed to Savanna Creek gas and what portion was attributed to North Coleman gas. In doing so however, it faced procedural problems. The determination of costs attributed to the Savanna Creek gas arose in its jurisdiction as an appellate tribunal from the A.P.M.C. Its jurisdiction to determine the Coseka portion of the equation arose under the Gas Utilities Act and it was forbidden by s. 5.1 of the Act to hold that hearing until it received an order in council from the Lieutenant-Governor in Council permitting it to do so. It proceeded to try to determine the Coseka portion of the charge only as a means of determining the Savanna Creek portion but was unable to make any order binding upon Coseka incorporating its finding.

16 In October 1978, as the appeal from the A.P.M.C. got under way, Coseka stated its contention that the

board lacked jurisdiction to fix the costs of processing its gas. Though the board requested Coseka to assist it by remaining in the hearing while the board fixed the costs of processing Savanna Creek gas, Coseka declined to do so and withdrew. The board, for its own reasons, chose not to rely upon its general powers to subpoena witnesses and documents. After a lengthy hearing, the board in June 1979, issued a decision allowing Husky's appeal from the A.P.M.C. and fixing the cost of processing the Savanna Creek gas. In the result, the costs attributed to Savanna Creek gas under that decision and the 15.6 cents per Mcf. for processing paid by Coseka fell (as estimated by counsel) approximately $100,000 per month short of the cost of operating the Saratoga plant. Under its contract with Saratoga, Westcoast bore the burden of this shortfall. Westcoast appealed the P.U.B. decision to this court. The appeal was dismissed (Prowse J.A. dissenting) in *Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd.*, [1980] 3 W.W.R. 313, 109 D.L.R. 698 (3d) (sub nom. *Re Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd.*), 22 A.R. 24.

17 Meanwhile, Saratoga was attempting to bring Coseka before the P.U.B. Application was made to the Lieutenant-Governor in Council for an order permitting the P.U.B. to hear evidence on the cost of processing the North Coleman gas. An order in council was promulgated in February 1979 but was attacked in the courts by Coseka as being defective. That order in council was replaced by a further order in council, dated 10th October 1979, on the authority of which the board, upon its own motion, convened a hearing and issued the decision which is the subject of these appeals. The order in council specifically authorized the board to proceed by review of the interim order of 2nd May 1975 or otherwise.

18 At the opening of the "Pre-Hearing Conference" on 2nd November 1979 the board made it clear that it was proceeding "to finish the job we started back in 1975". At the hearing the board heard evidence for five days and issued a decision some 80 pages in length. It determined the Saratoga cost of service and allocated it between the Savanna Creek gas and the North Coleman gas. The result was a determination that the rates, tolls and charges to be paid by Coseka and fixed by the interim order of 2nd May 1975 were not just and reasonable; indeed, they had not been since a time "at or shortly after the issuance of the interim order". The proper rates, tolls and charges to Coseka as determined by the board would require a substantial increase in payments by it, presumably approximating the $100,000 per month shortfall in plant costs which then existed.

19 In its decision the board discussed the proper effective date for the imposition of the "just and reasonable rates, joint rates, tolls or charges" which it had determined. After reviewing the arguments presented to it by the parties the board said:

> The Board considers that the "charges" to be paid by Coseka fixed in its Interim Order No. C75127 ceased to be just and reasonable at the time of the changes in circumstances that occurred as mentioned in Section 2 hereof. That time was at or shortly after the issuance of Interim Order No. C75127. It is logical that the effective date of this Decision should be at that time as argued by Petrogas. However, as stated by Petrogas, an increase in the charge paid by Coseka up to September, 1977 would result in an unearned windfall to Saratoga unless the Board ordered such windfall amount to be paid to Petrogas and Husky.
>
> The Board considers that it does not have the authority under Section 29 of The Public Utilities Board Act or any other section of that Act or of The Gas Utilities Act to order such a payment, either directly to Petrogas and Husky or through Saratoga. With respect to the subject proceedings the provisions of those two Acts authorize the Board to fix and approve of rates, tolls or charges for services provided by Saratoga to the users or customers of Saratoga. Petrogas is not a customer of Saratoga and never has been. Should Pet-

rogas consider it has a claim against Saratoga and/or Coseka, then it can prosecute such claim before the courts.

The Board considers that it will be just and reasonable to Saratoga and its customers if the effective date of this Decision is September 1, 1977, which is the effective date of Interim Order No. E79083.

20 The narrow issue raised by these appeals is whether the final order of the board dated 12th August 1980 must be effective on the date it was issued or whether at some earlier date. If an earlier date is chosen, should it be 1st September 1977 (the effective date of the relief given Petrogas by the A.P.M.C.) or the date of the interim order itself, 2nd May 1975?

21 During the argument there was repeated mention by the parties of "windfall profits" which would accrue to some or other of them depending on which of the dates is adopted as the effective date, assuming, of course, that this result remains unaffected by subsequent legal action, a point which is not before us. With the premise, as found by the board, that the rates charged Coseka for processing its gas ceased to be just and reasonable at or about the time of their imposition, the following results would follow the choice of each date:

1. If the date adopted is the date of the final order, 12th August 1980, as urged by Coseka, then:

(a) From 2nd May 1975 until August 1980, Coseka would pay approximately $100,000 per month less than the just and reasonable rates.

(b) From 2nd May 1975 until 1st September 1977 Petrogas would pay 90 per cent and Husky 10 per cent of the plant costs after deducting the Coseka payments, though Petrogas did not use the plant. The material before us does not disclose whether the payment by Husky would be more or less than the just and reasonable rate for processing Savanna Creek gas.

(c) From 1st September 1977 to 12th August 1980 Coseka would still pay approximately $100,000 per month less than the just and reasonable rates. The payment by Petrogas would be stopped. Husky would pay the just and reasonable rates fixed by the board on Husky's appeal from the A.P.M.C. The shortfall in plant costs of $100,000 per month would be borne by Westcoast.

2. If the effective date is 1st September 1977 as fixed by the board, then after that date all parties would be paying or receiving their proper share of costs. For the period between 2nd May 1975 and 1st September 1977, however, the discrepancies would be as set forth in 1(a) and (b) above.

3. If the interim order is simply replaced by the final order as of 2nd May 1975:

(a) Coseka would pay the just and reasonable rates for processing its gas throughout.

(b) The just and reasonable rates for Husky would be determined for the whole period, but there would be no proceeding before the board in which Husky would either be ordered to pay, or entitled to receive, moneys for the period between 2nd May 1975 and 1st September 1977. The material before us does not disclose whether Husky paid more or less than the proper amount during that period.

(c) Saratoga would still have the sums paid by Petrogas from 2nd May 1975 to 1st September 1977 which would be in excess of plant costs, subject to whatever advantage or disadvantage Husky gained during that period.

22 It is urged on behalf of Coseka that to prescribe any effective date, other than the date the order issued, is to offend the well established principle that the P.U.B. may not establish rates retroactively. Authorities cited are *Re Calgary and Home Oil Co. Ltd. (1959)*, 28 W.W.R. (N.S.) 19 D.L.R. (2d) 655 (Alta. C.A.); *Western Decalta Petroleum Ltd. v. Alta. Public Utilities Bd.* (1978), 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600, 9 A.R. 175 (C.A.); *Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125; *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 23 N.R. 565, (sub nom. *Northwestern Utilities v. Edmonton); Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Co. Ltd.)* 12 A.R. 449, [1980] 3 W.W.R. 1, 20 A.R. 384 (C.A.). The respondents Saratoga and Petrogas contend that to replace an interim order with a final order would not, in fact, be fixing rates retroactively; rather, it would be a mere finalization of the interim order and the exercise of a jurisdiction reserved by the interim or- der.

23 The board's original jurisdiction to regulate a gas scrubbing plant is contained in the Gas Utilities Act, as amended. By s. 2(*f*)(iii), a gas scrubbing plant is a gas utility. By s. 21, the board is given a general power of supervision of gas utilities. This section provides:

> 21. (1) The Board shall exercise a general supervision over all gas utilities, and the owners thereof, and may make such orders regarding equipment, appliances, extension of works or systems, reporting and other matters, as are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.
>
> (2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

24 By s. 24 [am. 1980, c. 21, s. 9] a number of prohibitions are imposed on gas utilities, among them a provision that no utility shall "make, impose, or extract" any unjust, unreasonable or discriminatory rate. By s. 27 [since am. 1980, c. 21 s. 10] it is provided:

> 27. The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested.
>
> (*a*) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation and other special rates, which shall be imposed, observed and followed thereafter by the owner of the gas utility.

25 The only power expressly given in the Gas Utilities Act to make orders effective prior to the date of them is contained in s. 31 [am. 1977, c. 9, s. 5]. That section, as it read prior to amendments in 1977, which are not applicable to this case, provided:

> 31. It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

26 The Act does not itself contain a provision enabling the board to issue an interim order. By s. 49, however, many of the provisions of the Public Utilities Board Act R.S.A. 1970, c. 302 are imported into the

powers of the board when it functions under the Gas Utilities Act. This section provides:

> 49. All the provisions of *The Public Utilities Board Act* relating to the jurisdiction of the Board, hearings, service of notices or orders, regulations, rules and procedure, enforcement of orders, appeals, rights, privileges and immunities of the Board, and applicable in the case of a public utility under that Act, if not provided for expressly in this Act, apply and have effect as if this Act formed a part of *The Public Utilities Board Act*.

27 The power to make interim orders is contained in s. 52 of the Public Utilities Board Act. This section provides:

> 52.(1) The Board may direct in any order that the order, or any portion or provision thereof, come into force at a future fixed time, or upon the happening of any contingency, event or condition specified in the order, or upon the performance, to the satisfaction of the Board or a person named by it for the purpose, of any terms that the Board imposes upon any party interested, and the Board may direct that the whole or any portion of the order have force for a limited time or until the happening of any specific event.
>
> (2) The Board may, instead of making an order final in the first instance, make an interim order and reserve further direction, either for an adjourned hearing of the matter or for further application.

28 There can, in my view, be no doubt that, apart from the powers given in s. 31 of the Gas Utilities Act and s. 52 of the Public Utilities Board Act (with a further power in s. 54 for ex parte interim orders not applicable here), all rates fixed by the board must be prospective. Each of the authorities cited above except *Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Co. Ltd.*, supra, deals with final orders or with the power to predate orders where there has been "undue delay". These authorities uniformly hold that a final order fixing rates must be prospective but none of them deals with the problem raised here: whether a final order may affect the past by varying rates specified in an interim order.

29 In *Re Calgary and Home Oil Co. Ltd.*, supra, the board made a number of interim orders while the hearing was in progress but in 1947 issued a final order which purported to reserve a right of review. The precise rates approved were put into effect for the sale of gas to the city of Calgary. Due to the city's rapid growth, however, the rates produced a higher than expected rate of return. When the board came to fix new rates in 1958 it was urged to fix rates lower than then required to take into account the amount by which the previous earnings exceeded the rate of return. It was held that the board had no power to reserve a right of review in a final order; its rate fixing power is prospective only and it cannot make rates retroactively. Similarly this court held in *Western Decalta Petroleum Ltd.*, supra, where a final order issued, that it was required to be prospective. The 1961 decision of *Edmonton v. Northwestern Utilities Ltd.*, supra, dealt with the question whether there had been "undue delay" and the effect to be given that delay in a final order.

30 The 1978 decision of the Supreme Court of Canada in *Northwestern Utilities Ltd. v. Edmonton*, supra, covers the same point. The company applied in 1974 for a rate increase. Before the final order was issued in that application the company made another application in 1975. In the second application the board issued an interim order increasing rates. It was held that the only losses suffered by the company which could be taken into consideration were those arising after the date of the last application. At p. 690 ([1979] 1 S.C.R. 684) Estey J. said:

> While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the

board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized *prior to the date of the application (vide Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C., 28 D.L.R. (2d) 125, *per* Locke J. at pp. 401, 402).

The rate-fixing process was described before this Court by the Board as follows:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which under normal temperature conditions are expected to produce the estimates of 'forecast revenue requirement'. These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. *Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.* (The italics are Laycraft J.A.'s).

The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that the board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

31 The board's rate making powers are prospective; nothing permits retrospective operation of rates *prior to the date of the application*. In the last sentence of the quotation which Estey J. took from the board's description of its rate-fixing process, it is recognized that an interim rate already charged and paid may be varied by a final order. He does not dissent from that proposition but the point was not before the court in that case. In my view it is not authority for either view. In the present case, no party seeks to charge rates before the date of the application; indeed none of Coseka's gas was processed prior to that date. One purpose of the application was to require Saratoga to process the gas.

32 The decision of this court in *Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Co. Ltd.*, supra, turned for the most part on the specific terms of the statute involved, the Alberta Gas Trunk Line Company Act, 1954 (Alta.) c. 37. While casting no doubt on the general proposition that the board may not make retroactive orders, Clement J.A., for the majority of the court, held that nothing in that Act prevented the 12-month period for which rates were to be fixed from being applied either retrospectively or prospectively. Clement J.A. referred to the interim order and its effect but did so in the context of the 12-month period specially provided by the applicable statute. Prowse J.A., concurring in the result, held that s. 52 of the Public Utilities Board Act applied. He therefore had to consider whether an interim order made under s. 52 is subject to adjustment by the final order. He concluded that it is. He said (p. 46):

> ... it is open to the board in its final order to fix rates that apply to the period covered by both orders and to direct the necessary adjustment to give effect thereto.

33 I respectfully agree with that statement. It is not necessary to consider in this case the validity of his

characterization of the variation of an interim order as "an administrative matter". I would leave that point for the case in which it arises. In my view, s. 52(2), empowering the board to "make an interim order and *reserve further direction*, either for an adjourned hearing of the matter or for further application" (the italics are mine), contemplates the very situation which arose in this case. It was virtually impossible to fix just and reasonable rates for the processing of Coseka's gas and even an approximation of them would have been speculative. So, instead of making a final order, the board made an interim order and reserved the matter for a "further direction" which it has now made.

34 In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the board from s. 52 beyond those already contained in either the Gas Utilities Act or the Public Utilities Board Act to make final orders. The board is, by other provisions of the statute, empowered by order to fix rates either on application or on its own motion. An interim order would be the same, and have the same effect, as a final order unless the "further direction" which the statute contemplates includes the power to change the interim order. On that construction of the section the "interim" order would be a "final" order in all but name. The board would need no further legislative authority to issue a further "final" order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to correction to be made when the hearing is subsequently completed.

35 It was urged during argument that s. 52(2) was merely intended to enable the board to achieve "rough justice" during the period of its operation until a final order is issued. However, the board is required to fix "just and reasonable rates" not "roughly just and reasonable rates". The words "reserve further direction", in my view, contemplate changes as soon as the board is able to determine those just and reasonable rates.

36 It was also urged on behalf of Coseko that great injustice will result if interim rates once paid may subsequently be varied. There is no doubt that the board must take careful account of this factor in its determination of what is just and reasonable and the problem becomes the more serious the longer is the delay. Some purchasers of the utility service for whom it is a cost of doing business may be unable to incorporate a changed rate in the price of the goods or services they themselves sell. Other purchasers who made economic decisions on the premise that the utility service had a given cost, may find those decisions invalidated. Nevertheless, all consumers of a utility service must be aware that the rates in an interim order are subject to change and determine their course of action upon the basis of that knowledge. The time involved will usually be relatively short and the board will do its best to minimize the impact of the change. In this case, through no fault of the board, a very long time elapsed before the interim order could be finalized. When the parties to a hearing realize that the rates set in an interim order are subject to variation, they will perceive that there is no advantage to be gained by delay.

37 I am constrained to observe that protestations by Coseka of injustice arising from long delay have a hollow ring in this case. Coseka refused to come before the board or to assist it on Husky's appeal from the A.P.M.C. decision when the board sought to determine the position of Saratoga's costs attributed to Savanna Creek gas. It sought by legal action to prevent the board from acting on the first order in council to finalize the interim order. It gave every appearance of being reluctant to find itself before the board. An officer of the company was frank to explain the reason for this attitude in answer to questions from a board member who pointed out that Coseka had refused to assist the board and had withdrawn from the hearings. The following then appears in the transcript of the hearing:

> Q. "I see, and that's what concerns me. I'm sure you're a very astute businessman, Mr. Kutney, and since you were being so badly treated, you knew this board may be of some assistance, you knew you were a party to these proceedings, yet you didn't wish to give it. What happened to your practical considerations then?"
>
> A. "I guess there was some more that entered into that judgment, possibly the business consideration, *the longer we stayed away from this board, maybe the longer the favourable rate would stay in effect*." (The italics are mine.)

38 In my view the board was empowered by the provisions of s. 52 of the Public Utilities Board Act to replace the rates in the interim order with different rates with effect from any time back to the date of the interim order.

39 Having rejected Coseka's contention that the order cannot affect rates charged prior to the date it was issued, I turn now to a consideration of the appropriate effective date. That determination is, of course, a function of the board under the terms of the statute. This court may interfere only if the determination was made upon wrong principles. In *Trans Mountain Pipe Line Co. Ltd. v. Nat. Energy Bd.*, [1979] 2 F.C. 118, Pratte J., speaking for the Federal Court of Appeal, said at p. 121:

> What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.

40 In my view this language is equally applicable to a review of the decisions of the Public Utilities Board by this court. I must therefore consider whether the board reached its conclusion acting on wrong principles.

41 Having observed that the rates charged Coseka ceased to be just and reasonable "at or shortly after" their imposition, the board characterized as "logical" the Petrogas submission that the effective date should be at the commencement of the interim order. It then declined to reach that conclusion on the ground that if Coseka made the payment, Saratoga would have an unearned windfall and on the further ground that the board has no authority to order payment "to Petrogas or Husky or through Saratoga".

42 At this stage in a complex unfolding story it is desirable to analyze the result of the various hearings, and the course open under the statutes to the board and to the parties. With the board's order effective 1st September 1977 Saratoga, the utility being regulated, has received its full cost of service. In the period prior to 1st September 1977 a large portion of this money came indirectly from Petrogas. Coseka paid less than the proper amount since the rates charged to it were not just and reasonable. Nothing before this court establishes whether the sums charged Husky before 1st September 1977 were proper or not. It must also be realized that sums paid by Petrogas are the result of orders, not by the P.U.B., but by the A.P.M.C. made at a time when no appeal procedures had been established. The board has no jurisdiction at all to overrule those orders.

43 The further complication is that there is no proceeding before the board in which it can fix by order binding on Husky, the just and reasonable rates for Husky for the period prior to 1st September 1977. There is no interim order in existence affecting Husky to which a final order can relate. Any application made now by one of

the parties or any proceeding commenced by the board on its own motion will produce rates applicable only to the period after the date of the application or proceeding. The board could not correct past deficiencies or over-payments by means of rate adjustments: *Re Calgary and Home Oil Company Ltd.*, supra.

44 In my view, what the board has done is to decline its jurisdiction to fix just and reasonable rates for Coseka for the period from 2nd May 1975 until 1st September 1977. It has done so not because the utility would not receive its proper cost of service from those rates, but because from another source completely outside the board's jurisdiction the utility has received other moneys. That, in my view, is not a proper ground on which the board may decline to exercise its jurisdiction. Either voluntarily or after legal action the utility may repay that money. That is not before the board or before this court. The board must, in any event, accept its jurisdiction to consider and to rule on the just and reasonable rates which each customer of the utility which it regulates must pay for the service received. I would quash the portion of the board order dealing with its effective date and refer the matter back to the board for determination in accordance with these reasons. Costs may be spoken to.

Order quashed in part.

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TAB 5

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

2006 CarswellAlta 139

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)

City of Calgary (Appellant/Respondent on cross-appeal) v. ATCO Gas and Pipelines Ltd. (Respondent/Appellant on cross-appeal) and Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited (Interveners)

Supreme Court of Canada

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Charron JJ.

Heard: May 11, 2005
Judgment: February 9, 2006[FN*]
Docket: 30247

Proceedings: reversing in part *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205, [2004] 4 W.W.R. 239, 312 W.A.C. 250, 339 A.R. 250, 2004 CarswellAlta 55, 2004 ABCA 3 (Alta. C.A.)

Counsel: Brian K. O'Ferrall, Daron K. Naffin, for Appellant / Respondent on cross-appeal

Clifton D. O'Brien, Q.C., Lawrence E. Smith, Q.C., H. Martin Kay, Q.C., Laurie A. Goldbach, for Respondent / Appellant on cross-appeal

J. Richard McKee, Renée Marx, for Intervener, Alberta Energy and Utilities Board

George Vegh, Michael W. Lyle (written submissions), for intervener, Ontario Energy Board

Michael D. Schafler, J.L. McDougall, Q.C. (written submissions), for Intervener, Enbridge Gas Distribution Inc.

Michael A. Penny, Susan Kushneryk (written submissions), for Intervener, Union Gas Limited

Subject: Public

Public law --- Public utilities — Regulatory boards — Miscellaneous

AS Ltd., division of A Ltd., gas and pipeline company, filed letter application with Alberta Energy and Utilities Board for approval of sale of AS Ltd. properties — Board found that "no-harm" test was satisfied — Board then determined allocation of net sale proceeds — Board determined that from gross proceeds of $6,550,000, A Ltd. should receive $465,000 to cover cost of disposition and provision for environmental remediation, shareholders should receive $2,014,690, and customers should receive $4,070,310 — A Ltd. appealed board decision on basis

that board did not have jurisdiction to allocate proceeds to customers — Appeal was allowed and matter was referred back to board — Court of Appeal found that board did not have jurisdiction to allocate proceeds of sale to ratepayers — City, representing rights of customers, appealed, contending that board had jurisdiction to allocate portion of net gain on sale of utility asset to rate-paying customers — A Ltd. cross-appealed, questioning board's jurisdiction to allocate any of A Ltd.'s proceeds from sale to customers — Appeal dismissed; cross-appeal allowed — Appropriate remedy was to set aside board's decision and refer matter back to board to approve sale of property belonging to A Ltd., recognizing that proceeds of sale belonged to A Ltd. — Issue of jurisdiction of board attracted standard of correctness — Court of Appeal made no error of fact or law when it concluded that board acted beyond its jurisdiction by misapprehending its statutory and common law authority — Court of Appeal erred when it did not go on to conclude that board had no jurisdiction to allocate any portion of proceeds of sale of property to ratepayers — Legislation was silent as to board's power to deal with sale proceeds — Board's discretion was to be exercised within confines of statutory regime and principles generally applicable to regulatory matters — Customers did not have property interest in utility — Board misdirected itself by confusing interest of customers in obtaining safe and efficient utility service with interest in underlying assets owned by utility — None of three statutes, Gas Utilities Act, Alberta Energy and Utilities Board Act, and Public Utilities Board Act, provided board with power to allocate proceeds of sale and therefore affect property interests of public utility.

Droit public --- Utilités publiques — Organismes de réglementation — Divers

AS ltée, une filiale de A ltée, une compagnie de gazoducs, a fait une demande par lettre au Alberta Energy and Utilities Board (la Commission) afin d'être autorisée à vendre des biens qu'elle détenait — Commission a conclu à « l'absence de préjudice » — Commission a ensuite déterminé à qui serait attribué le produit net de la vente — Commission a réparti le produit brut de la vente de 6 550 000 $ comme suit: 465 000 $ à A ltée pour les frais d'aliénation et de dépollution, 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients — A ltée est allée en appel de la décision de la Commission, invoquant que celle-ci n'avait pas compétence pour attribuer une partie du produit aux clients — Pourvoi a été accueilli et l'affaire a été renvoyée devant la Commission — Cour d'appel a conclu que la Commission n'avait pas compétence pour attribuer le produit de la vente aux clients — Représentant les droits des clients, la Ville a interjeté appel, alléguant que la Commission avait compétence pour attribuer aux clients payeurs une partie du produit net de la vente des biens d'une entreprise de services publics — A ltée a formé un pourvoi incident, mettant en doute la compétence de la Commission pour attribuer quelque partie du produit de la vente aux clients — Pourvoi rejeté; pourvoi incident accueilli — Réparation appropriée était d'annuler la décision de la Commission et de renvoyer l'affaire devant celle-ci afin qu'elle approuve la vente des biens appartenant à A ltée et qu'elle reconnaisse que le produit de la vente appartient à A ltée — Norme de la décision correcte était la norme applicable pour la question de la compétence — Cour d'appel n'a pas commis une erreur de fait ou de droit en concluant que la Commission avait excédé sa compétence en interprétant mal ses pouvoirs conférés par la loi et la common law — Cour d'appel a commis une erreur en omettant de conclure que la Commission n'avait pas compétence pour attribuer quelque partie du produit de la vente des biens aux clients — Loi était silencieuse en ce qui concernait le pouvoir de la Commission d'aborder la question du produit de la vente — Commission devait exercer son pouvoir discrétionnaire à l'intérieur des limites du régime législatif et des principes généralement applicables en matière réglementaire — Clients ne détenaient aucun droit sur les biens du service public — Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise de services publics est le propriétaire — Aucune des trois lois, soit la Gas Utilities Act, la Alberta Energy and Utilities Board Act et la Public Utilities Board Act ne conférait à la Commission le pouvoir d'attribuer le produit de la vente et,

donc, d'affecter les droits dans des biens détenus par le service public.

AS Ltd., a division of A Ltd., a gas and pipeline company, filed a letter application with the Alberta Energy and Utilities Board for approval of the sale of its properties located in Calgary. A Ltd. requested that the board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover disposition costs, and to recognize the balance of the profits resulting from the sale should be paid to shareholders. Considering the application to approve the sale, the board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the transaction, and found that the test was satisfied. The board then determined the allocation of net sale proceeds. The board found that it should apply the formula whereby the windfall realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. The board found that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings. The board determined that from the gross proceeds of $6,550,000, A Ltd. should receive $465,000 to cover the cost of disposition and the provision for environmental remediation, the shareholders should receive $2,014,690, and the customers should receive $4,070,310.

A Ltd. appealed, arguing that the board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. The appeal was allowed, the decision of the board was set aside and the matter was referred back to the board. The board was directed to allocate the entire amount of allocation of proceeds categorized as "Remainder to be Shared" to A Ltd.. The Court of Appeal found that the board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers. The city, representing the customers' interests, appealed, contending that the board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the board approved the sale. A Ltd. cross-appealed, contending that the board had no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years, and questioning the board's jurisdiction to allocate any of A Ltd.'s proceeds from the sale to customers.

Held: The appeal was dismissed and the cross-appeal was allowed.

Per Bastarache J. (LeBel, Deschamps and Charron JJ. concurring): The board's decision should be set aside and the matter referred back to the board to approve the sale of the property belonging to A Ltd., recognizing that the proceeds of the sale belong to A Ltd..

The issue of jurisdiction of the board attracted a standard of correctness. No deference was to be shown for the board's decision with regard to its jurisdiction on the allocation of the net gain on sale of assets.

The Court of Appeal made no error of fact or law when it concluded that the board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the board had no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers.

Considering the grammatical and ordinary sense of the relevant provisions of the Gas Utilities Act ("GUA"), the Alberta Energy and Utilities Board Act ("AEUBA") and the Public Utilities Board Act ("PUBA"), the legislation was silent as to the board's power to deal with sale proceeds. The broader context had to be considered. A grant of authority to exercise a discretion as found in s. 15(3) of AEUBA and s. 37 of PUBA did not confer unlimited discretion in the board. The board's discretion was to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters.

The customers did not have a property interest in the utility. Customers have made no investment. Shareholders have made an investment and assume all the risks as the residual claimants to the utility's profit. The board misdirected itself by confusing the interest of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned by the utility. The board was not in a position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. There was no such power granted by the various statutes, and it could not even be said that there was over-compensation. The power to allocate the proceeds from the sale of the utility's assets was not necessarily incidental to the express powers conferred on the board by the AEUBA, the GUA and the PUBA. Section 15(3) of the AEUBA had to be construed in accordance with the purpose of s. 26(2) of the GUA. Allowing the board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the public interest would be a serious misconception of the powers of the board to approve a sale. To do so would completely disregard the economic rationale of rate setting. None of the three statutes provided the board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

Had it not been concluded that the board lacked jurisdiction, the disposition would have been the same. The board did not meet a reasonable standard when it exercised its power. The board wrongly assumed that the ratepayers had acquired a proprietary interest in the utility's assets because the assets were a factor in the rate-setting process. The board explicitly concluded that no harm would ensue to customers from the sale of the asset. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds.

Per Binnie J. (dissenting) (McLachlin C.J.C. and Fish J. concurring): The appeal should be allowed, the board's decision restored, and the cross-appeal dismissed. The board has authority under s. 15(3) of the AEUBA to impose on the sale any additional conditions the board considers necessary in the public interest. Whether or not the conditions of approval imposed by the board were necessary in the public interest was for the board to decide. The board was in a better position to assess the necessity in this field for the protection of their public interest than either the Court of Appeal or the Supreme Court of Canada.

The standard of review on matters of jurisdiction was correctness. The board's exercise of its discretion called for greater judicial deference. The identification of a subjective discretion in the decision-maker ("the board considers necessary"), the expertise of that decision-maker and the nature of the decision to be made ("in the public interest") called for the patent unreasonableness standard. Regardless of whether the proper standard was patent unreasonableness or reasonableness, the board's response was well within the range of established regulatory opinions.

Neither the legislation nor the regulatory practice in the province and elsewhere dictated the answer to the problems confronting the board. It would have been open to the board to allow A Ltd.'s application for the entire profit. However, the solution adopted by the board was within its statutory authority and did not call for judicial intervention. It was for the board to decide what conditions in the circumstances of this case were necessary in the public interest, and the board's solution was well within the range of reasonable options. A Ltd.'s argument that the board's distribution was confiscatory overlooked the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. The board was addressing a prospective receipt and allocated two thirds of it to a prospective, and not retroactive, rate-making exercise. This was consistent with regulatory practice.

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

In exercise of its authority under s. 15(3) of the AEUBA, and having regard to its general supervision over all gas utilities and owners of them pursuant to s. 22(1) of the GUA, the board made an allocation of net gain for the public policy reasons it articulated in its decision. The allocation of the gain on an asset A Ltd. sought to withdraw from the rate base was a decision the board was mandated to make.

AS ltée, une filiale de A ltée, une compagnie de gazoducs, a fait, par lettre, une demande à la Alberta Energy and Utilities Board (la Commission) afin d'être autorisée à vendre des biens situés à Calgary. A ltée a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. Dans le cadre de son examen de la demande d'autorisation de la vente, la Commission a utilisé le critère de « l'absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération; elle a conclu a « l'absence de préjudice ». La Commission a ensuite décidé de l'attribution du produit net de la vente. Elle a conclu qu'il fallait appliquer la formule selon laquelle le profit inattendu réalisé lorsque le produit de la vente excède le coût initial pouvait être réparti entre les clients et les actionnaires. Elle a conclu qu'il fallait tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments. Elle a réparti le produit brut de la vente de 6 550 000 $ comme suit: 465 000 $ à A ltée pour les frais d'aliénation et de dépollution, 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients.

A ltée est allée en appel, soutenant que la Commission n'avait pas compétence pour décider de l'attribution du produit de la vente et que celui-ci aurait dû être attribué en totalité aux actionnaires. Le pourvoi a été accueilli, la décision de la Commission a été annulée et l'affaire a été renvoyée devant la Commission. Il a été ordonné à la Commission d'attribuer à A ltée la totalité du produit qualifié de « [Traduction] résidu à partager ». La Cour d'appel a conclu que la Commission n'avait pas compétence pour attribuer le produit de la vente aux clients. Représentant les intérêts des clients, la Ville a interjeté appel, alléguant que la Commission avait compétence pour attribuer aux clients une partie du produit net de la vente d'un bien appartenant à un service public, et ce, même si la Commission a conclu à l'absence de préjudice pour le public au moment où elle a autorisé la vente. A ltée a formé un pourvoi incident, soutenant que la Commission n'avait pas compétence pour attribuer une partie du produit aux clients équivalente à la dépréciation accumulée calculée pour les années antérieures, et mettant en doute la compétence de la Commission d'attribuer une quelconque partie du produit de la vente aux clients.

Arrêt: Le pourvoi a été rejeté et le pourvoi incident a été accueilli.

Bastarache, J. (LeBel, Deschamps et Charron, JJ., souscrivant à son opinion): La décision de la Commission devait être annulée et l'affaire devait être renvoyée à celle-ci afin qu'elle autorise la vente des biens appartenant à A ltée et qu'elle reconnaisse que le produit de la vente appartient à A ltée.

La norme de la décision correcte était la norme applicable à la question de la compétence de la Commission. Il n'y avait pas lieu de faire preuve de retenue à l'égard de la décision de la Commission quant à la compétence de celle-ci pour attribuer le produit net de la vente des biens.

La Cour d'appel n'a pas commis d'erreur de fait ou de droit en concluant que la Commission a excédé sa compétence en interprétant mal ses pouvoirs conférés par la loi et la common law. Elle a cependant commis une erreur en omettant de conclure que la Commission n'avait pas compétence pour attribuer aux clients quelque partie que ce soit du produit de la vente des biens.

Il ressortait de l'examen du sens grammatical et ordinaire des dispositions pertinentes de la Gas Utilities Act

(GUA), de la Alberta Energy and Utilities Board Act (AEUBA) et de la Public Utilities Board Act (PUBA) que ces lois étaient silencieuses quant aux pouvoirs de la Commission d'aborder la question du produit de la vente de biens. Il fallait examiner le contexte plus général. Le pouvoir discrétionnaire octroyé par les art. 15(3) AEUBA et 37 PUBA n'était pas illimité. La Commission devait exercer son pouvoir discrétionnaire à l'intérieur des limites du régime législatif et des principes généralement applicables aux affaires réglementaires.

Les clients n'avaient aucun droit de propriété sur le service public. Ils n'avaient fait aucun investissement. Ce sont les actionnaires qui investissent des fonds et ce sont eux qui assument les risques, car ils ont droit au reliquat du profit du service public. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise de services publics est le propriétaire. Elle ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. Les différentes lois ne conféraient pas un tel pouvoir, et on ne pouvait même pas dire qu'il y avait eu paiement excessif. Le pouvoir d'attribuer le produit de la vente des biens du service public n'était pas nécessairement accessoire aux pouvoirs expressément conférés à la Commission par la AEUBA, la GUA et la PUBA. Il fallait interpréter l'art. 15(3) AEUBA en conformité avec l'objet de l'art. 26(2). Permettre à la Commission de confisquer le gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'intérêt public serait se méprendre grandement sur le pouvoir de celle-ci d'autoriser ou non une vente. Cela ferait totalement abstraction des fondements économiques de la tarification. Aucune des trois lois n'accordait à la Commission le pouvoir d'attribuer le produit de la vente et, donc, d'empiéter sur le droit de propriété de l'entreprise de services publics.

Même s'il avait été conclu que la Commission n'avait pas compétence, le résultat aurait été le même. La Commission n'a pas exercé son pouvoir de façon raisonnable. Elle a présumé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise de services publics parce que les biens constituaient l'un des facteurs pris en compte dans le cadre du processus de tarification. Elle a explicitement conclu que la vente des biens ne causerait aucun préjudice aux clients. Les clients n'avaient aucun intérêt légitime qui devrait être protégé ou avait besoin de l'être en refusant d'autoriser la vente ou en accordant une autorisation conditionnelle à une attribution particulière du produit.

Binnie, J. (dissident) (McLachlin, J.C.C., et Fish, J., souscrivant à son opinion): Le pourvoi devrait être accueilli, la décision de la Commission rétablie et le pourvoi incident rejeté. La Commission avait le pouvoir, en vertu de l'art. 15(3) AEUBA, d'assortir la vente de toutes les conditions qu'elle peut juger nécessaires dans l'intérêt du public. C'était à la Commission qu'il revenait de décider si les conditions d'autorisation qu'elle avait imposées étaient nécessaires dans l'intérêt du public. La Commission était mieux placée dans ce domaine que ne l'était la Cour d'appel ou la Cour suprême du Canada pour apprécier la nécessité de protéger l'intérêt du public.

La norme de contrôle applicable pour les questions de compétence était celle de la décision correcte. L'exercice de son pouvoir discrétionnaire par la Commission commandait de faire preuve d'une plus grande retenue. L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent l'application de la norme de la décision manifestement déraisonnable. Peu importe que la norme de contrôle soit celle de la décision manifestement déraisonnable ou celle de la décision raisonnable, il demeurait que la décision de la Commission se situait dans les limites des opinions exprimées par les organismes de réglementation.

Ni les lois ni les pratiques réglementaires en cours dans la province ou ailleurs ne donnaient de réponse aux problèmes devant la Commission. Il aurait été loisible à celle-ci d'accorder la demande de A ltée à l'égard du

produit en entier. Cependant, la solution adoptée par la Commission se situait à l'intérieur de ses pouvoirs conférés par la loi et ne nécessitait aucune intervention des tribunaux. C'était à la Commission qu'il revenait de décider, en fonction des circonstances de l'espèce, quelles conditions devaient être imposées dans l'intérêt du public; la solution trouvée par la Commission se situait à l'intérieur des choix raisonnables. L'argument de A ltée selon lequel l'attribution déterminée par la Commission avait un effet confiscatoire ne tenait pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. La Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure, et non antérieure, ce qui était conforme à la pratique réglementaire.

Dans l'exercice de ce pouvoir conféré par l'art. 15(3) AEUBA et vu la surveillance générale des services de gaz et de leurs propriétaires qui lui incombait conformément à l'art. 22(1) GUA, la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. La Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'A ltée souhaitait soustraire à la base tarifaire.

Cases considered by *Bastarache J.*:

ATCO Electric Ltd., Re (December 4, 2003), Doc. 2002-098 (Alta. E.U.B.) — referred to

Atco Ltd. v. Calgary Power Ltd. (1982), [1982] 2 S.C.R. 557, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 20 B.L.R. 227, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 41 A.R. 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 140 D.L.R. (3d) 193, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* [1983] 1 W.W.R. 385, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 23 Alta. L.R. (2d) 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 45 N.R. 1, 1982 CarswellAlta 205, 1982 CarswellAlta 557 (S.C.C.) — considered

Barrie Public Utilities v. Canadian Cable Television Assn. (2003), 2003 SCC 28, 2003 CarswellNat 1226, 2003 CarswellNat 1268, [2003] 1 S.C.R. 476, 304 N.R. 1, 225 D.L.R. (4th) 206, 49 Admin. L.R. (3d) 161 (S.C.C.) — considered

Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission) (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Bristol-Myers Squibb Co. v. Canada (Attorney General) (2005), 253 D.L.R. (4th) 1, 2005 SCC 26, 2005 CarswellNat 1261, 2005 CarswellNat 1262, 39 C.P.R. (4th) 449, 334 N.R. 55, [2005] 1 S.C.R. 533 (S.C.C.) — considered

Canadian Broadcasting League v. Canada (Canadian Radio-Television & Telecommunications Commission) (1982), 138 D.L.R. (3d) 512, 43 N.R. 77, [1983] 1 F.C. 182, 67 C.P.R. (2d) 49, 1982 CarswellNat 71F, 1982 CarswellNat 71 (Fed. C.A.) — referred to

Canadian Broadcasting League v. Canada (Canadian Radio-Television & Telecommunications Commis-

sion) (1985), [1985] 1 S.C.R. 174, 57 N.R. 76, 1985 CarswellNat 671, 1985 CarswellNat 671F (S.C.C.) — referred to

Canadian Pacific Air Lines Ltd. v. C.A.L.P.A. (1993), 93 C.L.L.C. 14,062, 17 Admin. L.R. (2d) 141, 160 N.R. 321, [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1, 1993 CarswellNat 816, 1993 CarswellNat 1385 (S.C.C.) — considered

Chieu v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 3, 2002 CarswellNat 5, 2002 CarswellNat 6, 18 Imm. L.R. (3d) 93, 208 D.L.R. (4th) 107, 280 N.R. 268, 37 Admin. L.R. (3d) 252, [2002] 1 S.C.R. 84 (S.C.C.) — referred to

Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy & Utilities Board) (1996), 41 Alta. L.R. (3d) 374, [1996] 9 W.W.R. 637, 187 A.R. 205, 127 W.A.C. 205, 1996 CarswellAlta 689 (Alta. C.A.) — referred to

Consumers' Gas Co. v. Ontario (Energy Board) (2001), 2001 CarswellOnt 4503 (Ont. Div. Ct.) — referred to

Contino v. Leonelli-Contino (2005), 2005 CarswellOnt 6281, 2005 CarswellOnt 6282, 2005 SCC 63, 19 R.F.L. (6th) 272 (S.C.C.) — referred to

Coseka Resources Ltd. v. Saratoga Processing Co. (1980), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541, 1980 CarswellAlta 136 (Alta. C.A.) — considered

Coseka Resources Ltd. v. Saratoga Processing Co. (1981), [1981] 2 S.C.R. vii, 40 N.R. 172, 34 A.R. 360 (note) (S.C.C.) — referred to

Dome Petroleum Ltd. v. Alberta (Public Utilities Board) (1976), 2 A.R. 453, 13 N.R. 301 (Alta. C.A.) — considered

Dome Petroleum Ltd. v. Alberta (Public Utilities Board) (1977), [1977] 2 S.C.R. 822, 2 A.R. 451, 13 N.R. 299, 1977 CarswellAlta 282, 1977 CarswellAlta 282F (S.C.C.) — referred to

Dow Chemical Canada Inc. v. Union Gas Ltd. (1982), 141 D.L.R. (3d) 641, 1982 CarswellOnt 753 (Ont. Div. Ct.) — considered

Dow Chemical Canada Inc. v. Union Gas Ltd. (1983), 42 O.R. (2d) 731, 3 Admin. L.R. 314, 150 D.L.R. (3d) 267, 1983 CarswellOnt 785 (Ont. C.A.) — referred to

Duquesne Light Co. v. Barasch (1989), 488 U.S. 299, 98 P.U.R. 4th 253, 109 S.Ct. 609, 102 L.Ed.2d 646, 57 U.S.L.W. 4083 (U.S. S.C.) — referred to

Edmonton (City) v. Northwestern Utilities Ltd. (1929), [1929] S.C.R. 186, [1929] 2 D.L.R. 4, 1929 CarswellAlta 114 (S.C.C.) — considered

Hongkong Bank of Canada v. Wheeler Holdings Ltd. (1993), 6 Alta. L.R. (3d) 337, 135 A.R. 83, 33 W.A.C. 83, 100 D.L.R. (4th) 40, 29 R.P.R. (2d) 1, [1993] 1 S.C.R. 167, 148 N.R. 1, 1993 CarswellAlta 250, 1993 CarswellAlta 559 (S.C.C.) — referred to

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

Interprovincial Pipe Line Ltd. v. Canada (National Energy Board) (1977), [1978] 1 F.C. 601, 78 D.L.R. (3d) 401, 17 N.R. 56, 1977 CarswellNat 125, 1977 CarswellNat 125F (Fed. C.A.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

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Northwestern Utilities Ltd. v. Edmonton (City) (1978), [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, 1978 CarswellAlta 141, 1978 CarswellAlta 303 (S.C.C.) — con- sidered

Pacific National Investments Ltd. v. Victoria (City) (2000), 2000 SCC 64, 2000 CarswellBC 2439, 2000 CarswellBC 2441, 193 D.L.R. (4th) 385, 83 B.C.L.R. (3d) 207, [2001] 3 W.W.R. 1, 263 N.R. 1, 15 M.P.L.R. (3d) 1, [2000] 2 S.C.R. 919, 144 B.C.A.C. 203, 236 W.A.C. 203 (S.C.C.) — referred to

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R. v. McIntosh (1995), 36 C.R. (4th) 171, 95 C.C.C. (3d) 481, 21 O.R. (3d) 797 (note), 178 N.R. 161, 79 O.A.C. 81, [1995] 1 S.C.R. 686, 1995 CarswellOnt 4, 1995 CarswellOnt 518 (S.C.C.) — referred to

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Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

TransAlta Utilities Corp., Re (March 28, 2002), Doc. 2002-038 (Alta. E.U.B.) — referred to

Transalta Utilities Corp. v. Alberta (Public Utilities Board) (1986), 43 Alta. L.R. (2d) 171, 21 Admin. L.R.

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

1, 68 A.R. 171, 1986 CarswellAlta 24 (Alta. C.A.) — considered

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Board of Public Utility Commissioners v. New York Telephone Co. (1926), 271 U.S. 23, 46 S.Ct. 363, 70 L.Ed. 808 (U.S.S.C.) — considered

Boston Gas Co., Re (1982), 49 P.U.R. 4th 1 (U.S. Mass. D.P.U.) — considered

C.J.A., Local 579 v. Bradco Construction Ltd. (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — considered

C.U.P.E. v. Ontario (Minister of Labour) (2003), [2003] 1 S.C.R. 539, 2003 SCC 29, 2003 CarswellOnt 1770, 2003 CarswellOnt 1803, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour))* 66 O.R. (3d) 735 (note), 2003 C.L.L.C. 220-040, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour))* 304 N.R. 76, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour))* 173 O.A.C. 38, 50 Admin. L.R. (3d) 1, 226 D.L.R. (4th) 193 (S.C.C.) — considered

Calgary Power Ltd. v. Copithorne (1958), 16 D.L.R. (2d) 241, 78 C.R.T.C. 31, [1959] S.C.R. 24, 1958 CarswellAlta 74 (S.C.C.) — considered

California Water Service Co., Re (1996), 66 CPUC (2d) 100 (U.S. Cal. P.U.C.) — considered

Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd. (1987), 10 O.S.C.B. 1771, 35 B.L.R. 117, 23 Admin. L.R. 285, (sub nom. *C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission))* 59 O.R. (2d) 79, 37 D.L.R. (4th) 94, 21 O.A.C. 216, 1987 CarswellOnt 1733 (Ont. Div. Ct.) — considered

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Q. v. College of Physicians & Surgeons (British Columbia) (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — considered

Southern California Gas Co., Re (1990), 118 P.U.R. 4th 81, 38 CPUC (2d) 166 (U.S. Cal. P.U.C.) — considered

Southern California Water Co., Re (1992), 43 CPUC (2d) 596 (U.S. Cal. P.U.C.) — considered

Transalta Utilities Corp. v. Alberta (Public Utilities Board) (1986), 43 Alta. L.R. (2d) 171, 21 Admin. L.R. 1, 68 A.R. 171, 1986 CarswellAlta 24 (Alta. C.A.) — considered

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Yukon Energy Corp. v. Yukon (Utilities Board) (1996), 74 B.C.A.C. 58, 121 W.A.C. 58, 1996 CarswellYukon 3 (Y.T. C.A.) — considered

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Generally — considered

s. 13 — referred to

s. 15 — considered

s. 15(1) — considered

s. 15(3) — considered

s. 15(3)(d) — considered

s. 26(1) — considered

s. 26(2) — considered

s. 27 — referred to

Gas Utilities Act, R.S.A. 1980, c. G-4

s. 25.1(2) [en. 1984, c. 66, s. 1(3)] — referred to

Gas Utilities Act, R.S.A. 2000, c. G-5

Generally — considered

s. 16 — referred to

s. 17 — referred to

s. 22 — referred to

s. 22(1) — referred to

s. 24 — referred to

s. 24(1) — referred to

s. 26 — referred to

s. 26(1) — referred to

s. 26(2) — considered

s. 26(2)(a) — referred to

s. 26(2)(d) — considered

s. 26(2)(d)(i) — considered

s. 26(2)(d)(ii) — referred to

s. 27(1) — referred to

s. 36 — referred to

s. 36(a) — considered

ss. 36-45 — referred to

s. 37 — referred to

s. 37(1) — considered

s. 37(2) — considered

s. 37(3) — referred to

s. 40 — referred to

s. 59 — referred to

Interpretation Act, R.S.A. 2000, c. I-8

s. 10 — referred to

Public Utilities Act, S.A. 1915, c. 6

Generally — considered

s. 21 — referred to

s. 23 — referred to

s. 24 — referred to

s. 29(g) — referred to

Public Utilities Board Act, R.S.A. 2000, c. P-45

Generally — considered

s. 36 — referred to

s. 37 — considered

s. 80 — referred to

s. 80(b) — referred to

s. 85(1) — referred to

s. 87 — referred to

s. 89 — referred to

s. 89(a) — considered

ss. 89-95 — referred to

s. 90 — referred to

s. 91 — referred to

s. 101 — referred to

s. 101(2)(a) — referred to

s. 101(2)(d)(i) — referred to

s. 101(2)(d)(ii) — referred to

s. 102(1) — referred to

Statutes considered by *Binnie J.*:

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

s. 15(3) — considered

Gas Utilities Act, R.S.A. 2000, c. G-5

s. 22(1) — considered

s. 26 — considered

s. 26(2)(d)(i) — considered

Hydro and Electric Energy Act, R.S.A. 1980, c. H-13

Generally — referred to

Public Utilities Board Act, R.S.A. 2000, c. P-45

s. 101(2)(d)(i) — referred to

APPEAL by city from judgment reported at *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205, [2004] 4 W.W.R. 239, 312 W.A.C. 250, 339 A.R. 250, 2004 CarswellAlta 55, 2004 ABCA 3 (Alta. C.A.), allowing appeal by gas company from decision of utilities board allocating proceeds of sale of company's former assets to customers; CROSS-APPEAL by company with respect to jurisdiction of board.

POURVOI de la Ville à l'encontre de l'arrêt publié *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205, [2004] 4 W.W.R. 239, 312 W.A.C. 250, 339 A.R. 250, 2004 CarswellAlta 55, 2004 ABCA 3 (Alta. C.A.), qui a accueilli le pourvoi de la compagnie de gazoducs à l'encontre de la décision de la commission réglementant les services publics qui avait attribué aux clients une partie du produit

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

de la vente de biens appartenant à la compagnie; POURVOI INCIDENT de la compagnie relativement à la compétence de la commission.

***Bastarache J.*:**

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes*? (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board (the "Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

4 As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary (the "City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

1.1 Overview of the Facts

8 ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 Judicial History

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 Decision 2001-78 (Atco Gas and Pipelines Ltd.)

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

9 In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 Decision 2002-037, (Alta. E.U.B.)

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Alta. E.U.B. Decision 2001-65, *Atco Gas-North, A Division of Atco Gas and Pipelines Ltd.*: "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest (p. 16)."

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *Transalta Utilities Corp. v. Alberta (Public Utilities Board)* (1986), 68 A.R. 171 (Alta. C.A.), referring to various decisions it had rendered in the past. Quoting from Alta. E.U.B. Decision 2000-41 (*TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*" (para. 27):

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale.

The Board also referred to Decision 2001-65, where it had clarified the following (para. 28):

> In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula.

12 On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated, at paras. 47-49:

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circum-

> stances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.
>
> The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset.

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company (paras. 112-13):

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.

16 The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

17 The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta (24 Alta. L.R. (4th) 205, 2004 ABCA 3 (Alta. C.A.))

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 Issues

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 Standard of Review

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittman J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.).

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

22 Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: 1) the existence of a privative clause; 2) the expertise of the tribunal/ board; 3) the purpose of the governing legislation and the particular provisions; and 4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

24 First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

> 26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.
>
> (2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made
>
> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
>
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (Ont. Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy & Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (Alta. C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilit- ies.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

28 Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557 (S.C.C.), at p. 576; *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)* (1976), 2 A.R. 453 (Alta. C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822 (S.C.C.). The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

29 The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) GUA and s. 15(3)(d) AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28 (S.C.C.), at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in

Pushpanathan v. Canada (Minister of Employment & Immigration), at para. 38:

> ...the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

33 The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

34 As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 Was the Board's Decision as to its Jurisdiction Correct?

35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada*, (3rd ed. 2001), at pp. 183-184).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

> 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 ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26; *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at paras. 186-87; *Marche v. Halifax Insurance Co.* (2005), 1 S.C.R. 47, 2005 SCC 6 (S.C.C.), at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, 2005 SCC 63 (S.C.C.), at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: 1) express grants of jurisdiction under various statutes (explicit powers); and 2) the

common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

40 As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *TransAlta Utilities Corp.*, Alta. E.U.B. Decision 2000-41; *ATCO Gas-North, A Division of ATCO Gas and Pipelines Ltd.*, Alta. E.U.B. Decision 2001-65; *Alberta Government Telephones* (1984), Alta. P.U.B. Decision No. E84081; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116; *TransAlta Utilities Corp., Re* (Alta. E.U.B.); *ATCO Electric Ltd., Re* (Alta. E.U.B.)).

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and (3)(d) of the AEUBA and s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. ...

(2) No owner of a gas utility designated under subsection (1) shall

. . . . .

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them

. . . . .

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease,

> mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

> 15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.
>
> . . . . .
>
> (3) Without restricting subsection (1), the Board may do all or any of the following:
>
> . . . . .
>
> (d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
>
> . . . . .

PUBA

> 37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

42 Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

43 There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function

(especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.), at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26 (S.C.C.), at para. 105). These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3 (S.C.C.) at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

49 The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ...
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.), at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed 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 (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Dow Chemical Canada Inc. v. Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. Div. Ct.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (Ont. C.A.) (see also *Interprovincial Pipe Line Ltd. v. Canada (National Energy Board)* (1977), [1978] 1 F.C. 601 (Fed. C.A.); *Canadian Broadcasting League v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1982), [1983] 1 F.C. 182 (Fed. C.A.), aff'd. [1985] 1 S.C.R. 174 (S.C.C.)).

52 I understand the City's arguments to be as follows: 1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and 2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

53 After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 Historical Background and Broader Context

54 The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p.

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

55 Pursuant to *The Public Utilities Act*, the first public utility board was established as a three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b))

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a)); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility (GUA, 27(1); PUBA, s. 102(1)).

58 It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

59 Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Alberta Government Telephones* (1984), Alta. P.U.B. Decision No. E84081; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

60 Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board [Emphasis ad- ded.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 Rate Setting

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> ...the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".
>
> (R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price - nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco*, at p. 576; *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at pp. 192-93 (hereinafter "*Northwestern 1929* ")).

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

64 Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

65 The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable ... rates" (PUBA, s. 89(a), GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.), at p. 691 (hereinafter "*Northwestern 1979*"), adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Gas Utilities Act and Public Utilities Board Act* (1984), Alta. P.U.B. Decision No. E84113, at p. 23; *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-702.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
>
> (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

68 Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Ab-

solutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, p. 245).

69 In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory...

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (U.S. S.C. 1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission California*, 324 U.S. 548 (U.S. S.C. 1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case, the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings,

etc.

71 From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii (S.C.C.); *Dow Chemical Canada Inc.*, at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 The Power to Attach Conditions

72 As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.* (1987), E.B.R.O. 410-II/411-II/412-II, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

> 1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
>
> 2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
>
> 3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
>
> 4. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
>
> 5. when the legislature did not address its mind to the issue and decide against conferring the power to the Board. (See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

> In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infin-

> itely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

75 In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

76 MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

> 1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;
>
> 2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and
>
> 3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *Reference re National Energy Board Act*, [1986] 3 F.C. 275 (Fed. C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides

the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64 (S.C.C.), at para. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 S.C.R. 349 (S.C.C.), at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 (S.C.C.), at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

80 If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 Other Considerations

81 Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers*, (i.e., was the order *necessary in the public interest?*); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate* it (if it should do so in the first place). It is also inter-

esting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation (Decision 2002-037; para. 54):

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e. context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

***Binnie J.*:**

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

88 The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board (the "Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

89 I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA") to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

90 ATCO's argument boils down to the proposition announced at the outset of its factum:

> In the absence of any property right or interest and of any harm to the customers arising from the withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.
>
> (Respondent's factum, para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. The Board's Statutory Authority

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them...". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific

powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions) (Decision 2002-037, (Alta. E.U.B.), para. 47).

> In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557 (S.C.C.), at p. 576, Estey, J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.). ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory.
>
> (Respondent's factum, para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

93 ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. The Board's Decision

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> ...the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the

Board was not engaged in fixing rates (if that could provide any justification, which is denied).

(Respondent's factum, para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *Transalta Utilities Corp. v. Alberta (Public Utilities Board)* (1986), 68 A.R. 171 (Alta. C.A.). That case (which I will refer to as *Transalta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174.

I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

96 Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

97 The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted (Decision 2002-037):

The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding.* On that basis, the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Emphasis added; para. 13.]

98 In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than

> the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

101 The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. Standard of Review

102 The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

103 I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that *the Board* considers necessary *in the public interest*". The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne* (1958), [1959] S.C.R. 24 (S.C.C.), at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: *"Objective" and "Subjective" Grants of Discretion.*

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

(This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at p. 592.)

106 A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *Transalta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Assn. (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353 (S.C.C.), where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, ... [Emphasis added.]

107 This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada v. Sydenham Gas & Petroleum Co.*, [1957] S.C.R. 185 (S.C.C.), at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

108 Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R.F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)) who wrote in *Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.* (1987), 59 O.R. (2d) 79 (Ont. Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

> ...when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for*

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132, 2001 SCC 37 (S.C.C.), at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

> A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.
>
> (*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

112 I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. Did the Board Improperly Exercise the Jurisdiction it Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?

113 There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

114 Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so

> as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favouritism toward investors to the detriment of ratepayers affected by the transaction.
>
> ("The Efficient Allocation of Proceeds from a Utility's Sale of Assets", by P. W. MacAvoy and J. G. Sidak (2001) 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.* (1976), E.B.R.O. 341-I, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Boston Gas Co., Re*, 49 P.U.R. 4th 1 (U.S. Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.* (1991), E.B.R.O. 465, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

> ...the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary (para. 3.3.8).

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147; EB-2002-0446, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction (para. 45).

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *Transalta (1986)*, at pp. 175-76, including *Boston Gas Co.. Re* mentioned earlier. In *Transalta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within

the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Yukon (Utilities Board)* (1996), 74 B.C.A.C. 58, 121 W.A.C. 58 (Y.T. C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.
>
> (P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), *Public Utilities Fortnightly* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Arizona Public Service Co., Re*, 91 P.U.R. 4th 337, 1988 WL 391394 (U.S. Ariz. C.C. 1988):

> To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not automatically entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates.

121 Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Southern California Water Co., Re*, 43 CPUC (2d) 596, 1992 WL 584058 (U.S. Cal. P.U.C. 1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders. The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D. 89-07-016, 32 Cal.

> P.U.C. 2d 233 (Redding). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation.

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. ATCO's Arguments

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100% of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

127 Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

128 In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

1. The Confiscation Issue

129 In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the market place. In *Southern California Gas Co., Re*, 38 CPUC (2d) 166, 118 P.U.R. 4th 81, 1990 WL 488654 (U.S. Cal. P.U.C. 1990) ("

SoCalGas"), the regulator pointed out:

> In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property.

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (U.S. C.A. D.C. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

> We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis _ sometimes articulated, sometimes implicit _ that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away (p. 800).

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (U.S.S.C. 1926), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said (at p. 31):

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock.

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that

the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Arizona Public Service Co., Re*:

> In New York Telephone, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return .... the Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay current [reasonable] operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in New York Telephone does not address that issue. [Emphasis added.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold.

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

> No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service.

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

133 The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base.

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

134 My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in

any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals as follows (at p. 806):

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests." The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation.

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.), Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Co. v. Public Service Commission*, 208 N.Y.S.2d 857 (U.S. S.C. Ct. App. 1962). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p. 864):

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so that there is a corresponding reduction of the rate base and resulting return.

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

138 More recently, in *Compliance with the Energy Policy Act of 1992, Re*, 62 CPUC (2d) 517, WL 768628 (U.S. Cal. P.U.C. 1995), the regulator commented:

> ...we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in ratebase. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former prop- erty.

139 The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this

case.

3. Land as a Non-Depreciable Asset

140 The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Boston Gas Co., Re* for example (cited in *Transalta (1986)*, at p. 176), the regulator held:

> ...the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land.

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating "We see little reason why land sales should be treated differently." The decision continued:

> In short, whether an asset is depreciated for ratemaking purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added.]

143 In *California Water Service Co., Re*, 66 CPUC (2d) 100, 1996 WL 293205 (U.S. Cal. P.U.C. 1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use].

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. Lack of Reciprocity

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

> ...the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

(See *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116, at p. 17; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84115, at p. 12; *Re Gas Utilities Act and Public Utilities Board Act*, (1984), Alta. P.U.B. Decision No. E84113, at p. 23.)

146 In *Alberta Government Telephones*, the Board reviewed a number of regulatory approaches (including *Boston Gas Co., Re*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

> The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market, the utility continues to be entitled to a rate of return on its original investment even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property.

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident rejeté.

Appendix — APPENDIX

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

[Jurisdiction]

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

[Powers of the Board]

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

[Appeals]

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

[Exclusion of prerogative writs]

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or re-

strained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

[Supervision]

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

[Investigation of gas utility]

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

[Designated gas utilities]

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's busi- ness.

[Prohibited share transactions]

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

[Powers of Board]

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

[Rate base]

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

[Excess revenues or losses]

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

[General powers of Board]

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

Public Utilities Board Act conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

[Jurisdiction and powers]

36(1) The Board has all the necessary jurisdiction and power

(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

[General power]

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

[Investigation of utilities and rates]

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are

excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

[Supervision by Board]

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

[Investigation of public utility]

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

[Fixing of rates]

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the

financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

[Determining rate base]

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

[Revenue and costs considered]

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the

hearing and determining of the matter, and

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

[Designated public utilities]

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

[Prohibited share transaction]

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

outstanding capital stock of the owner of the public utility.

Interpretation Act, R.S.A. 2000, c. I-8

[Enactments remedial]

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

FN* A corrigendum issued by the court on April 24, 2006 has been incorporated herein.

END OF DOCUMENT

TAB 6

1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60


1998 CarswellNfld 150

Newfoundland (Board of Commissioners of Public Utilities), Re

In The Matter of Section 101 of the Public Utilities Act, R.S.N. 1990, c. P-47

In The Matter of a case stated by the Board of Commissioners of Public Utilities to the Court of Appeal for its hearing consideration and opinion on questions of law affecting the jurisdiction of the Board of Commissioners of Public Utilities

Newfoundland Court of Appeal

O'Neill, Cameron, Green JJ.A.

Heard: March 11, 1997
Heard: March 12, 1997
Judgment: June 15, 1998
Docket: 96/141

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Subject: Public; Civil Practice and Procedure

Public utilities --- Regulatory boards — Regulation of rates

Utilities board stated case to Court of Appeal for determination of "just and reasonable" return on rate base of utility — Board had jurisdiction to fix rate of return that public utility could earn annually — Board did not have jurisdiction to fix rate of return on common equity or shares — Board had jurisdiction to set rate of return as range — Board had broad jurisdiction to regulate how excess revenue was dealt with in situation where utility earned rate of return greater than that determined to be just and reasonable — Board had jurisdiction to define excess revenue for purpose of maintenance of reserve account and set out how excess, if not ordered to be paid into reserve account, was dealt with — In setting rate, board had jurisdiction to consider type and level of projected expenses of utility and determine whether such expenses were reasonable — Board did not have jurisdiction to require public utility to maintain debt-equity ratio or ratio within stated range — Board did not have jurisdiction to require utility to obtain its capital requirements by issue of specific financial instruments — Board did not have jurisdiction to intrude into day to day financial or managerial decision-making of utility with re-

spect to capital structure.

The Board of Commissioners of Public Utilities stated at case to the Court of Appeal with respect to the jurisdiction and powers of the board as they affected the board's approach to the determination of a "just and reasonable" return on the rate base of a utility. A number of question were posed.

Held: The board had broad jurisdiction with respect to the determination of a just and reasonable return on the rate base of a utility.

Per Green J.A. (Cameron J.A. concurring): The board had jurisdiction to fix the rate of return that a public utility could earn annually but it did not have jurisdiction to fix the rate of return on common equity or shares. The board had jurisdiction to set the rate of return as a range and it had broad jurisdiction to regulate how any excess revenue was dealt with in a situation where the utility earned a rate of return greater than that determined to be just and reasonable. The board had jurisdiction to define what excess revenue was for the purpose of maintenance of a reserve account and had the jurisdiction to set out how that excess, if not ordered to be paid into the reserve account, was dealt with. In setting the rate, the board had jurisdiction to consider the type and level of projected expenses of a utility and to determine whether such expenses were reasonable. The board did not have the jurisdiction to require a utility to obtain its capital requirements by issue of specific financial instruments, nor did it have jurisdiction to intrude into the day to day financial or managerial decision-making of a utility with respect to its capital structure.

Per O'Neill J.A. (dissenting): The determination of the rate on common shares of a utility is very much a part of the rate making process. Rates to be charged should provide sufficient revenue to enable the producer or retailer of the power to earn a just and reasonable return so that it is able to achieve and maintain a sound credit rating in the world's financial markets. The board had the jurisdiction to fix the rate of return on the rate base as well as the rate on common shares. Revenues generated after the rates, tolls and charges were set belonged to the utility and thus the board did not have the jurisdiction to order rebates to customers. The Board did not have the jurisdiction to set rates in a manner that would compensate for prior excess earnings.

Cases considered by *Green, J.A.*:

Acker v. United States (1936), 298 U.S. 426, 56 S. Ct. 824, 80 L. Ed. 1257 (U.S. Ill.) — considered

Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, [1989] 1 R.C.S. 1722 (S.C.C.) — considered

Bell Telephone Co. of Canada, Re (1966), 56 B.T.C. 535 — considered

Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia (1923), 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176, P.U.R. 1923D 11 (U.S. W. Va.) — considered

British Columbia Electric Railway v. British Columbia (Public Utilities Commission), [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 (S.C.C.) — considered

Edmonton (City) v. Northwestern Utilities Ltd., [1929] S.C.R. 186, [1929] 2 D.L.R. 4 (S.C.C.) — considered

Federal Power Commission v. Hope Natural Gas Co. (1944), 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333, 51 P.U.R. (N.S.) 193 — considered

Montana-Dakota Utilities Co. v. Northwestern Public Service Co. (1951), 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912, 88 P.U.R. (N.S.) 129 (U.S. S.D.) — considered

Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board) (1987), 25 Admin. L.R. 180, 37 D.L.R. (4th) 35, 63 Nfld. & P.E.I.R. 335, 194 A.P.R. 335 (Nfld. C.A.) — considered

Northwestern Utilities, Re (1978), [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565 (S.C.C.) — considered

Union Gas Ltd. v. Ontario (Energy Board) (1983), 43 O.R. (2d) 489, 1 D.L.R. (4th) 698 (Ont. Div. Ct.) — considered

Wabush (Town) v. Power Distribution District of Newfoundland & Labrador (1988), 71 Nfld. & P.E.I.R. 29, 220 A.P.R. 29 (Nfld. C.A.) — considered

Statutes considered by *Green, J.A.*:

Electrical Power Control Act, 1994, S.N. 1994, c. E-5.1

s. 3(a) — considered

s. 3(a)(i) — considered

s. 3(a)(ii) — considered

s. 3(a)(iii) — considered

s. 3(b) — considered

s. 3(b)(i) — considered

s. 3(b)(ii) — considered

s. 3(b)(iii) — considered

s. 4 — considered

Public Utilities Act, R.S.N. 1990, c. P-47

s. 16 — considered

s. 37(1) — considered

s. 58 — considered

s. 59 — considered

s. 59(2) — referred to

s. 64(1) — considered

s. 64(2) — considered

s. 68(4) — considered

s. 69 — considered

s. 69(3) — considered

s. 70 — considered

s. 70(1) — considered

s. 75 — considered

s. 75(3) — considered

s. 76 — considered

s. 78(1) — considered

s. 78(2) — considered

s. 78(2)(h) — considered

s. 80 — considered

s. 80(1) — considered

s. 80(2) — considered

s. 80(4) — considered

s. 84(1) — considered

s. 84(2) — considered

s. 87(1) — considered

s. 91 — considered

s. 91(1) — considered

s. 91(3) — considered

s. 91(5)(a) — considered

s. 101 — pursuant to

s. 102 — referred to

s. 117 — considered

s. 118 — considered

s. 118(2) — considered

Statutes considered by *O'Neill, J.A.*:

Electrical Power Control Act, 1994, S.N. 1994, c. E-5.1

Generally — considered

s. 3 — considered

s. 4 — considered

Public Utilities Act, R.S.N. 1990, c. P-47

Generally — considered

s. 16 — considered

s. 37 — considered

s. 37(1) — considered

s. 58 — considered

s. 59 — considered

s. 69 — considered

s. 69(1) — considered

s. 69(2) — considered

s. 69(3) — considered

s. 69(4) — considered

s. 70 — considered

s. 70(1) — considered

s. 76 — considered

s. 80 — considered

s. 80(1) — considered

s. 80(2) — considered

s. 80(4) — considered

s. 84(1) — considered

s. 85 — considered

s. 86 — considered

s. 87(1) — considered

s. 91 — referred to

s. 101 — pursuant to

RULING on stated case.

Green, J.A.:

1 The Board of Commissioners of Public Utilities has stated a case for the opinion of this Court, pursuant to s. 101 of the *Public Utilities Act*[FN1]. The questions posed concern the jurisdiction and powers of the Board as they affect the approach of the Board to the determination of a "just and reasonable return" on the rate base of a utility, as well as related matters.

The Stated Case in Context

2 The Board is the statutory body which has the authority and duty for the "general supervision of all public utilities" in Newfoundland and Labrador and in the course of exercising that supervisory role has general authority to "make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law" and, as well, it has the right "to obtain from a public utility all information necessary to enable the Board to fulfil its duties"[FN2].

3 One of the Board's primary functions with respect to electrical utilities is the regulation and approval of rates, tolls and charges[FN3]. In so doing, the Board must take account of the statutory requirement that the utility is entitled to earn annually a "just and reasonable return" as determined by the Board on the rate base as fixed and determined by the Board.[FN4] The process essentially involves the fixing and determining of the appropriate rate base, the determination of a "just and reasonable return" on that rate base and then the approval of a schedule of rates, tolls and charges that would be appropriate to generate the revenue which, in the Board's estimation, would be necessary to provide the determined rate of return. Once rates, tolls and charges are set by the Board they continue to apply until altered under the Act, as a result of a reapplication by the utility for an increase, a complaint by the public or an order for a reexamination initiated by the Board itself.

4 It is important to remember, however, that in addition to its periodic adjudicative role which itself involves a large measure of policy implementation in arriving at its decisions, the Board has, because of its duty of "general supervision of all public utilities", an ongoing supervisory role of the activities of the utility between hearings as well, which is facilitated by statutory requirements for periodic reporting of financial information to the Board.

5 In 1991 the Board made Orders[FN5] determining a just and reasonable return for Newfoundland Light and Power Co. Ltd.[FN6] and approving a schedule of rates, tolls and charges based on estimated revenue requirements necessary to cover operating expenses and to provide that level of return. The essential features of

the 1991 order determining the just and reasonable rate of return were that:

(a) The just and reasonable return was determined to be between a stated range (10.6% - 11.19%) of the company's average rate base;

(b) The rate base was determined on the basis of a hypothetical test year (1992);

(c) The Board determined that the just and reasonable return, as defined, would provide an opportunity to NLP to earn a rate of return on common equity between a certain stated range (13% to 13.5%);

(d) The schedule of rates, tolls and charges was determined applying a rate of return equal to the mid-point between the stated range of returns on rate base;

(e) The Board ordered that a particular capital structure of NLP be adopted and continue to be the basis of NLP's financial plan.

6 The Board had previously adopted a policy allowing NLP to retain earnings above the allowed range of return on rate base, provided those earnings were within the allowed range of rates of return on common equity. Where the earnings exceeded the allowed rate of return on common equity, the Board, in purported exercise of its statutory powers to regulate NLP's accounting procedures, as well as other powers, required NLP to set up a reserve account in which these excess earnings would be held and dealt with in accordance with subsequent direction by the Board.

7 In April of 1996, NLP petitioned the Board for another order fixing and determining a new rate base, determining a just and reasonable return and approving a revised schedule of rates, tolls and charges, amongst other matters. One of the parties represented at the hearing was the "Consumer Advocate", who was appointed [FN7] by the Government of Newfoundland and Labrador to represent the interests of domestic and general service consumers in respect of the rate hearing.

8 During the years between the making of the 1991 orders and the 1996 hearing, NLP had filed annual returns with the Board, as required by s-s. 59(2) of the Act, which indicated that in the years 1991, 1992 and 1993 the company's rate of return on rate base was in excess of the range determined in the 1991 Order. However, as calculated by NLP, the rate of return on common equity was always within the range that had been stipulated by the Board. The rates of return on rate base and on common equity were calculated based on actual expenses and on the actual capital structure of NLP.

9 In its periodic reports to the Board, NLP disclosed that its actual advertising costs in 1992 exceeded the amounts projected to the Board as a forecast for 1992 which had been approved as reasonable and prudent by the Board in its 1991 Order in the course of fixing and determining the rate base.

10 During the course of the 1996 hearing, certain submissions were made to the Board respecting, amongst other things,

(a) whether NLP should be regarded as having earned revenue in excess of its allowed range of rate of return where its rate of return on common equity was nevertheless within the stated allowable range;

(b) whether the manner of calculation of excess revenue and the proposed manner of the disposition of any excess was permitted;

(c) whether NLP could and should be required to alter its capital structure so as to obtain its capital requirements in a manner other than the way in which it was presently doing;

(d) whether the Board could and should take account, in setting future rates, of past expenditures which were in excess of amounts deemed reasonable and prudent at the time of a previous hearing.

11 Questions arose as to the jurisdiction and power of the Board to entertain and act on the sorts of submissions that were made. This prompted the Board to state the current case to this Court. NLP and the Consumer Advocate were granted standing to appear and be heard at the hearing.

The Specific Questions

12 The Stated Case poses for consideration by this Court the following questions:

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the

holders of common shares,
in prior years.

(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

(7) Does the Board have jurisdiction to require a public utility to maintain:

(i) a ratio; or

(ii) a ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

Although the questions are stated above as they appear in the Stated Case filed with the Court, there are several obvious typographical errors in the language used. This was recognized by the participants in references to the questions in their written arguments. In particular "supplied" was at times substituted for the word "applied" in questions 1(i), 3(i) and 4(i) and "base rate" in Question 3(i) was replaced by "rate base." In addition, the phrase "In the event that a public utility should ..." at the beginning of Question 3 was used at times in the written submissions in preference to the phrase "Should a public utility ..." Nothing turns on these informal changes. They do, however, make the import of the questions clearer and I will interpret the questions in that light.

The Legislative Framework

13 The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

14 While a number of specific provisions of the Act and related legislation will have to be referred to in the course of this opinion, certain legislative provisions, which are central to this analysis, can be conveniently set

forth here:

Public Utilities Act

58. The board may prescribe the form of all books, accounts, papers and records to be kept by a public utility and a public utility shall keep its books, accounts, papers and records and make its returns in the manner and form prescribed by the board and comply with all directions of the board relating to those books, accounts, papers, records and returns.

69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.

(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.

(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.

(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

(5) An order under this section shall be made only after hearing the public utility concerned.

70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

75.(1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

(2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

76. The board may upon notice to the public utility and after hearing as provided in this Act, by order rescind, alter or amend an order fixing rates, tolls, charges or schedules, or other order made by the board, and certified copies of the order shall be served and take effect as provided in this Act for original orders.

78.(1) Except as otherwise provided in this Act, the board may fix and determine a separate rate base for each kind of service provided or supplied to the public by a public utility, and may revise the base.

(2) In fixing a rate base the board may, in addition to the value of the property and assets as determined under section 64, include

. . . . .

(h) other fair and reasonable expenses which

(i) the board thinks appropriate and basic to the public utility's operation, and

(ii) has, with the approval of the board, been charged to capital account,

but the expenses shall be allowed only to the extent not amortized in previous years.

80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.

(3) Reasonable payments each year to former employees of a public utility who have retired and are receiving payments of supplemental income from the public utility are expenses that the board may allow as reasonable and prudent and properly chargeable to the operating account of the public utility.

(4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

84.(1) Upon a complaint made to the board against a public utility by an incorporated municipal body or the Newfoundland and Labrador Federation of Municipalities or by 5 persons, firms or corporations, that the rates, tolls, charges or schedules are unreasonable or unjustly discriminatory or that a regulation, measurement, practice or act affecting or relating to the operation of a public utility is unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the board shall proceed, with or without notice, to make the investigation that it considers necessary or expedient.

(2) The board may order the rates, tolls, charges or schedules reduced, modified or altered, and make other orders as to the reduction, modification or change of the regulation, measurement, practice or acts that the case may require, and may order on the terms and subject to the conditions that are just that the public utility provide reasonably adequate service and facilities and make extensions that may be required, but an order shall not be made or entered by the board without a public hearing or inquiry.

87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreason-

able, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

91.(1) A public utility shall not issue shares, which for the purposes of this section shall include preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than 1 year from the date of issue, except as provided in subsection (2) until it has obtained approval from the board for the proposed issue;...

. . . . .

(3) After hearing the application and where satisfied that the proposed issue by a public utility of its shares, stocks, bonds, debentures or other evidence of indebtedness is to be made in accordance with law and for a purpose approved by the board, it is the duty of the board to make an order approving the proposed issue to the amount that it considers appropriate, and also to prescribe the purpose to which the issue or the proceeds of the issue are applied.

. . . . .

(5) Without first obtaining the approval of the board,

(a) a public utility shall not make a material alteration in the characteristics of its stocks or shares, or its bonds, debentures, securities, or other evidence of indebtedness as those characteristics are described by the board in granting its approval of the issue;...

Electrical Power Control Act, 1994[FN8]

3. It is declared to be the policy of the province that

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

(iii) should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world, and

. . . . .

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of

> power,
>
> (iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service,...
>
> . . . . .
>
> 4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

Approach to Interpretation

15 The Court was not referred to any decisions in this or other jurisdictions which directly addressed, let alone answered, the specific types of questions which have been posed. To answer the questions, therefore, it is necessary to develop a theoretical frame of reference within the context of the general language of the existing legislation so as to determine the approach to be taken to its application in concrete situations.

16 It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice[FN9]. This approach follows from s. 118 of the Act which provides:

> 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
>
> (2) The Board created has, in addition to the power specified in this Act, all additional implied and incidental powers which may be appropriate or necessary to carry out the powers specified in this Act.
>
> (3) A substantial compliance with the requirements of this Act is sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature.

17 In addition, the EPC Act[FN10], provides that the Board, in carrying out its duties and exercising its powers under the *Public Utilities Act* must implement the power policy of the province, as declared in s. 3 of the Act, and in so doing must "apply tests which are consistent with generally accepted sound public utility prac- tice".

18 It follows from these provisions that a literal and technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation[FN11] as well as the power policy of the province and be consistent with generally accepted sound public utility practice.

19 In answering the questions posed, therefore, it is necessary to identify generally accepted principles of sound public utility practice and to give to the legislation an interpretation which follows those principles and advances the stated legislative policy of the Province.

20 The trade off for the regulation by the state of the rates, tolls and charges of monopolistic utilities in the interests of consumers is the statutory recognition that the utility should be entitled to earn a fair return for its ef-

forts. Although differing in details, the regulatory statutory regimes existing throughout North America can, as a generalization, be said to be broadly similar in approach[FN12], although in recent years the regulatory schemes and their coverage are being affected more and more by the trends towards deregulation.

21 The regulatory body in question (in Newfoundland, the Board of Commissioners of Public Utilities) is generally charged with balancing the competing interests of consumers and the investors in the utility[FN13]. As deGrandpré[FN14] observed:

> This involves the Board attempting to make sure that, in the consumers' interests, the service provided is adequate and provided at just and reasonable rates and, for the utility and its investors, that those rates provide a sufficient income.

22 This balancing of interests is found in the province's stated power policy in s. 3 of the *EPC Act* where, emphasizing the interests of the utility, it is declared that the rates charged for the power should provide sufficient revenue to the utility to enable it to earn a just and reasonable return "so that it is able to achieve and maintain a sound credit rating in the financial markets of the world"[FN15] while at the same time declaring that the rates should be "reasonable"[FN16] and that the utilities' facilities should be managed and operated in a manner that would result in power being delivered to consumers "at the lowest possible cost consistent with reliable service"[FN17]. This policy finds legislative expression in the regulatory mechanisms of the Act itself, which provides that a utility must provide service and facilities which are "reasonably safe and adequate and just and reasonable"[FN18] and prohibits a utility from charging rates, tolls and charges unless they have been approved by the Board[FN19] while at the same time stating as a general principle that the utility is entitled to earn annually a just and reasonable return on its rate base[FN20].

23 This statutory entitlement of the utility to earn a "just and reasonable" return is the linguistic touchstone for the balancing exercise. This phrase emphasizes the fairness aspect, both to the utility, in earning sufficient revenues to make its continued investment worthwhile and to maintain its credit rating in financial markets, and to the consumer, in obtaining adequate service at reasonable rates. It also emphasizes the need for a tempering of each interest group's economic imperative by consideration of the interests of the other.

24 Having said that, the entitlement of the utility to a fair return on its investment is always regarded as of fundamental importance[FN21]. In the United States, controls which fail to allow a fair return have the potential of running afoul of constitutional strictures against confiscation of property without due compensation. While the same constitutional concerns may not be present in Canada, the case law has at times nevertheless referred to the entitlement to a fair return as a "common law right"[FN22] which should be read into the legislation even where it is not specifically expressed.

25 There is no uniform methodology employed in the regulatory jurisdictions in North America for the determination of a just and reasonable rate of return[FN23]. What recurs, however, is a theme that the process is not an exact science and depends on a variety of factors necessary to balance the competing interests involved. Rate setting is essentially a prospective exercise where determinations are made on the basis of estimates and information that will not necessarily remain static.

26 Most jurisdictions adopt a "multiple factor" approach. The *Bluefield Waterworks* case[FN24] in the United States emphasized early on that the determination of a fair rate of return

> ...depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.[FN25]

27 Statements such as "the company will be allowed as large a return on the capital invested in the enterprise ... as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise"[FN26] often occur. For the rationale for such statements one need look no further than the provincial policy, stated in paragraph 3(a)(iii) of the *EPC Act* that the utility must be "able to achieve and maintain a sound credit rating in the financial markets of the world" so as to be able to raise the money necessary for the proper performance of its functions. To achieve such a goal of attracting capital, factors such as comparisons with other comparable enterprises, the respective costs of debt and equity, the capital breakdown between debt and equity and general economic conditions, amongst other things, are considered.

28 In *Federal Power Commission v. Hope Natural Gas Co.*[FN27], another landmark United States case, the court emphasized that it is the "end result of the process which has to be judged as to whether the rate is "just and reasonable". As a result, in the words of deGrandpré:

> In stating that the end result was the only point of consideration, whatever the means of arriving thereat, the court opened the door to a wide variety of ways and means to arrive at a proper calculation of returns. In effect, it left the valuation of rate bases to the Commission's or Court's discretion.[FN28]

DeGrandpré's conclusion, based on his survey of North American regulatory regimes, is later stated as follows:

> The constantly changing economic conditions are perhaps a good reason why there should be no stringent rules for determining a rate of return. As was often stated, the process is one which calls for common sense, good judgment and a proper appreciation of all surrounding factors.[FN29]

29 This approach is also reflected in the decision of this Court in *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)* where O'Neill, J.A., speaking for the Court in rejecting an argument that the Board of Commissioners of Public Utilities had exceeded its jurisdiction in determining a just and reasonable rate of return by not adopting a particular methodology (a "comparable earnings" test), stated:

> ...it is within the discretion of the Board, having heard all the evidence and giving consideration to the various tests which may be used, to make its ruling on the basis of what in the Board's opinion will give to the applicant a just and reasonable return and permit it to maintain a sound financial credit rating.[FN30]

The Board therefore has a broad discretion to adopt appropriate methodologies for the calculation of allowable rates of return. So long as the methodologies chosen are not inconsistent with generally accepted sound public utility practice and the purposes and policies of the Act, and can be supported by the available opinion evidence, the determination of what constitutes a just and reasonable return in a given case will generally be within the province of the Board and will not normally be interfered with[FN31]. The jurisdiction of the Board must therefore be defined to enable that process to occur.

30 Because setting the rate of return is not an exact science no matter what methodology is chosen, because the viewpoint is essentially prospective, it has been recognized that there is a "zone of reasonableness" within which a rate of return chosen by the Board should be regarded as just and reasonable. This has been expressed by the United States Supreme Court in the following language:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high [FN32].

This notion has also at times been recognized in Canada[FN33].

31 This leads to another point: because the setting of the rate of return is based on projections, one cannot be sure that the rate of return will be achieved in practice. Although the utility is "entitled" by s. 80 of the Act to have the Board determine a just and reasonable rate of return based on appropriate predictive techniques and methodologies, it is not "entitled", in the sense of being guaranteed, to that rate of return[FN34]. The utility therefore takes the risk that its chosen management techniques and the future economic climate may not yield its expected success. Although some of the activities of the utility are regulated within the framework of the statutory objectives, the utility nevertheless remains subject to business risks and the effects of management decisions. To that extent, the financial risks associated with the operation of the utility, just as in the case of any private business, are to be born by the investors in the enterprise, not the consumer of the service.

32 The corollary of this position is that the utility must be accorded a degree of managerial flexibility in decision-making in order to be able to minimize the risks to which it must respond. Thus, it is often said that the powers of the Board must be regulative and corrective, but not managerial, and they do not therefore contemplate a retroactive adjustment of the actions of management.

33 This leads to the general principle of non-retroactivity which prevents a utility from recovering expenses incurred in the past out of current rates. The utility must live with the decisions it makes and the economic vicissitudes that occur.[FN35].

34 By the same token, it is sometimes argued that the occurrence of the reverse situation, of the utility doing better than expected, should mean that the utility should be able to reap the advantage of better and more efficient management techniques and favourable economic conditions and keep any surplus. The concern for the consumer interest is often put forward as a brake on this idea, however. The requirement that the consumer receive power "at the lowest possible cost"[FN36] consistent with the utility's requirement of earning a just and reasonable return for its purposes means, it is often argued, that the regulator ought to have power to ensure that excessive returns are somehow accounted and compensated for.

35 Another factor that is referred to in the cases is the recognition that the capital structure of the utility will often have a bearing on the total cost of capital and this will therefore be important where the determination of the rate base depends on the total debt and equity capital requirements. DeGrandpré observes that "the reasonableness of the ratio of debt to equity is a question of fact left to the appreciation of the Board or Court"[FN37]. Thus, issues such as whether the Board can dictate to the utility a particular mix of debt and equity or, for the purpose of setting the rate of return, do so on the basis of a notional blend of capital requirements if the actual blend is not in accordance with what the Board feels is optimal to ensure a fair return as well as low rates, tolls and charges, often surface. Indeed, this issue is presented in this case.

36 Having conducted this brief survey, I will now attempt to state some general principles to be used in the interpretation and application of the local legislation:

1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action

does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

37 It is now necessary to consider each of the specific questions that have been posed. In approaching them, it is worth remembering that the questions have been posed in the abstract and ask for answers to broadly-identified issues of jurisdiction. The case is not an appeal and there can be no findings of fact made by this Court in arriving at its conclusions. The information provided by the Board as to past hearings was given as background only so as to assist the Court in better understanding the scope and potential importance of the questions. While the answers given may provide guidance with respect to specific issues that have arisen in hearings in the past, they cannot be taken as an adjudication of those issues in the specific factual context in which they arose.

Question No.1

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

38 It will become apparent from the ensuing discussion that a number of the questions posed on this stated case are interrelated in the sense that the answer to some of them will provide a strong impetus for a particular response in others. This is particularly evident in Question 1.

39 The answer to Question 1 in fact involves a consideration of two sub-issues. The first relates to the legal significance of a determination by the Board on a given application of the just and reasonable return to which the utility is entitled. The second sub-issue, which is affected by the decision on the first, relates to the powers of the Board to make determinations with respect to the rate of return on a utility's common equity portion of its capital structure.

1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

(a) The Legal Significance of a "Determination"

40 It is to be noted that Question 1 asks whether the Board has jurisdiction to "set and fix" the utility's return whereas s-s. 80(1) of the Act speaks in terms of the utility being entitled to earn a return as "determined" by the Board. The use of this differing terminology in the question, as explained by counsel for the Board at the hearing, was designed deliberately to raise the issue as to whether the Board may, by determining the level of return, be said to be prescribing that level as an upper limit to the level of earnings to which the utility may be entitled and thereby exercise certain powers with respect to disposition of any excess that may in fact be earned. This issue becomes more focused when Question 3 is considered. The answer to that question will, to some extent, be influenced by the powe which the Board can be said to have unde s. 80 with respect to the setting of a level of return.

41 It is obvious, of course, that in the process of approving rates, tolls and charges under s-s. 70(1) the Board must determine what is a just and reasonable return on the utility's rate base in order to determine the level of revenue needed by the utility[FN38]. This flows from the utility's "entitlement" in s-s. 80(1) to earn that level of return. The determination of a just and reasonable return on rate base is therefore an essential component in the series of calculations which the Board must undertake in the process of approving rates, tolls and charges.

42 If the determination of a just and reasonable return is merely a step in the process of approving rates, tolls and charges under s-s. 70(1), that is, if it is only an intermediate calculation necessary to arrive at the final result of consumer rate approval, the "determination" of a just and reasonable level of return will have no independent legal significance, in the sense of prescribing the limit of the utility's return for other purposes of the Board's functions.

43 On the other hand, if the determination of a just and reasonable level of return has, as it were, an independent life of its own, in the sense of it not being a mere intermediate calculation but can be "set and fixed", in the sense of being prescribed, it could, for example, be used to support an argument that a utility is not entitled to earn in excess of a just and reasonable return. As indicated, this impacts directly on Question 3. While counsel for NLP suggested that there may be other mechanisms available to deal with excess earnings (by means of the use of a designated excess revenue reserve fund), that would not require the derivation of such a power from s. 80, counsel for the Board and the Consumer Advocate both indicated that they were concerned about the legal basis for the derivation of the operation of an excess revenue account from other parts of the legislation, such as the administrative and supervisory power of the Board to regulate a utility's accounts. It is appropriate therefore that this matter be addressed.

44 The issue boils down to this: If the power to "determine" the return encompasses the notion of fixing, in the sense of prescribing the limits of entitlement, one would be able to derive from s-s. 80(1) a power in the Board to say to the utility that it may earn that level of return and no more. If not, the power to determine would simply be part of a calculation that leads to consumer rate setting with no independent existence or significance for regulatory practice generally.

45 *Black's Law Dictionary*[FN39] explains "determine" in part as follows:

> To bring to a conclusion, to settle by authoritative sentence, to decide.... To adjudicate on an issue presen- ted...

To estimate...

To decide, and analogous to "adopt" or "accept"...

46 The *Concise Oxford Dictionary*[FN40] defines the word in pertinent part as:

1. v.t. & i. settle, decide, (dispute, person's fate ...), come to a conclusion, give decision, be the decisive factor in regard to ...; ascertain precisely, fix;...

3. v.t. & i. (esp. Law) bring or come to an end.

4. v.t. limit in scope, define; fix (date) beforehand.

47 For what limited value these definitions can have in this context, it would appear that the primary meaning of the word determine, with its emphasis on coming to a final decision and amounting to a decisive factor as well as the notion of ascertaining something precisely and "fixing", encompasses something more than a mere calculation in a broader process.

48 Having said that, it is to be noted that s-s. 80(1) is structured in such a way that its emphasis is on the entitlement of the utility to a just and reasonable return, as determined by the Board, rather than involving the express conferral on the Board of a power to prescribe the level of return. The structure of the subsection could be said to be directed towards establishing a minimum base line of entitlement without saying anything expressly about the power of the Board to create a cap. To put the matter beyond doubt, the insertion of the words "and no more" after the language entitling the utility to a just and reasonable return would certainly have clearly indicated a prescriptive power in the Board, if that had been intended. Furthermore, although the return is referred to as being "determined" by the Board, the subsection goes on to indicate that the return so determined is applied to the rate base "as fixed and determined" by the Board. On a strict linguistic analysis alone, the use of the word "fixed" in conjunction with "determined" in one place would imply that its absence in the other was deliberate.

49 Notwithstanding these matters, I am not satisfied that a linguistic analysis of the subsection can provide the answer in this case. Even a cursory perusal of the remaining provisions of the Act indicates that there is no uniform terminology chosen to describe the various decision-making functions in which the Board may engage. For example, the Act provides that the Board may "inquire into and determine"[FN41] the valuation of a utility's assets and may "determine"[FN42] those values in accordance with a number of stated rules. It may "ascertain and determine"[FN43] what are proper and adequate rates of depreciation of classes of utility property. Its role with respect to the utility's rates, tolls and charges is one of "approval"[FN44]. Indeed, if there is any decision of the Board which is contemplated as having operative legal effect and to amount to a "fixing" of the utility's rates, tolls and charges from which the utility may not deviate, it is the "approval" contemplated in this regard; yet the word "fix" does not appear. In another context, the Board may "fix and determine"[FN45] a separate rate base for each kind of service supplied by a utility; yet when describing what is to be included in the calculation of rate base, the reference to "determine" is dropped and it is simply described as "fixing a rate base"[FN46]. Finally, the term "approval" surfaces again in the context of the power of the Board to authorize new stock issues of the utility[FN47].

50 To resolve this conundrum, resulting from inconsistency in terminology, resort must be had to the purposes of and policies underlying the legislation as mandated in s-s. 118 of the Act as well as s. 4 of the *EPC Act*. As indicated previously,[FN48] the Board is required, in carrying out its functions under the Act, to balance the interests, as identified in the legislation, of the utility against those of the consuming public. The notion of a

"just and reasonable return" in s-s. 80(1) is the benchmark against which fairness to the utility and the consumer is to be measured. It is pivotal in the balancing exercise. The interests of the consuming public in obtaining power at the lowest possible cost consistent with reliable service[FN49] must accommodate the utility's interest in being afforded the opportunity to earn a fair rate of return for its efforts. In the methodology adopted by the Board, the approval of appropriate rates, tolls and charges necessarily factors the just and reasonable return, and only that level of return, into that calculation. Otherwise, the interests of the consumer would not be protected in obtaining power at the lowest possible cost. It is therefore inherent in the process that in determining a just and reasonable return for the utility, the utility should have the opportunity of earning that return but, other things being equal, should not expect to earn any more. Accordingly, determining the just and reasonable return necessarily involving prescribing the return and in that sense can be said to amount to "setting and fixing" the rate of return.

51 It follows from this that the use of the word "determine" can, in the context of the use of that and other terminology in the Act, encompass something more than the notion of mere calculation and extends to the idea of prescribing, or fixing, a level of return in the nature of a legal decision which can bind and have effect on the utility for other purposes related to the Act.

(b) The Power to Set and Fix the Level of Return on Common Equity

52 In order to determine the just and reasonable return on rate base to which the utility is entitled by s-s. 80(1), the Board must first determine the cost to the utility of the various components of its sources of funds. The costs associated with long term debt and preference shares are generally static over the period covered by a particular rate hearing. Accordingly, they are often described as "embedded costs". The rate of return necessary to be earned on rate base to cover the cost of debt and preference shares can therefore usually be easily determined based on the interest rates or dividend rates applicable to such instruments. In the case of common equity, however, the cost to the utility of this source of funds depends upon a number of factors, especially current market conditions which, by nature, can be volatile.

53 At a rate hearing, therefore, the Board usually faces a greater difficulty in determining the component of rate of return on common equity than on the other sources of funds because their embedded costs are usually well defined.

54 Since the rate base is financed by a combination of debt, preference shares and common equity, the rate of return on which is different for each component, the overall rate of return on rate base is calculated as a weighted average of the rates of return on the various individual components.[FN50]

55 As a generalization, it is sometimes said that the cost of common equity is often higher than that of debt [FN51]. The rate of return on common equity may therefore be expressed as a percentage which is higher than the overall rate of return on the full rate base because the higher equity cost will be weighted downwards by the rates for the other components.

56 The issue raised by Question 1(ii) is whether the Board may set and fix the rate of return on common equity, as a component of the overall rate of return on rate base in a manner such that it can be used as an independent benchmark for other purposes in the same way as the overall determination of return on rate base can be. Alternatively, is the "determination" of the rate of return on common equity to be treated in the narrower sense of a mere calculation leading to the final determination of overall return?

57 Subsection 80(1) makes no reference at all to determining, let alone setting and fixing, the rate of return on common equity. The calculation of an appropriate rate of return on common equity is truly a mere component in the overall process of determining a just and reasonable return on rate base. Furthermore, there is nothing in the purpose of the Act or the policies which the Board is to implement which would lead inexorably to the conclusion that the Board ought to have the power to prescribe a rate of return on common equity as a component of an overall return or rate base, any more than it ought to have a power to prescribe a return on any other compon- ent.

58 The Consumer Advocate submitted that inasmuch as s-s. 80(1), by its express language, contemplates that the only measure of what NLP may earn annually is to be determined by a just and reasonable return on rate base, to allow the utility to measure what it may earn annually based upon a different factor, such as a rate of return on common equity which could very well be higher than the overall rate of return on rate base and might lead to a higher overall return that could be said to be justified, would be to allow the utility to earn more than that to which it is statutorily entitled.

59 It is to be noted, however, that in its previous orders[FN52] the Board has not sought to determine the level of return on the basis of anything other than a rate of return on rate base. For example, in the 1991 Order, the Board ordered:

> A just and reasonable return for [NLP] is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%.
>
> [Emphasis added]

The reference to the range of rates of return on common equity appears to have been inserted more as information in support of a rationale for the determination of the overall return on rate base, since the Board states that the determination of the return on rate base "will provide" an "opportunity" to earn a rate of return on common equity. Similarly, the 1996-97 Order simply described the rate of return on rate base as being "derived from" a given range of return on common equity. This is the correct approach.

60 As to whether the Board may make other decisions, for example relating to the manner in which an excess revenue fund should be maintained, by reference to the contemplated rate of return on common equity, is a separate matter which should be dealt with in that context.

61 I therefore conclude that the power to "determine" a just and reasonable return on rate base, as contained in s-s. 80(1) does not include within it a power to "set and fix a rate of return on common equity" but it obviously does contemplate that the analysis of appropriate rates of return on common equity will be undertaken and factored into the conclusion as to what is a just and reasonable return on rate base.

62 Accordingly, giving the words "set and fix" in the question a meaning which implies the notion of prescribing, I would answer Question 1 as follows:

As to:

1. (i) - Yes

1. (ii) - No

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Question No. 2

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

63 In light of my answer to the second part of Question 1, it is only necessary to address Question 2 in the context of whether the Board has jurisdiction to set the rate of return on rate base as a "range of permissible rates of return".

64 It has already been stressed that the determination of a just and reasonable return on rate base involves a consideration of the differing costs of the components of the utility's capital structure and that in arriving at the overall rate of return, it is permissible for the Board to use a weighted average of the rates associated with each individual component. It has also been pointed out that the cost of common equity is often difficult to estimate with precision. The best that experts are often able to do is estimate rates within a reasonable range. Inasmuch as the cost of common equity is weighted into the overall rate of return on rate base, that range would also have to be reflected in the ultimate rate of return on rate base, as determined by the Board.

65 In *Edmonton (City) v. Northwestern Utilities Ltd.*[FN53] Smith, J. emphasized:

> The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

66 It is evident, as *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)*[FN54] demonstrates, that the determination of a just and reasonable return is an area in which the Board is accorded a broad discretion as to the methodology to be adopted. Obviously, the striking of a balance between the interests of the utility and the consumer, whilst at the same time attempting to comply with the Board's obligation to approve rates which will produce a fair return to the utility, cannot be done with the precision of a simple mathematical calculation. Realistically, the balance can only be struck within a reasonable range. It is for that reason that the courts have, on subsequent appeal or applications for judicial review, generally deferred to the determinations of boards in this regard provided the determination is not arbitrary or capricious and can be said to fall within a reasonable range.[FN55] As indicated in the earlier discussion[FN56], in the United States the notion of a "zone of reasonableness" as an "area rather than a pinpoint" has been recognized. Whilst this notion has been enunciated as a justification for deference to Board decisions in the context of challenges on appeal or judicial review, it nevertheless indicates a recognition of what is inherent in the rate setting process.

67 I see no reason, therefore, why, instead of attempting to justify a particular decision ex post facto by an argument that a particular rate falls within a zone of reasonableness, the Board could not expressly indicate what it believes that area of reasonableness to be by expressing what it believes to be a just and reasonable return in terms of a range of rates of return. This indeed is a practice that has been adopted elsewhere[FN57]

68 It is to be noted that s-s. 80(1) does not speak in terms of a "rate" or "rates" of return; rather, it speaks of a just and reasonable "return". It is not limited by its language to the pinpointing of a particular rate of return. I conclude that a liberal construction of the word "return" in the context of s-s. 80(1) leads to the conclusion that it can include a range of rates of return.

69 Of course, in applying the rate of return to the rate base, as ascertained by the Board, a single figure will have to be used since rates, tolls and charges are expressed as finite numbers. The Board in practice has chosen the mid-point of its stated range of rates of return as the figure to be used for this purpose. This is a perfectly ac-

ceptable practice for the purpose of setting the rates. By expressing a range, however, the Board leaves open to the utility the flexibility of earning more than the mid-point up to the maximum end of the range so as, in effect, to give the benefit of the doubt to the utility that the expert evidence favouring the upper end of the range turns out to be the more accurate and to provide an incentive to the utility towards managerial efficiency.

70 The Consumer Advocate expressed concern in argument that the use of the word "permissible" in Question 2, as qualifying the phrase "rates of return", might be misleading. As I understand the argument, the concern is that the adoption of a range approach might lead to the conclusion that the "entitlement" of the utility to a just and reasonable return would be regarded as an entitlement, or guarantee, of earning up to the maximum end of the range. While the utility, if it earned as much as the maximum would be entitled to keep that amount of earnings, it is not, for reasons already given, guaranteed that level of return if it is not in fact successful in earning them. The Board is under no obligation to adjust future rates or to take other steps to make up any such shortfall. Any rate of return earned within the range would be regarded as permissible and it is only when a rate of return exceeds the upper limit of the range that it would be regarded by the Board as subject to any excess revenue regulation.

71 Accordingly, recognizing that, on my analysis, Question 2 only relates to whether the Board has jurisdiction to set rates of return as a range in relation to its determination of a just and reasonable return on rate base, the answer I would give to Question No. 2 is: "Yes".

Question Nos. 3 and 4

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

72 The analysis leading to the answers to Questions 3 and 4 can be considered together since they both address the same general theme: the scope of the Board's powers to deal with situations where a utility in fact earns a rate of return that is greater than that determined to be a just and reasonable return.

73 It was suggested by counsel for NLP that the concept of "excess earnings" does not exist under the Act other than by reference to a definition of what is to be deposited into a reserve fund which the utility may be ordered to create and maintain pursuant to s-s. 69(3) of the Act. This submission follows from the position taken by NLP that the Board has no power under s-s. 80(1) to "set and fix", in the sense of prescribing, a maximum rate of return. NLP had submitted that the Board's power to deal with excess earnings comes solely from its statutory powers to prescribed the form of accounts to be maintained by the utility[FN58] and to create a reserve fund "for a purpose which the Board thinks appropriate"[FN59] which could include the purpose of dealing with excess returns. This argument has already been rejected in the analysis relating to Question 1. It follows, therefore, that the issue of excess earnings may present itself for consideration by the Board in circumstances even where a reserve account has not been ordered to be set up. For the purpose of regulation by the Board, the concept of excess earnings is derived from the process of prescribing a just and reasonable return on rate base and not by the decision to require the creation of a reserve account. The question to be considered is what enforcement mechanisms the Board may use to deal with excess earnings so identified.

74 If, as determined in the answer to Question 1, the Board has jurisdiction flowing from s-s. 80(1) to prescribe the maximum rate of return which a utility may earn in a given year, it is a necessary consequence of such a determination that revenue earned in excess of the maximum of the prescribed range of return is excess revenue to which, by definition, the utility will not be entitled. The Board accordingly must have jurisdiction to regulate how that excess revenue is to be dealt with.

75 Question 3 requires the Court to consider the range of enforcement mechanisms which the Board may employ to ensure that the utility does not benefit from any windfall profits resulting from earnings in excess of the just and reasonable return to which it is entitled. Three scenarios are proposed:

(1) use excess earnings to reduce revenue requirements for the succeeding year ("Revenue Reduction Approach");

(2) place the excess earnings in a reserve fund to enable an adjustment of rates, tolls and charges at a future date ("Reserve Fund Approach");

(3) require a rebate of excess earnings to consumers ("Rebate Approach").

Question 4 is really a subset of the Revenue Reduction Approach. In one sense it really asks the same question as in Question 3(i) but does not limit the process to the application of excess earnings to only the year next succeeding the year in which the excess earnings have been achieved. It appears to ask the Court to address the question of whether, in the absence of the existence of a reserve account, the Board may, upon being made aware of excess earnings in prior years, reach back into those prior years and take account of those excess earnings by using them to reduce rates, tolls and charges in subsequent periods below what would otherwise be indicated.

76 In approaching these questions, it is important to bear in mind the nature of the rate setting process and the general principles which are recognized as being applicable to govern the manner in which that process is carried out.

77 The process of rate setting is generally prospective by nature. Although the Board must set rates for the future, it only has data from past experience, the evidence from utility officials as to planned changes in operations and the opinions of experts as to future economic trends as a guide to what the revenue requirements of the utility will likely be. It is, therefore, necessarily speculative. In developing the utility's requirements, the Board focuses on a "test year" as the basis for its estimates and adjustments. Traditionally, in North America the test year was chosen as the latest 12 month period for which complete data were available.[FN60] More recently, due largely to inflation, boards adopted a forward-looking test year which in effect amounts to a forecast of what expenses and costs, and hence revenue requirements, will be. This has been the practice of the Board[FN61] and is supported by the Act[FN62] and the *EPC Act*[FN63]. Past experience of course remains relevant, however, insofar as it gives insight into the possibility of forecasting error.[FN64]

78 Because the process is prospective, there is a good possibility that all of the assumptions will not be achieved in practice. The actual rate of return may therefore differ from the rate, or range of rates, prescribed at a previous hearing. On paper, this difference may appear to redound to the benefit or detriment of the utility depending upon whether the actual rate is greater or less than the rate or range prescribed.

79 When, as a result of actual experience, it appears that the actual rate of return was greater than the rate prescribed for the same period, it becomes necessary to address what the Board can do, if anything, to ensure that the earnings in excess of the prescribed level, (which by definition will be regarded as greater than a just and reasonable return on the rate base), are not allowed to remain with the utility or its investors. In the *Bell Rebate* case[FN65], Gonthier, J. observed that differences between projected and actual rates "call for a high level of flexibility in the exercise of the [Board's] regulatory duties".

80 Those opposing a broad jurisdiction on the part of the Board to define and deal with excess revenue couch the objection, at least in part, in terms of a violation of the non-retroactivity principle.[FN66] In its narrow sense, it is a principle of benefit to consumers, that "today's rate payers should pay the cost of today's services and not the cost of past or future services"[FN67]. More broadly, it also yields a presumption (which is of benefit to the utility as well), flowing from the idea that the Board acts prospectively in setting rates, that the Board cannot or, even if it has jurisdiction, should not as a general rule, make orders that have the retroactive effect of disturbing existing rights already enjoyed by the utility. In practical terms, it leads to the argument that where rates, tolls and charges have been approved by the Board as being permissible for the utility to charge, the Board cannot or should not make a subsequent order that has the direct or indirect effect of reducing or otherwise changing those rates. In other words, changing past transactions or attaching new consequences to past transactions would be prohibited.

81 As Penning points out[FN68] the retroactivity rule has its genesis in general rules of statutory interpretation that guard against interpreting a statutory provision as having a retrospective operation unless it is clear that such an effect was intended. It is not an immutable rule but can give way to contrary legislative intention.

82 Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

> ...the rule is concerned more with issues of fairness, both to customers and to utility shareholders. The customer-related fairness issue is often referred to as the "inter-generational equity" problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to at-

tract and maintain reasonably-priced equity investment in a utility, shareholders require some certainly that matters already dealt with by the regulator have some degree of finality associated with them.[FN69]

83 It was argued that one of the questions that is theoretically presented in this case is the degree to which the Board is authorized to trespass on the no-retroactivity principle in fulfilment of its legislative powers, specifically, to enforce a prescription that a utility may earn a just and reasonable return and no more.

84 In reality, however, in light of the prospective nature of this Opinion, the non-retroactivity principle is not, in practical terms engaged by Question No. 3. The answers to previous questions have already established that the concept of excess revenue is to be determined by reference to the meaning of a "just and reasonable return" as that phrase is understood in ss. 80(1); and not by the definition used to operate an excess revenue account. All participants in the regulatory process must therefore take account of that concept and conduct their activities accordingly. The "rules of the game" are known.

85 Section 59 of the Act requires the utility, unless otherwise ordered by the Board, to close its accounts at the end of each calendar year and to file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the following year. Effectively, therefore, within 3 months after the utility's year end, both the utility and the Board will know the financial position of the company for the previous year and from that, as well as any other information which the Board may require, a determination of the actual level of return earned by the utility in the previous year can be made. Applying the known definition of excess revenue, by reference to the upper end of the range of return on rate base, as determined by the Board's prior orders under ss. 80(1), it can be determined whether there has been any excess revenue earned. There is no revisiting and revision of a prior order respecting the allowable return on rate base. The examination of actual results in the context of a comparison with the previously prescribed rate merely leads to enforcement of the original order. Any decision by the Board with respect to disposition of excess revenue will therefore not retroactively interfere with past revenues which the utility assumes belong to it and which may be disbursed to shareholders or otherwise spent. Given the concept of excess revenue, as explained in this option, the utility knows in advance that it is not entitled to excess revenue so defined and may institute whatever accounting practices are necessary to segregate and deal with such revenues pending direction from the Board.

86 The situation is conceptually no different from the concept behind an excess revenue account set up under ss. 69(3), which the utility accepts as a legitimate way of dealing with such revenue. Just as in the case of an excess revenue account, the definition of excess revenue is known in advance and the utility can account for such revenue accordingly.

87 The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superseded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by ss. 75(3) of the Act.

88 In the situation presently under consideration, however, there is no subsequent order of the Board which retroactively changes previously-approved rates, tolls or charges or revises the prescribed level of return to which the utility is entitled. All that occurs is the subsequent examination of actual results and a determination of whether excess revenue was in fact earned by applying a pre-existing standard derived from a previous Board

order made under ss. 80(1).

89 I recognize that, to the extent that the utility in the past may have been operating under the impression, perhaps engendered by positions taken by the Board, that excess revenue need only be calculated by reference to the excess over the rate of return on common equity as defined for the purpose of operating the existing excess revenue account, it may consider that if the concept of excess earnings as discussed in this Opinion is applied at this stage to those previous years, there may effectively be a change in the "rules of the game". In that practical sense, there would be a "retroactive" readjustment.

90 The Court is not being asked, however, to determine the position of the utility specifically in relation to the years 1991 through 1996 and to determine the entitlement of the utility to excess revenues as calculated by reference to the current definition. The degree of NLP's misapprehension, if any, the actions of the Board in dealing with the excess revenue issue in the past, the degree to which NLP may have acted to its prejudice, and the degree to which the utility may nevertheless be required to disgorge excess revenues in previous years in accordance with presently understood concepts raise complex issues of mistake of law in the law of restitution and the defence of change of position which require for their resolution a detailed factual base. It would be inappropriate to attempt to answer such questions in this Opinion.

91 The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity. Here, assuming (without deciding) there was a misapprehension in the past as to how excess revenue should be calculated, the "change" in calculation method comes about, not because of a retroactive change in the rule by the Board but by a (perhaps) unanticipated declaration and clarification by the Court of what the law is and how it is or should be applied.

92 I turn now to the determination of the powers of the Board to deal with excess revenue once it has been determined to exist.

93 The only express provisions of the Act dealing with excess revenue are s-s. 69(4) which provides a power to require a utility to refrain from distributing extra revenue as dividends until further order, and s-s. 75(3) which enables the Board to order that excess revenue earned as a result of an "interim order" made under s-s. 75(1) and not confirmed by final order be either refunded to customers or placed in a reserve account for an approved purpose. Does the fact that similar powers are not expressed in respect of "final" orders mean that they were not intended to be available?

94 I do not believe so. The power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer. The starting point is the power, found to exist in the answer to Question 1, that the Board may prescribe a rate of return under s-s. 80(1) which carries with it the necessary corollary that the utility is only entitled to earn that level of return, as determined by the Board to be just and reasonable. It follows that unless the Board is to be a "toothless tiger" it must be accorded the means by which revenues earned in excess of the prescribed level of return are used in furtherance of the objectives and policies of the legislation and not simply for the benefit of the utility's investors. Such policies as the maintenance of a sound credit rating by the utility[FN70], the efficient production, transmission and distribution of power[FN71], the delivery of power at the lowest possible cost[FN72] and the provision of reliable service[FN73] are all candidates for the use of the excess. It does not follow, as the Consumer Advocate argued, that any dealing with the excess should involve only a return or rebate to consumers so as to ensure that the goal of delivery of low cost

power is vindicated. While the maintenance of low rates is an important objective of the legislation, it is not the only one. As emphasized earlier,[FN74] the Board is always engaged in a balancing exercise between the interests of the consumer and the interests of the utility. It is not correct to say that any revenues earned in excess of a just and reasonable return belong to the consumer. Just as the utility is not "entitled" to earn and retain revenues in excess of such a level of return, so also the consumer is not absolutely "entitled" to the excess. The Board, having identified that an excess exists, must deal with it in furtherance of the objectives of the legisla- tion.

95 The means whereby the excess is dealt with should not be, unless expressly limited by the legislation, rigidly prescribed provided the means chosen comport with the objectives and policies of the legislation. It is worth repeating Gonthier, J.'s observation in the *Bell Rebate* case that the fact that the differences between projected and actual rates of return are common calls for "a high level of flexibility in the exercise of the [Board's] regulatory duties".[FN75]

96 Counsel for NLP argued that the only power of the Board to deal with excess revenue, aside from interim order situations, flows from its power in s. 58 to prescribe the form of books and accounts to be kept by the utility and that, if it ordered, pursuant to s-s. 69(3), the creation of a reserve fund "for a purpose which the Board thinks appropriate", it could stipulate that the accounts should be kept in such a way as to require excess revenues to be accounted for in such a reserve account. I do not find the jurisdiction to deal with excess revenue in the power to prescribe the utility's accounts. That is only a procedural means of exercising powers, the jurisdiction for which must be found elsewhere. Whilst the creation, pursuant to s-s. 69(3), of a reserve fund to deal with excess revenues could be said to be "a purpose which the Board thinks appropriate" (provided that purpose is consistent with the powers otherwise conferred on the Board), there is nothing in the language of s-s. 69(3) which expressly makes it applicable to an excess revenue situation and there is certainly nothing there which would purport to make the use of a reserve fund for the purpose of dealing with excess revenue as the only mechanism which would be at the Board's disposal to deal with this issue.

97 I conclude that, bearing in mind the approach to interpretation mandated by s-s. 118(2) of the *Act*, the Board must of necessity have broad powers to deal with revenue earned by a utility in excess of the prescribed rate of return. Inasmuch as the ascertainment of the existence of excess revenue can only be made following a subsequent review, any order dealing with excess revenue will of necessity have certain retrospective elements about it. But that is not the same as saying that an order dealing with excess revenue ascertained by application of a pre-existing concept of what constitutes excess revenue is a retroactive order. It was argued by NLP that the setting up of a reserve account would be the only method that would not involve any trespass on the principle of non-retroactivity because the utility would know in advance that it had to set up its reserve account and could therefore provide for it without running the risk of spending or distributing excess revenues in ignorance of the fact that they would have to be held accountable for them.

98 For reasons already given, this argument is unconvincing. By virtue of the answers given to Question 1, the utility knows that it is only entitled to earn a just and reasonable rate of return pursuant to any order made by the Board to that effect under s-s. 80(1). It can monitor its financial progress and can organize its accounts in such a way as to account for excess revenue so as to prevent the possibility of it being disposed of before any subsequent order dealing with the excess may be made. The utility does not need an express order of the Board requiring it, as a general rule, to set up a reserve account for this purpose. Nevertheless, the use of a reserve account is a convenient way of doing this. It may well be, however, that the Board may, through other directions with respect to the manner of keeping accounts, develop other accounting procedures that will enable the utility

to identify excess returns and to segregate them for other use.

99 A reserve fund could be ordered by the Board to be used in the future to improve service, or to keep rates low or for some other purpose that is consistent with the objectives and policies of the legislation. Whether the advancement of these policies is done formally through the use of a reserve fund or through some other mechanism such as an order setting further rates, tolls and charges taking the prior excess revenue into account, the utility should not be prejudiced, in light of the fact that it knows that it is not entitled to earn a return in excess of a just and reasonable return.

100 A rebate to consumers would also be permissible since it would have the indirect effect of ex post facto keeping the rates low. While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning[FN76] observes:

> As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers - especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force. Furthermore, to the extent it is still present, it can be dealt with through the choice of mechanism design - so instead of adjusting all rates, through either surcharges or refunds, the individual customers who met the timing criteria would receive an adjustment to their bill.

101 This recognition was echoed by Gonthier, J. in the *Bell Rebate* case[FN77] as follows:

> ...it is true that the one time credit ordered by the appellant will not necessarily benefit the customers who are actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement among its several classes of customers to determine just and reasonable rates, the appellant's decision was imminently reasonable...

102 Accordingly, I conclude that each of the Revenue Reduction, Reserve Fund and Rebate approaches to dealing with excess returns are within the jurisdiction of the Board and could, in particular circumstances, all constitute reasonable responses to a finding that the utility has earned in excess of a just and reasonable return.

103 I would also add that the setting up of a reserve fund in a given case does not exhaust the ways in which the Board may deal with excess revenue. The methodologies proposed are not mutually exclusive. The Board has jurisdiction to deal with all revenue in excess of a just and reasonable return on rate base using one, or a judiciously blended combination, of the methodologies identified.

104 Having said that, it must be emphasized that just because the Board has the jurisdiction to use these approaches, the particular circumstances may well dictate that one or more of them may be inappropriate in a given case. For example, the ordering of a rebate to consumers of the total amount of an excess return might not, in the light of the general financial condition of the utility, be appropriate when measured against such legislative objectives as the maintenance of the utility's sound credit rating. It might be appropriate, when all of the interests are properly balanced, for the Board, for example, to order that only the excess over a stipulated rate of

return on equity, or some other measure, be refunded or otherwise dealt with. These are all matters to be considered by the Board in a given case.

105 The answers to Questions 3 and 4 can be given as follows:

As to: 3(i) - Yes

3(ii) - Yes

3(iii) - Yes

106 The answer to Question 4 is also "yes" on the assumption that what is being asked is not whether the Board may retroactively revise a previous order but merely whether, applying a defined and understood concept of excess revenue, (ie. an excess of a just and reasonable return on rate base) the excess so determined to have existed in prior years may then be taken account of and applied in setting future rates, tolls and charges.

Question 5

Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

107 In order to understand the import of this question, it is necessary to review the approach taken by the Board to the definition of excess earnings in past years.

108 In correspondence passing between NLP, Newfoundland Telephone Company Limited (which at that time was regulated by the Board) and the Board during the late 1980's, there was considerable discussion as to the manner of defining "excess revenue" for the purpose of the operation of the reserve account which the Board had required the utilities to maintain for that purpose. As a result of these discussions, the Board approved a change in the utilities' systems of accounts to recognize a new definition of excess earnings. As indicated, this was accomplished by defining the excess revenue account in the utilities' system of accounts as follows:

This account shall be credited with any revenue in excess of the maximum return on common equity determined by the Board at the previous rate hearing to be refunded to customers or used for such purposes as the Board may order.

109 By the operation of this definition, the situation could occur whereby the utility might earn a rate of return on rate base in excess of the maximum range of returns determined by the Board pursuant to s-s. 80(1) but could nevertheless be within the range of return on common equity used by the Board for the purpose of determining a just and reasonable return on rate base under s-s. 80(1). If that eventuality occurred, there would be no requirement on the utility to pay anything into the excess revenue account; yet, the result would be that the utility would have earned more than a just and reasonable return on rate base. In light of the answer given to Question 1, the benchmark for determining excess revenue is the range of return on rate base determined by the Board to be just and reasonable. Does the Board have jurisdiction to deal with this money as excess earnings in light of the fact that it has defined excess earnings for the purposes of the utility's accounting by reference to the maximum return on common equity?

110 Question 5, we were told, attempts to address this issue. As phrased, however, the question merely asks whether the fact that the Board has "advised" (presumably, in the form of its order changing the definition of excess revenue for the purposes of the establishment of the excess revenue account) the utility of this new definition of excess revenue "affect" the jurisdiction of the Board to approve rates, tolls and charges. The short answer to this question, strictly construed, is "no". The Board cannot limit its jurisdiction, in the sense of its legal power, by determinations made in exercise of its powers. It either has the jurisdiction or it does not. Whether it chooses to exercise the jurisdiction is another matter.

111 As a result of the discussions at the hearing, however, it is apparent that there is a more fundamental issue at stake. The assumption appears to be that if the Board chooses to define excess revenue for the purpose of establishment of the excess revenue account in terms of revenue earned in excess of the maximum return on common equity, it is in effect saying that revenue earned below that maximum but which happens to be in excess of the just and reasonable return on rate base as determined by the Board under s-s. 80(1) is necessarily money which the utility can keep. This position is obvious from the arguments made by counsel for NLP since his position has been throughout that excess revenue has no meaning other than by reference to the definition used for the purposes of the excess revenue account. As indicated previously,[FN78] this is not a correct interpretation of the situation. The same assumption is also apparent from the position taken by the Consumer Advocate who argues that the decision of the Board to define excess revenue for the purpose of the excess revenue account in terms of exceeding the return on common equity, as opposed to rate base is ultra vires the Board because the Board must determine excess revenue by reference to revenues which are earned in excess of a just and reasonable return on rate base.

112 The assumption that the definition of excess revenue for the purpose of the operation of the reserve account is equivalent to the concept of excess revenue flowing from earnings in excess of a just and reasonable return on rate base as prescribed under s-s. 80(1), is false. I agree with the Consumer Advocate, for reasons already given[FN79], that any revenues earned in excess of the maximum range of a just and reasonable return on rate base are revenues to which the utility is not automatically entitled. It does not follow, however, that for the purposes of regulating the accounts of the utility, the Board is prevented from requiring payment into an excess revenue account on a different basis (provided it does not deprive the utility of the level of return on rate base to which it has been determined to be entitled). The Board can and should deal with all revenue earned in excess of a just and reasonable return on rate base; however, it does not have to require that all of it be paid into an excess revenue account.

113 As indicated in the answer to Question 3 and 4, the Board has a broad jurisdiction as to how to deal with the excess and it may well be that, in the circumstances obtaining, it will determine that only a portion (i.e. that portion above the maximum return on common equity) should be paid into a reserve account. It might determine that the rest should be rebated to consumers or used by the utility in furtherance of the objective of ensuring that it maintains a sound credit rating in the financial markets of the world. In short, there is nothing wrong in principle with the Board defining excess revenue for the purposes of a reserve account differently from the notion of excess revenue as determined by a comparison with a just and reasonable return on rate base as determined by s-s. 80(1). In so doing, however, the Board ought not to assume that any additional excess revenue ought necessarily to be returned to the utility to be used as it sees fit. The Board has jurisdiction, and in exercise of its legislative mandate it ought to exercise that jurisdiction, to make a determination as to how that remaining excess revenue, if any, should be dealt with consistent with the objectives and policies of the legislation.

114 Accordingly, the technical answer to Question 5 is "no" but so as to limit any confusion over the im-

plications of the wording of the question, I would add that the Board has jurisdiction to define excess revenue for the purposes of maintenance of a reserve account by reference to the maximum level of return on common equity (or any other appropriate measure for that matter) but that does not mean that the Board may for all purposes define the level of excess revenue to which the utility is not entitled by reference to that measure; rather, the Board must determine, on the specific circumstances of the case, what is to be done with respect to any excess revenue measured against a just and reasonable return on rate base. If all or a portion of the excess revenue, measured against the return on rate base, is not ordered to be paid into a reserve account, it must nevertheless be dealt with in some other manner consistent with the objects and policies of the legislation. It should not be simply assumed that such excess revenue if not required to be paid into a reserve account belongs to the utility to be dealt with as it sees fit.

Question 6

> Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

115 The just and reasonable return on rate base which the Board determines that the utility is entitled to earn annually is "in addition to those expenses which the Board may allow as reasonable and prudent and properly chargeable to the operating account..."[FN80]. Thus, in the process leading up to the prospective setting of rates, the Board may look at the type and level of projected expenses of the utility in the test year and determine whether they are reasonable and, if not, only allow, for the purposes of calculation of a just and reasonable return on rate base, such types and levels of expenses as are, in the opinion of the Board, reasonable.

116 In the 1991 rate hearing, certain types and levels of projected advertising expenses were approved by the Board. At the 1996 rate hearing, it was suggested that in the light of what actually happened in the years subsequent to 1991, the utility had in fact incurred advertising expenses well in excess of the amounts approved as reasonable and also of a type different from those which were approved, i.e. for corporate image building rather than related to the supply of service. The issue posed by Question No.6 is whether expenses of a class which were previously approved as reasonable but which are in excess of the projected amounts can be disallowed by the Board for the purposes of rate regulation.

117 The level of operating costs is obviously an important factor in fixing rates. It is generally accepted that Board supervision as to reasonableness of such costs is therefore essential to effective regulation.[FN81] Phillips describes the matter thus:

> Commissions seldom challenge expenditures controlled by competitive forces, such as those for plant maintenance, raw materials and labor. Conflicts do arise over whether certain expenditures should be charged to operating expenses or paid for by owners out of earnings.
>
> Management might vote itself high salaries and pensions. Payments to affiliated companies for fuel and services might be excessive. Expenses for advertising, rate investigations, litigation and public relations should be closely scrutinized by the commissions to determine if they are extravagant or if they represent an abuse of discretion. In all cases, moreover, the commissions should require proof as to the reasonableness of a utility's charges to operating expenses.[FN82].

Accordingly, the power to determine reasonable rates necessarily requires supervision of operating expenses.

118 In defining the parameters of such supervisory power, however, the Board must account for a competing principle, namely, that the Board is not the manager of the utility and should not as a general rule substitute its judgment on managerial and business issues for that of the officers of the enterprise[FN83].

119 Nevertheless, it is recognized that regulatory boards have a wide discretion to disallow or adjust the components of both rate base and expense[FN84]. In an American case[FN85] the matter was put as follows:

> The contention is that the amount to be expended for these purposes is purely a question of managerial judgment. But this overlooks the consideration that the charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any other purposes.

120 Having said that, however, there will normally be a presumption of managerial good faith and a certain latitude given to management in their decisions with respect to expenditures. In the United States, the test for disallowance is usually "abuse of discretion" showing "inefficiency or improvidence" or "extravagant or unnecessary costs".[FN86].

121 When the issue becomes a retrospective examination of actual expenses as compared with what was projected and determined to be reasonable and prudent, there ought, similarly, to be caution exercised before determining that an expense was improperly incurred. The circumstances facing a utility are not static and a considerable latitude has to be given to the decisions of management in making expenditures to respond to the new situations as they present themselves.

122 Nevertheless, it is still within the jurisdiction of the Board to supervise and review both the type and level of expenses incurred by the utility in respect of its operations. If it did not have that jurisdiction, the actual rate of return earned on rate base in a given year would be subject to manipulation by the utility as, for example, in a year where near the close of the fiscal period it appears that the rate of return will be more than anticipated, the utility, if totally unsupervised, could make large expenditures, unrelated to the delivery of service, simply to bring the rate of return in line with what had been projected.

123 The jurisdiction of the Board to take account of deviations from estimates of expenses when setting future rates does not differ from that pertaining to its jurisdiction with respect to taking account of excess revenue. The disallowance of an expense may lead, in effect, to a greater rate of return, and potentially to excess revenue if the resulting actual adjusted rate of return is in excess of the previously determined acceptable range of return. The excess revenue over a just and reasonable range of return on rate base can be dealt with by the Board as discussed in the answers to Questions 3 and 4. It does not remain the property of the company.

124 Accordingly, the answer to Question 6 is "yes". In giving this answer, however, I would emphasize that the question that was asked is a jurisdictional one. It does not give, in the circumstances of a particular case, a wide unfettered power to "second guess" managerial decisions with respect to expenses. In this regard, I agree with the comments of Phillips:

> Public utilities ... cannot spend freely and expect all expenditures to be included as allowable operating expenses. In effect, this means the commissions are permitted to question both the judgment and integrity of management. And if rates must be high enough to yield sufficient revenue to cover all operating expenses, the consumer has the right to expect that such expenditure will be necessary and reasonable.

At the same time, managerial good faith is presumed. Public utilities must be given the opportunity to prove the necessity and reasonableness of any expenditure challenged by a commission (or intervenor). To justify an expenditure, a company must show that the expenses was actually incurred (or will be incurred in the near future), that the expense was necessary in the proper conduct of its business or was of direct benefit to the utility's rate payers, and that the amount of the expenditure was reasonable. Moreover, it must be emphasized again that a public utility may still spend its money in any way it chooses. Management's function is to set the level of expenses; the commission's duty is to determine what expense burden the rate payer must bear.

Question Nos. 7 and 8

(7) Does the Board have jurisdiction to require a public utility to maintain:

(i) a ratio; or

(ii) a ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

125 These two questions will be considered together because the issues they raise are interrelated.

126 In theory, both the overall level of capitalization and the individual components of a utility's structure are of interest to regulatory boards. Clearly, if a utility is allowed to engage in financing practices which result in overcapitalization, the whole viability of the enterprise may be threatened with consequent impact on the delivery of service to the public.

127 Furthermore, unlike in competitive conditions where the enterprise would not be able effectively to raise its prices over those of its competitors even if its costs of capital were excessive, overcapitalization of a regulated utility may well affect rates. That is because, in principle, rates must be set at such a level as to allow for recovery of the utility's costs, including its costs of capital, as well as a just and reasonable return. Overcapitalization, if uncontrolled, would increase the utility's costs and hence its rates. If the utility is not permitted to recover its costs in this regard it will, like any unregulated business, face bankruptcy with the consequence of disruption of service to customers. Overcapitalization may therefore indirectly put an upward pressure on rates to ensure the continued viability of the utility to enable service to be maintained. Alternatively, service may suf- fer.

128 Arguably, the purpose of s. 91 of the *Act* is to enable the Board to control the risk of overcapitalization and its impact on the viability of the utility, or at least on its credit standing. By examining each proposed new security issue in advance, the Board has a chance of minimizing the adverse effects of overcapitalization before the occur.

129 The composition of a utility's capital structure, that is, the mix of debt and equity, is also a matter that is necessarily of interest to regulatory boards.

1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

130 Because the costs of the individual components of a utility's capital structure, i.e. the embedded costs of debt and preference shares and the reasonable rate of return on common equity, are given a weighted cost, proportional to their share of the total capital structure, for the purpose of deriving a reasonable rate of return on rate base, the level of the actual proportional share of each component will necessarily have an effect on the result of the overall determination of a just and reasonable return on rate base. The makeup of the utility's capital structure can therefore influence that determination.[FN87]

131 Phillips[FN88] expresses it this way:

> ...the traditional theory of business finance holds that the average cost of capital to a firm varies with the capital structure upon which it is based. The interest rate on debt is normally lower than the cost of equity capital. Consequently, within limits determined by such factors as the risk of a business, the overall cost may be somewhat lower when the debt-equity ratio is high than when the debt-equity ratio is low.

It is too simplistic, however, to say that in all cases, the higher the debt equity ratio, the lower will be the overall costs of capital. As deGrandpré[FN89] points out:

> It is often argued that if utilities increased their debt ratio, their cost of capital would be reduced since the cost of debt is less than the cost of equity. This may be true, but then the rate of return would have to be increased under the risk factor since the interest has to be paid before dividends and the investor might find himself deprived of dividends because of insufficient earnings.

The debt equity ratio can, therefore, have a complicated effect. What is undeniable, however, is that the debt-equity mix does have an effect on the rate of return. Hence, it is something which, in principle, should come within the regulatory umbrella in fulfilment of the policies of keeping the costs to consumers low and of ensuring a sound credit rating for the utility. The higher the cost of capital, the higher will be the return necessary to be awarded to the utility to enable it to maintain a sound credit rating in world financial markets. This would inevitably lead to higher rates, tolls and charges which would work against the policy of providing power to consumers at the lowest possible cost consistent with reliable service.

132 From this, the Consumer Advocate and the Board itself argued that it is a necessary and appropriate power on the part of the Board to regulate the ratio of debt to equity in a utility's capital structure. Without such a power, the Board is limited, it was suggested, in its ability to ensure that sources and facilities for the production, transfer and distribution of power are managed and operated in a manner that would result in power being delivered to consumers at the lowest possible cost consistent with reliable service.

133 In like manner, it was argued that the Board has the power, as a necessary incident of the legislative scheme, to stipulate, from time to time, that a public utility must obtain its capital requirements by the issue of financial instruments of a specified nature.

134 Granting that the level of overall capitalization and the composition of the capital structure of a utility are both matters of regulatory concern, at least insofar as they affect the utility's rate of return on rate base and hence the cost to consumers of the delivery of reliable service, the question to be determined is the degree of intrusion which the Board may undertake into the financial affairs of the utility. Can it be proactive and, as Question 7 suggests, "require" the utility to maintain a particular debt-equity ratio or, as Question 8 implies, "require" the utility to finance its activities in a particular way, or is it limited to passive disallowance of particular financing in a particular financing proposals either in the process of setting rates or in the course of other applica- tions?

135 In approaching these questions, it has to be remembered that there is no such thing as one ideal capital structure. It is a function of economic conditions, business risks and "largely a matter of business judgment". [FN90] Furthermore, a given capital structure cannot be changed easily or quickly. As well, the long-term effects of changes on capital structure on the enterprise and on the future cost of capital may not be easily predictable. Capitalization decisions also have other business dimensions that transcend the considerations relevant to this issues directly presented in the regulatory process.

136 All of these considerations favour an approach that, in principle, should limit the degree of intrusion by the Board into the managerial control by the utility over financial decision-making. As emphasized earlier [FN91] the powers of the Board should be generally regulatory and corrective, not managerial. A debate has nevertheless occurred over whether regulatory agencies can and should "fix" debt-equity ratios and restrict new financing techniques to specified types of instruments.[FN92] Phillips notes that:

> These methods, however, have limitations. For example, since the financial conditions of individual utilities vary, no one ratio of debt to equity is correct. The refusal to approve a bond issue may lead to no issue at all, since, if a utility's earnings are insufficient to maintain its stock at par, it is in no position to issue more stock; bonds are the only way new capital can be raised. As a result of these problems, few commissions are willing to substitute their judgments for those of management...[FN93]

137 An alternative to actual intrusion into the utility's financial affairs in the form of a direction as to how the enterprise should be structured is for the regulator, *for the purpose of setting rates*, to base its estimates of the cost of capital on a hypothetical appropriate capital structure, thereby disregarding the utility's actual capitalization[FN94]. The justification for this approach is given by Phillips who, citing other authors, states:

> Locklin has argued that most commissions 'disregard actual capital structures and set up an ideal or normal structure for the purpose. To do otherwise would burden the public with the higher costs of obtaining capital that result from a capital structure that is something less than ideal, and may, in fact be quite unsound'. And Rose argues: 'When a commission in determining cost of capital disregards the actual capital structure or a capital structure proposed by management it is no more invading the domain of management than when it disregards unreasonable expenses for labor, fuel, or other productive factors in prescribing rates'.[FN95].

It appears, however, that actual capitalization has also been used as a basis[FN96]. Nevertheless, the arguments in favour of the ability of the Board to disregard the actual capital structure in an appropriate case and base its determination upon a hypothetical structure are convincing. Indeed, this has occurred in Canada.[FN97] Without such a power, the Board would not be able effectively to fulfill its mandate of promoting the delivery of reliable service to consumers at the lowest possible cost and at the same time maintaining a sound credit rating for the utility in the financial markets of the world. Having said that, in exercising that power, it goes without saying that the Board ought to have a healthy respect for managerial judgment[FN98] in such matters since if a hypothetical capital structure is used that is too far off the mark of the actual structure, it may in practical terms make the utility unable to meet its actual commitments, thereby threatening its credit standing and possibly affecting service to customers.

138 It is not necessary to go further, for the purpose of promotion of the objectives and policies of the legislation, and accord to the Board a power of actual intrusion into the capital structure of the utility. The distinction between actual intrusion and disallowance for rate making purposes is justified in the context of the existing legislation and enables the Board o respect the principle of general deference to managerial decisions.

139 The question that remains is whether s. 91 of the Act, which is the only provision expressly dealing with the powers of the Board respecting capital structure, can be said, either expressly, or by necessary implication, to accord greater powers to the Board.

140 On its face, s. 91 appears to be limited to a situation where the Board may approve or disapprove of a particular proposal from the utility for the issuance of a proposed form of securities. It is expressed in terms of a power of negative disallowance rather than positive direction.

141 As noted previously[FN99], s. 91 enables the Board to control the level of overall capitalization. Is that the only purpose for which a disallowance under s. 91 can be made? Obviously, an indirect effect of an approval or refusal of a particular security issue could be to affect the utility's future proposed debt-equity ratio and hence the composition of its capital structure. In practical terms, the power to disallow a specific proposal will enable the Board to exercise at the very last, by means of moral suasion in discussion, a degree of positive influence over total capitalization as well as capital structure. The power of disallowance under s.91 may, in my view, be used, in appropriate cases, to further such objectives. Subsection 91(3) requires the Board, before approving a security issue, to be satisfied that it is in accordance with law and "for a purpose approved by the Board". Accordingly, so long as the power of approval or disallowance under s. 91 is exercised in a manner that is consistent with and in furtherance of any of the policies which the legislation was designed to serve, it will be within the jurisdiction of the Board to so act. In what way, the Board may influence the total level of capitalization as well as the particular debt-equity ratio. It does not, however, permit the Board to direct the utility to raise money in a particular way or to maintain a particular debt-equity ratio. In other words, it cannot be used as a springboard for an aggressive intrusion into the day to day financial and managerial decision making of the utility with respect to the capital structure of the enterprise. Nor can the general policies underlying the legislation justify such a power. As indicated, financing is undertaken for considerations that are not necessarily directly related to utility regulation. Furthermore, it has also been noted that, within the regulatory context, the utility is still subject to business risks and the effects of management decisions and the utility, other things being equal, ought to have the power to respond to that zone of risk. To that extent, the utility must be able to make financial decisions related to the overall health of the enterprise for reasons other than strictly regulatory ones, provided that in so doing it does not trespass on the objectives and policies of the legislation.

142 Accordingly, while recognizing that a degree of influence over the utility's capital structure and over the choice of financial instruments to be used in financing the enterprise can be exercised by means of the powers conferred by s. 91 and the powers inherent in the regulatory scheme itself, the answers to Questions 7 and 8, insofar as the questions imply an ability to directly stipulate particular financing results, is, in each case, "no".

General Observations

143 In answering the foregoing questions, it is worth emphasizing that the answers are given in terms of the jurisdiction of the Board. The fact that the Board may have jurisdiction, in the sense of legal power, to do something does not mean that, in a particular case, the power ought to be exercised. In the arguments which were presented on the hearing of the stated case, it was apparent that some of the positions taken by a party were being advanced out of a concern that if the jurisdiction was conceded, it would necessarily follow that the Board would exercise its power in a manner adverse to that party.

144 The question of whether the Board should in fact exercise powers within its sphere of jurisdiction and

the question of the manner in which those powers should be exercised raise very different considerations. It must always be remembered that, as has been emphasized throughout this opinion, the Board is charged with balancing the competing interests of the utility and the consumers of the service it provides. Neither set of interests can be emphasized in complete disregard of the interests of the other. Thus, in choosing to exercise a particular power within the Board's jurisdiction, the Board must always be mindful of whether, in so acting, it will be furthering the objectives and policies of the legislation and doing so in a manner that amounts to a reasonable balance between the competing interests involved.

Opinion

145 Pursuant to s. 101 of the *Act*, I would summarize my opinion on the questions posed as follows:

Question 1(i) Yes

Question 1(ii) No

Question 2 Yes

Question 3(i) Yes

Question 3(ii) Yes

Question 3(iii) Yes

Question 4 Yes

Question 5 No

Question 6 Yes

Question 7 No

Question 8 No

I emphasize that inasmuch as the import of the answers given depends on my interpretation of the questions posed, it is necessary to read the answers in the context of the rest of this Opinion.

146 Pursuant to s. 102, the Deputy Registrar of the Court is directed to remit this Opinion to the Board.

***O'Neill, J.A.*:**

147 The Board of Commissioners of Public Utilities (the Board) is a statutory body existing under the provision of the Public Utilities Act, R.S.N. 1990, c. P-47, as amended (the Act).

148 The general powers of the Board are set out in s. 16 of the Act:

> The board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law and shall have the right to obtain from a public utility all information necessary to enable the board to fulfil its duties.

149 In addition to the powers and obligations given to and imposed on the Board by the Act, the Board has certain duties and powers under the Electrical Power Control Act, 1994, Chapter E-5.1, as amended and, by s. 4 of that Act, is specifically directed to "implement the power policy" of the Province, as set out in s. 3 of that Act, and in doing so to apply tests "which are consistent with generally accepted sound public utility practice".

150 By s. 101 of the Act, the Board may, of its own motion, state a case in writing for the opinion of the Court upon a question which in the opinion of the Board is a question of law.

151 On August 14, 1996, the Board stated a case requesting the opinion of the Court with respect to certain specific questions as set out therein. Following an application for directions, the court ordered that, inter alia, certain parties be notified of the proposed hearing. Subsequently Newfoundland Light & Power Co. Ltd., a utility, and "the Consumer Advocate" were granted status to appear and be heard at the hearing before the court.

152 In its application to the Court, the Board stated that in the course of a hearing before it, the submissions of various parties raised questions as to the jurisdiction of the Board under the Act and the Board thereupon stated a case for the Court upon the following questions:

> (1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:
>
> (i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or
>
> (ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.
>
> (2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.
>
> (3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:
>
> (i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or
>
> (ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,
>
> does the Board have jurisdiction to:
>
> (i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or
>
> (ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tools and charges of the public utility at a future date; or
>
> (iii) require the public utility to rebate the excess earnings to customers of the public utility?
>
> (4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tools and charges on the basis queried in Question(4).

(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

(7) Does nhe Board have jurisdiction to require a public utility to maintain:

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 of the Act or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

Question #1

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

153 It may be useful to set out here the relevant parts of ss. 37, 70 and 80 of the Act:

37 (1) A public utility shall provide service and facilities which are reasonably safe and adequate and just and reasonable.

> 70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.
>
> 80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.
>
> (2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.
>
> (4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

154 In the past, the Board has ordered that a just and reasonable return for a utility is "determined" to be between two stated percentages of its annual rate base for a test year, and ordered the utility to file, for examination by the Board, a schedule of rates, tolls and charges which will comply with the Board's determination, and, if so found to comply, approval is granted for those rates, tolls and charges.

155 The rate base is arrived at by calculating the utility's net investment in plant and equipment required for the rendering of the regulated service.

156 While not having fixed the return which the utility may earn, the Board has, in its orders, directed that a utility establish an "excess revenue reserve" into which revenue exceeding a certain rate of return on equity is to be deposited.

157 The Board, in its order dated December 4, 1991, having fixed the average rate base for Newfoundland Power for the year 1992, and having determined a just and reasonable return for Newfoundland Power on its average rate base for that year, noted that that return would provide an opportunity for it to earn a somewhat higher rate of return on common equity:

> A just and reasonable return for [Newfoundland Power is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%.

158 The Board's position before the court was that since what is a just and reasonable return on rate base is influenced by the proportion of the various financing components, including long term and short term debt and preferred shares, it is imperative that the Board be able to set and fix the return which the holders of the common shares in the utility may earn since the market conditions for debt could alter the return to the holders of the common shares significantly.

159 Although s. 80 does not specifically provide for a rate of return for common shares, the determination of a rate of return on the common shares of a utility is very much a part of the rate making process. Further, it must be noted that by s. 3 of the Electrical Power Control Act, the policy of the Province is declared to be that the rates to be charged, either generally or under specific contracts, for the supply of power within the Province "should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world...".

160 For Newfoundland Power it was argued that the Board has the jurisdiction to determine the just and reasonable return on the rate base and, as part of that process, the jurisdiction to determine the return on common equity, it being one of its sources of funds. I see no distinction between "determine" and "set and fix" insofar as the jurisdiction of the Board here is concerned. The calculations and projections made by the Board in arriving at the rate of return, whether specifically on rate base or the return on common equity, involve by their very nature, looking into the future, estimating as best can be done the revenues and expenditures contemplated for the utility's operations, the costs of money which may vary substantially, up and down, and then to fix a rate base, and a just and reasonable return on that base upon which the rates, tolls and charges will be based and approved.

161 Although the Board is supplied on a regular basis and has the authority to demand all the financial information it requires of a utility, the rates are, in effect, established for relatively long periods, (in excess of one year) and the likelihood of the accuracy of the forecasts which are necessarily made in setting the rate base and the rates of return is somewhat diminished.

162 For the Consumer Advocate it was argued that s. 80(1) only gives the Board the jurisdiction to calculate the rate of return on rate base and does not allow a calculation of what return the common equity shares will have.

163 As noted earlier, common shares constitute one of the components of the financial make-up of a utility and, as argued by counsel for the Board, while, theoretically, the Board only determines a just and reasonable return on the rate base as fixed and determined by it, in a practical sense, the return on common equity must be considered as part of the mix in setting the return on rate base, just as are the rates of interest paid on preferred shares, bonds and other financial obligations.

164 In the result, in my opinion, questions 1(i) and 1(ii) should be answered in the affirmative.

Question #2

Does the Board have jurisdiction to set the rates of return referred to in question (1) as a range of permissible rates of return?

165 There is no question but that the rate setting process of the Public Utilities Board is prospective and is performed by the Board's making estimates of the myriad of factors which have to be considered. The problem is exacerbated by the fact that the process is not one which is contemplated to be reviewed regularly or on a short term basis. The meaningful interpretation of the word "return" as it appears in s. 80(1) allows for and, in the circumstances, contemplates a range of rates of return. It follows then that a just and reasonable return, though it may be stated as a fixed percentage, may be a range of rates which is determined to be just and reasonable. In making such a determination, the Board is clearly acting within its jurisdiction. As noted earlier, a con-

sideration of a just and reasonable return on common equity as one of the components of the financial investment in the company is a necessary part of the process of arriving at a just and reasonable return on rate base, and this return may also be stated as a range.

166 I would answer question 2 in the affirmative.

Question #3

Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on;

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment, which the Board has determined has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, the tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?

167 Under s. 69 of the Act, the Board has very broad powers including requiring a public utility to set aside from earnings monies in a depreciation account and creating and maintaining a reserve fund. Section 69 of the Act is as follows:

69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.

(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.

(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.

(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

168 The answer to the question also requires a consideration of the powers of the Board as set out in ss. 58 and 59 of the Act.

169 By ss. 58 and 59, the Board may prescribe the form of all books of account and records to be kept by the public utility and to make its returns to the Board on such forms as may be prescribed by it. By s. 59, unless

otherwise ordered by the Board, the utility shall close its accounts at the end of each calendar year and shall file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the year following. In effect, approximately three months after the close of the utility's financial year, the Board is made aware of the exact financial position of the company at the end of the previous year and of any other information which it may require.

170 It will be seen from s. 69(3) that the Board has the power to direct a utility to set up reserves out of revenue to be used for replacement of equipment, new construction, extensions or additions to the property of the company. As well, reserves may be ordered to be created which would have the effect of "improving the status of the utility as a borrower or seeker or funds for necessary maintenance or expansion". There is a further power which comes to the Board from s. 69(4) and that is to require the utility to set up a reserve of monies which may have been in excess of those anticipated by the Board at the time of setting the rate of return and to prevent the distribution of that money or any part of it as dividends until the further order of the Board.

171 In the setting of rates, the Board is looking into the future and addressing the anticipated revenues and expenses of the utility with the many variables which may occur. It follows then that it must have the authority to anticipate that there will be variations from what was forecast. While the rates, tolls and charges are set following a hearing and only by an order following a hearing, the constant reporting which a utility must make to the Board allows the Board to be kept informed as to the financial operations of the utility and, in the result, to be aware of how these revenues and expenditures affect the rate of return anticipated by the Board and set out in its order. At the same time, as stated earlier, the rate of return on rate base and on common equity are set not as specific percentages but as a range.

172 In order P.U. 6-1991, the following appears at p. 56:

> The applicant has applied for a rate of return on common equity in the range of 13.5% to 14.0%, with rates set at 13.75%. The midpoint of the range was chosen since it is consistent with past practice and gives the Company the motivation to strive for a higher range (up to 14.0%) while giving them an opportunity to remain within the range if they are unable to come in on forecast (i.e. earn 13.5%)

And later at p. 72:

> The Board orders a range of 13.00% to 13.50% be adopted as the Company's rate of return on common equity with rates being set at the mid-point of the range, 13.25%. In the Opinion of the Board this will give [Newfoundland Power] the opportunity to earn a fair and reasonable return and will increase [Newfoundland Power's] interest coverage in 1992 to 2.87 times.
>
> The Board believes that [Newfoundland Power's] interest coverage in 1991 of 2.81 times at existing rates, which is an increase from 2.7 times in 1990, together with the increase to 2.87 in 1992 is satisfactory.

173 In my view, when rates, tolls and charges are set, the revenues generated belong to the company. If the net revenues are less than forecast and result in a return on rate base or on common equity less than as set out in the Board's order, then that loss is the company's loss. Revenues which are greater than anticipated belong to the company and any revenues in excess of those forecast by the Board as reflected in its order belong to the company and cannot be used, except as discussed in the following paragraph, to reduce the revenues of the utility in the future.

174 I see nothing to preclude the Board's directing that those revenues of a utility in excess of the top of the range allowed by the Board in its order as a return on common equity, be set aside and maintained in a reserve fund by an order of the Board, as contemplated by s. 69 "for a purpose which the [B]oard thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations." I do not view any revenues of a utility in excess of those required to achieve the higher point of the range of return either on rate base or on common equity as becoming excess funds unless and until they are set aside by an order of the Board as authorized by s. 69. Until such order, these funds remain the property of the utility and may be treated as such. The creation of a reserve fund is a power given to the Board to be exercised as it sees fit. Indeed, s. 69(4) gives the Board the authority to "require the utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the [B]oard's opinion, attributable to the order". Indeed, it may happen from time to time that circumstances may so change following the making of an order that a utility may need to and may actually earn revenues in excess of those contemplated by the Board when the last order was issued.

175 It follows from what I have said that the Board does not have the power to order rebates to the customers of the utility other than out of such a reserve fund. To order a rebate from revenues other than those which have been placed in a reserve fund and, in that sense, not available to the company directly, would be to make a retroactive order. A sufficiently good reason for this is that just as additional billings are not permitted to be made to customers because of revenues which have fallen below the range set when the order was made, so any additional revenues may not be paid out. The role of rate making is prospective and this is itself in my view would preclude any reaching back.

176 Reference should also be made to s. 80(1) which in may view contemplates, by the use of the words "earn annually", that each year becomes a separate unit and the revenues from one year may not be applied to another year so as to effect any change in the financial makeup of the utility, except through the use of the reserve fund, which, on its creation by order of the Board, has the effect of removing funds from the particular financial year affected by the order of the Board creating or ordering the placing of funds in the reserve fund and, in effect, makes those monies unavailable for the general use of the utility, including the payment of dividends to the holders of common equity.

177 I would answer question 3(i) in the negative, 3(ii) in the affirmative and 3(iii) in the negative.

Question #4

Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares,

in prior years?

178 Although the Board's jurisdiction is to fix and determine a rate base which will enable the utility to earn annually a just and reasonable return on that rate base, it follows that, depending on the range settled upon by the Board in its order and considering that the rates, tolls and charges are set using the mid-point of that range as

a basis, the utility may, from time to time, record net revenues which are less than or more than that contemplated by the range as set. Although the wording of s. 80 of the Act states that the utility is entitled to earn a just and reasonable return, it does not follow that it may not nor should not have revenues in excess of those contemplated. At the same time, for reasons which may be beyond the complete control of the utility, the revenues received might be substantially below those anticipated when the rates, tolls and charges were set and approved.

179 In my view, the Board cannot set rates, as argued by counsel for the Board, in a manner that would compensate for prior "excess" earnings. At the same time, in setting rates, as it must do prospectively, the Board must be alive to the various factors which may have caused the utility in any previous year to earn more or less than that anticipated by the Board in its order, and it must factor those causes into the percentages and ranges for return on rate base and for return on common equity in future orders.

180 I would answer question 4 in the negative.

Question #5

> Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be adjust and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question 4.

181 Counsel for the Board argued that the authority of the Board to amend, alter or rescind any order made by it is plenary and the Board has full power to reconsider any order made previously by it, notwithstanding that there is a right of appeal in respect of its decisions on questions of law. Further, he argued that the fact that the Board has previously ruled or ordered a particular basis for the calculation of excess revenue does not preclude the Board from considering the effect of such earlier decisions in determining what revenues will be required by the utility in setting new rates based on a just and reasonable return in accordance with a new method of calculation.

182 Counsel further argued that since there is no fixed term for the continuing application of any approved rates, tolls or charges, the Board is not precluded from altering its previous order and assessing what is a just and reasonable return based upon its current assessment of the utility. Counsel argued that s. 87(1) of the Act clearly sets out that power:

> 87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

183 The investigation undertaken under s. 87(1) follows upon a complaint made to the Board as set out in s. 84(1) and following upon the procedures set out in ss. 85 and 86 of the Act.

184 The legislation empowers and indeed directs the Board to conduct a constant monitoring of the financial position of the utility and gives the Board the authority to institute a correction process at any time. It does

not, in my opinion follow, as argued by counsel for the Board, that the Board in setting new rates, tolls and charges may take into account earnings of the utility in previous years in excess of a just and reasonable return upon the rate base or upon the investment which the Board has determined has been made in the public utility by the holders of common shares. This is so notwithstanding that the Board has previously ordered or advised a utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return upon the rate base as fixed and determined by the Board where not in excess of the return determined by the Boards to be a just and reasonable return upon the investment made by the holders of common shares.

185 Counsel for the utility argued that the Board does not have jurisdiction to order that the rates, tolls and charges shall be approved taking into account earnings in excess of a just and reasonable return, either on rate base or on common equity, in prior years. Counsel further argued that such a power would "constitute retroactive appropriation of past revenues for future purposes". He further argued that the only mechanism available to the Board, where a utility earns in excess of the rate of return on rate base or on common equity, is to require the utility to deposit excess revenue, as defined by the Board, into a reserve account in the year earned. It is then, he argued, that the Board may approve the application of these funds as revenue in determining the rates, tolls and charges for a future period but any funds not ordered to be deposited in the reserve account are funds of the utility, belong to the utility, and cannot be considered in setting future rates. To do so, he argued, would be to change the system of accounts so that funds which were not excess in a previous year will then become excess and be brought forward - a retroactive order which is beyond the jurisdiction of the Board.

186 For the Consumer Advocate it was argued that although the Board had advised the utility that it was permitted to retain earnings in excess of the rate of return as determined by the Board, it is not precluded from later making an order under s. 80(1) and s. 76 of the Act rescinding, altering or amending any existing order and in declaring these earnings as excess revenue. The Consumer Advocate also argued that in light of its position taken in response to question 4, the Board does not have jurisdiction to order that the "excess revenue" earned in previous years by the utility should be taken into account in setting rates, tolls and charges in subsequent years but that the Board must order that it be rebated to customers of the utility.

187 I agree with the position taken by the utility. I would answer question 5 in the negative.

Question #6

Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

188 The example given by the Board in its factum illustrative of the situation giving rise to question 6 is as follows:

In determining in 1991 what was a just and reasonable return on the basis of projection for test year, 1992, the Board was presented with projections for the future cost of operating expenses including advertising. The actual cost of advertising for 1995 exceeded the projection for 1992 by some $314,000.00. As such, the amounts for advertising contemplated by the Board as being reasonable, prudent and properly chargeable to

> operating account vary significantly for the year 1995 from the estimate upon which the Board determined a just and reasonable rate of return.

189 Counsel for the Board argued that "the circumstances of a significant increase in expenses over the estimates used for the test year is indistinguishable from the circumstances of an increase in net earnings. For the same reasons as advanced by it in question 5, it argued that the Board had jurisdiction to order that the rates, tolls and charges could be approved taking into account these expenses, previously incurred, but now considered inappropriate to be allowed as reasonable and prudent.

190 For the utility, it was argued that once rates, tolls and charges are set, the resulting revenue belongs to the utility except for any amounts which the Board may order to be deposited into an excess revenue account. Further, although the Board has the authority to determine whether the expenses comply with s. 80(2), which jurisdiction is necessary to ensure the integrity of the excess revenue account, the Board does not have jurisdiction to disallow the amount of any operating expenses which is reasonable or which had previously been allowed as a just allowance. Further, it argued that the Board may not disallow an expenses because it is of the opinion that had it been the manager, it would not have made that expenditure. The question is whether the expenditure is one that could have been made by a reasonable and prudent manager.

191 The utility further argued that there should be no "microscopic review" especially with the benefit of hindsight. Counsel argued that the Board makes its annual review of the returns made by the utility and, in the specific example here, the Board had obviously made the decision that that expense, although it exceeded predictions, was reasonable (or at least the fact that it didn't say anything about it would indicate that it was reasonable). That expense should not, except in very rare circumstances, be later held to be unreasonable. The utility's position was stated in its factum as follows:

> The Board does not have jurisdiction to order that rates, tolls and charges shall be approved taking into account the amount of such "disallowed" expenses. The Board's jurisdiction is limited to disallowing expenses which it determines not to be "reasonable and prudent and properly chargeable to operating account" or otherwise not a "just allowance" under s. 80(2). The disallowance of an expense would lead to the company earning a somewhat greater return on common equity for the purpose of the excess revenue account for the year in which the expense was incurred. However, this revenue remains the property of the company and its shareholders unless the amount disallowed would mean that the company's return on common equity would exceed the maximum return on common equity previously allowed by the Board. If that were to occur, the amount which would be beyond the maximum return on common equity would be deposited into the "excess revenue account".

192 For the Consumer Advocate, it was argued that the Board may take into account past expenses in order to forecast more accurately future revenues and expenditures. However, its counsel argued that the Board does not have jurisdiction to set future rates, tolls and charges designed to compensate for past expenses that the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account.

193 I agree with the arguments proferred by the utility and the Consumer Advocate.

194 I would answer question 6 in the negative.

Questions #7 & 8

Question #7

Does the Board have jurisdiction to require a public utility to maintain:

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

Question #8

Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

195 In his decision which I have read in draft, Green, J.A. considered questions 7 and 8 together because, as he stated, the issues they raise are interrelated. I agree with the reasoning of Green, J.A. in dealing with these questions and I would answer both questions, as he did, in the negative.

196 I would also agree with the comments made by Green, J.A. in that part of his decision, entitled "General Observations".

Conclusion

197 In the result then I would answer the questions posed as follows: 1(i) yes, 1(ii) yes, question 2 - yes, question 3(i) - no, question 3(ii) - yes, question 3(iii) - no, question 4 - no, question 5 - no, question 6 - no, question 7 - no, and question 8 - no.

Order accordingly.

FN1 R.S.N. 1990, c. P-47 as amended (hereinafter the "Act")

FN2 *Act*, s. 16

FN3 *Act*, s. 70

FN4 *Act*, s. 80

FN5 Board Orders P.U.6 (1991) and P.U.7 (1991)

FN6 Hereinafter, "NLP"

FN7 Pursuant to s. 117 of the Act. See OC 96-226; OC 96-236

FN8 S.N. 1994, c. E-5.1, as amended (hereinafter, the "EPC Act")

FN9 I acknowledge a large indebtedness to the following sources for much of the information referred to herein

about general regulatory principles and practice in North America: Charles F. Phillips, Jr. *The Regulation of Public Utilities* (Arlington: Public Utilities Reports Inc., 1993); A.J. deGrandpré, "Fair Returns for Utilities-Concept or Reality?" (1970), 16 McGill L.J. 19; A.B. Jackson, "The Determination of the Fair Return for Public Utilities" (1964), 7 Canadian Public Administration 343.

FN10 s. 4

FN11 See *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.) (hereinafter referred to as the "Bell Rebate case") where Gonthier, J. in response to an argument that a regulatory board did not have a particular power because it was not expressly provided for in the legislation stated at p. 1758: "This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expansion of the wider rule that the Court must not stifle the legislator's intention by reason only that a power has not been explicitly provided for."

FN12 "Nearly all the boards and commissions in the United States and Canada that regulate public utility rates do so on the basis of allowing a public utility a 'return' on the 'value' of the public utility property. The return that must be allowed is usually referred to as the 'fair return' ..." per Jackson, op.cit. fn.9, p. 343. See also *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.) per Anderson, J. at page 710: "By way of general observation ... there are substantial similarities between the situation here and in the United States, and authorities of courts in the United States are frequently referred to and considered..."

FN13 *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (U.S. 1944), per Douglas J. at page 603: "The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests"; *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), per Lamont, J. at pages 192-193: "The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested".

FN14 deGrandpré, op.cit. fn. 9, p. 20. See also *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.) per Anderson, J. at page 710: "...it is the function of the [Board] to balance the interest of the [utility] in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interests of its customers to be served as cheaply as possible". See also *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.) per Gonthier, J. at p. 1748.

FN15 *EPC Act*, s. 3(a)(iii)

FN16 *EPC Act*, s. 3(a)(i)

FN17 *EPC Act*, s. 3(b)(iii)

FN18 *Act*, s. 37(1)

FN19 *Act*, s. 70(1). Although, unlike the legislation of some other jurisdictions, s. 70 does not expressly state that the rates approved by the Board must be "reasonable" or "just and reasonable", that standard is nevertheless imported into the approval process by virtue of the *EPC Act*, s. 3(a)(i) which declares the policy of the province to be that rates must be "reasonable".

FN20 *Act*, s. 80(1)

FN21 *British Columbia Electric Railway v. British Columbia (Public Utilities Commission)*, [1960] S.C.R. 837 (S.C.C.), per Locke, J. at page 848: "The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute..."

FN22 Ibid., per Locke, J. at pages 845, 847.

FN23 Ibid., per Locke, J. at page 848: "I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases ...". This observation was adopted and followed by this Court in *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)* (1987), 25 Admin. L.R. 180 (Nfld. C.A.) at page 193.

FN24 *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (U.S. W. Va. 1923). (This case has often been referred and relied upon in subsequent decisions in the United States and Canada, including in this Court. See *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)* supra, fn. 23 at page 193.)

FN25 Ibid., page 692.

FN26 *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), per Lamont, J. at page 193.

FN27 320 U.S. 591 (U.S. 1944)

FN28 deGrandpré op.cit. fn. 9, page 28

FN29 Ibid., page 37

FN30 supra, fn. 23 at page 194

FN31 Ibid. page 194

FN32 *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (U.S. S.D. 1951), per Jackson, J. at page 251

FN33 *Bell Telephone Co. of Canada, Re* (1966), 56 B.T.C. 535 at page 731: "We are ... not persuaded that reasonableness can, in practical terms, be expressed as a fixed point from which there can be no deviation. We therefore propose to use a range of percentage earnings on total average capitalization."

FN34 *Federal Power Commission v. Hope Natural Gas Co.* Supra fn. 13 per Douglas, J. at page 603

FN35 In *Northwestern Utilities, Re* (1978), 89 D.L.R. (3d) 161 (S.C.C.), Estey, J. stated at p. 164: "The statutory pattern is founded on the concept of the establishment of rates *in futuro*... [T]he Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under the rates established for past periods." [Of course, such an approach assumes that without such rates, the utility will continue to be economically viable. If poor management leads to losses that threaten the very continued existence of the utility, the Board may well have to set future rates at a level that will enable the utility to remain operative so as to ensure continued service to customers. This is an unlikely scenario in view of the close monitoring that the Board should exercise between rate hearings.]

FN36 *EPC Act*, s. 3(1)(b)(iii)

1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

FN37 deGrandpré op.cit. fn. 9, page 26

FN38 "The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity": per Gonthier, J. in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)* supra, fn. 11 at page 1747

FN39 4th ed. rev., 1968

FN40 J.B. Sykes (ed), 7th ed.

FN41 s. 64(1)

FN42 s. 64(2)

FN43 s. 68(4)

FN44 s. 70(1). This provision makes the scheme administered by the Board a "positive approval scheme" (requiring advance approval of rates as being reasonable) rather than a "negative disallowance scheme" (permitting the utility to set its own rates subject to user objection, which would only then trigger a review into reasonableness), as those terms were explained by Gonthier, J. in the *Bell Rebate* case, supra, fn. 11 at p. 1758.

FN45 s. 78(1)

FN46 s. 78(2)

FN47 s. 91(1), (3)

FN48 supra, paragraphs [21]-[23]

FN49 *EPC Act*, s. 3(b)(iii)

FN50 See, e.g., Board Order P.U.6 (1991), page 72

FN51 Phillips, op.cit., fn. 9, p. 389

FN52 See, e.g. P.U. 6 (1991) and P.U. 7 (1996-97)

FN53 Supra fn. 13 at p.199

FN54 supra fn. 23

FN55 *Union Gas Ltd. v. Ontario (Energy Board)*, supra fn. 12

FN56 para.[30]

FN57 See *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, supra, fn. 11 at page 1733. Yvonne Penning, "The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled" (1989), 47 U of T Fac. L.R. 607 observes at p. 617: "The CRTC has developed the practice of setting the allowed ROE on the basis of a one percentile range. While only one actual ROE - usually the middle of the range - is used in the calculation of rates to be charged customers, all rates encompassed by the range, in the-

ory, represent a reasonable return. One reason for setting such a range is that it explicitly provides some incentive for the company to be efficient; financial rewards due to efficiency or productivity gains would accrue to the company's shareholders, rather than being passed on to consumers through lower prices." Another rationale for a range approach is given by Penning later in her article at p. 621 where, after noting that the U.S. Federal Communications Commission also employs ranges, states: "...it also serves a very useful administrative function in that it limits the circumstances under which it would be necessary to alter rates on a prospective basis, within the time period for which the range of rates of return was deemed to be reasonable, in response to changing economic circumstances."

FN58 s. 58

FN59 s. 69(3)

FN60 Phillips, op cit. fn. 9, page 196

FN61 See, eg. Board Order P.U.6(1991), page 81

FN62 S. 80(4)

FN63 S. 3(a)(ii)

FN64 *Northwestern Utilities, Re*, supra fn. 35, per Estey, J. at p. 170: "...the Act does not prevent the Board from taking into account past experiences in order to forecast more accurately future revenues and expenses of a utility".

FN65 supra, fn. 11 at p. 1734.

FN66 See supra, para. [33]

FN67 *Wabush (Town) v. Power Distribution District of Newfoundland & Labrador* (1988), 71 Nfld. & P.E.I.R. 29 (Nfld. C.A.), per Goodridge, C.J.N. at p. 33.

FN68 op cit. fn. 57, pp. 608-610

FN69 Ibid, p. 610

FN70 *E.P.C. Act*, s. 3(b)(iii)

FN71 s. 3(b)(i)

FN72 s. 3(b)(iii)

FN73 s. 3(b)(iii)

FN74 Paras. [21]-[23]

FN75 Supra fn 11, at p. 1734

FN76 Op.cit. fn. 57 at page 619

1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

FN77 supra, fn. 11 at page 1762 - 3

FN78 para.[73]

FN79 paras.[31], [50]

FN80 *Act*,s.80(2)

FN81 Phillips, op.cit. fn. 9, pages 256-257

FN82 Ibid. page 256

FN83 supra, para. 32

FN84 *Union Gas Ltd. v. Ontario (Energy Board)* supra fn. 12 per Anderson, J. at page 712.

FN85 *Acker v. United States*, 298 U.S. 426 (U.S. Ill. 1936), per Roberts, J. at pages 430-431

FN86 Phillips, op. cit. fn. 9, at page 258

FN87 deGrandpré op cit. fn. 9, page 26; Phillips op. cit. fn. 9, page 233

FN88 Phillips, op. cit. fn. 9, pages 388-389

FN89 op. cit. fn. 9, page 26. See also to the same effect Phillips, op. cit. fn. 9, page 233

FN90 Phillips, op. cit. fn. 9, p. 234

FN91 paragraphs [31] - [32]

FN92 Phillips, op. cit. fn. 9, p. 236

FN93 Ibid.

FN94 Phillips, op. cit. fn. 9, pages 388-392

FN95 Ibid., page 389

FN96 Ibid., page 391

FN97 *Bell Telephone Co. of Canada, Re*, supra. fn. 33 at page 723: "...the Board has, when the circumstances so warrant it, seen fit to adjust the company's debt-ratio *for rate making purposes*."

FN98 No doubt as a practical matter, the Board would also be hesitant to make assumptions respecting a utility's capital structure for rate-making purposes, that are different from the actual structure which will have been created as a result of previous approvals given by the Board (though perhaps in not as focused a context as a rate hearing and without the benefit of argument from rate hearing participants, such as the Consumer Advocate) to the issuing of individual share or other financial instruments in the past pursuant to s. 91.

FN99 paragraph [128]

1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

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TAB 7

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 1

by

ROBERT W. MACAULAY, Q.C.

and

JAMES L.H. SPRAGUE, B.A., LL.B.

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such a broad purpose that no particular aim can be ascribed to the broad grant of discretion. See for example, *R. v. Morales*[27] the Supreme Court of Canada struck down the Criminal Code bail provision which directed that bail was to be denied where detention was justified in the "public interest". Chief Justice Lamer stated:

> Nor would it be possible in my view to give the term 'public interest' a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term 'public interest' would be capable of rendering it a provision which gives any guidance for legal debate.

5B.5 THE EXERCISE OF DISCRETION

This section discusses the manner in which discretion should be exercised. It, along with the earlier discussion in 5B.3(a) and 5B.3(b),[28] outlines the legal principles relating to the exercise of discretionary authority. As discussed in more detail below in section 5B.6 a court on judicial review will not interfere with a discretionary decision except where the discretion has been exercised in breach of a relevant legal principle (provided that the merits of the decision can be seen as being plausible). Those principles are discussed in this section and in the preceding sections 5B.3(a) and (b). The reader will discover that there is sometimes a certain amount of overlap between the various principles.

These principles are all implicit in a grant of discretion. That is to say, a simple grant of discretionary authority carries with it all of these implicit parameters. Thus, the courts have held that where one or more of these principles

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standard – an exercise of discretion other than in accordance with the common law principles can and will be struck down.

. . .

Given the clarity of the prohibition in s. 38(2)(e) and the common law constraints on the exercise of discretion, in my view it cannot be said that the limit imposed by s. 38(2)(e) is arbitrary."

See also *Harper v. Canada (Attorney General)* (2004), 239 D.L.R. (4th) 193, 320 N.R. 49 (S.C.C.) where the Supreme Court of Canada had to determine whether the definition of "election advertising" in the Canada Elections Act was unduly vague. In upholding the definition the Court found that the definition was not unduly vague.

> A provision will be considered impermissibly vague where there is no adequate basis for legal debate or where it is impossible to delineate an area of risk . . . The interpretation of the terms at issue here must be contextual. It is clear that a regulatory regime cannot by necessity provide for a detailed description of all eventualities and must given rise to some discretionary powers — a margin of appreciation. What is essential is that the guiding principles be sufficiently clear to avoid arbitrariness.

27 *R. v. Morales* (1992), 77 C.C.C. (3d) 91, [1992] 3 S.C.R. 711 (S.C.C.).

28 5B.3(a) "Presumptions in a Grant of Discretion". 5B.3(b) "Discretion to be Used for Purposes of Enabling Legislation."

have been breached the decision-maker has made an error going to jurisdiction. In other words, the decision-maker is exercising a power in a way, or for a purpose, which Parliament did not intend when it originally made the grant. Having said this, a legislature is always free, however, to oust one or all of these principles by express or implicit direction in the statute.[29] Where that happens it cannot be said that the decision-maker was expected to follow the ousted principle in the exercise of his or her discretion.

5B.5(a) Discretion Must Be Exercised

When Parliament gives discretion to an official it intends that that official exercise the discretion when the situation arises. To exercise discretion does not necessarily require that the official actually take some action. Where the grant of discretion contains the authority to determine when it is appropriate or proper act the official will be considered to have exercised the discretion as long as the official considers whether he or she should act or not. The official need not decide to actually take some action as a result of that consideration. His or her judgment may indicate that this is not the proper time to act. But in considering whether or not action should be taken, the official has exercised the discretion that went to determining when to act. If the official had simply refused to even consider whether it was appropriate to act, or not, the official would have failed to exercise the discretion granted by Parliament and would have erred.[30] One can see that if

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29 This is discussed, for example, in *Hallmark Poultry Processors Ltd. v. British Columbia (Marketing Board)*, 2000 CarswellBC 736 (B.C. S.C.). See, to the same effect *Canada (Attorney General) v. Georgian College of Applied Arts & Technology* (2003), 2 Admin L.R. (4th) 24 (Fed. C.A.), where the Court of Appeal, in discussing the operation of a discretionary power to award costs, frequently refers to the general principles respecting discretion being subject to legislative direction to the contrary.

30 *Martinoff v. R.* (1993), 18 Admin. L.R. (2d) 191 (Fed. C.A.); *Friends of the West County Assn. v. Canada (Minister of Fisheries and Oceans)*, 1999 CarswellNat 2081, 248 N.R. 25, [2000] 2 F.C. 263 (Fed. C.A.), leave to appeal to S.C.C. denied 2000 CarswellNat 2379, 262 N.R. 395 (note) (S.C.C.); *Manlangit v. Canada (Minister of Employment & Immigration)* (1987), 78 N.R. 1 (Fed. C.A.); *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18; *Workers Compensation Board v. British Columbia (Council of Human Rights)* (1990), 70 D.L.R. (4th) 720 (B.C. C.A.).

See also *Wang v. Canada (Minister of Citizenship & Immigration)*, 2007 Carswell 1317, 2007 FC 531 (Fed. Ct.). In that case a refugee claimant had failed to give proper notice of an intention to call an expert as a witness as required by the Rules of the Immigration and Refugee Board. While the Rules provided that failure to give proper notice would result in a witness not being permitted to be called, those Rules also granted the Board discretion to permit the witness to be called notwithstanding the non-compliance. The Rules also granted a separate discretion to the Board to release any party from compliance from the Rules, and discretion to extend or shorten time limits. In the case in point the Board made no inquiries as to the reason for the failure to comply with the Rules, the nature and importance of the evidence to be given by the witness, or any harm to the process if the witness were to be allowed to be called. It simply refused to hear the witness by reason of the technical breach of the notice provision. The Federal Court quashed

Parliament has entrusted the determination of the need for action, or the determination of the type of action which should be taken, to the judgment of another, the refusal of that other to exercise that discretion amounts to a refusal to complete the legislative scheme. Parliament has said, "I will leave this gap here to be filled by you when and if necessary." If the official turns his or her back on that grant then Parliament's legislative scheme is left with a hole.

For an interesting case where a Minister attempted to use a democratic process to avoid the necessity of his having to actually exercise his discretion see *Heisler v. Saskatchewan (Minister of Environment & Resource Management)* (1999), 16 Admin. L.R. (3d) 215 (Sask. Q.B.). In that case a Minister with the statutory discretion to divide up an area between outfitters essentially tried to

(*Continued on page 5B–15*)

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the decision of the Board on the grounds that it had breached its duty of fairness by failing to properly exercise its discretion in giving its refusal without making any of the above enquiries. However, this appears to be more of a case of a refusal to exercise discretion rather than an improper exercise.

See also *Karbalaeiali v. British Columbia (Deputy Solicitor General)*, 2007 CarswellBC 2822, 2007 BCCA 553 (B.C.C.A.) where the decision-maker failed to exercise its discretion because it improperly interpreted the statute as being mandatory rather than discretionary. Not believing that it had any discretion the agency obviously failed to exercise it.

duck the issue by requiring the applicants to resolve the division between themselves. He took the position that whatever they resolved he would approve. The Saskatchewan Court of Queen's Bench felt that the Minister had erred in failing to bring any of his own discretion to the issue and at least consider whether the agreed upon division was appropriate.[30.1]

5B.5(b) Discretion Must Be Exercised by the Person Who Possesses It — Not Someone Else

When a decision-maker exercises discretion he or she must do what he or she judges to be correct according to law, not what his or her employer, supervisor, peer or friends judge.[31] It is the judgment of the discretion holder which must be exercised. (Where the discretion has been lawfully delegated, the duty falls upon the delegate to use his or her own judgment in the exercise of the delegated discretion.)

This is implicit in the grant of a discretionary power. However, legislation may also alter or reduce the independent judgment contained in a grant of discretion. The issue in each case is the degree to which Parliament or a legislature intended the decision-maker to be bound by the judgment of others in the exercise of his or her discretion- or, in other words, the degree to which the operation of the ordinary principles implicit in a grant of discretion were intended to be altered by legislative direction. In *Yukon (Utilities Board) v. Yukon (Commissioner in Executive Council)*, 1987 CarswellYukon 1, 15 B.C.L.R. (2d) 139, 26 Admin. L.R. 239 (Y.T.C.A.), the Yukon Court of Appeal concluded that the Yukon Utilities Board was bound to follow a direction of the Commissioner in Executive Council to use its discretionary powers to adjourn a proceeding. In that case the relevant statute directed that the Board was to "comply with any general or special direction of the Commissioner in Executive Council with respect to the powers and functions of the Board."[31.1]

The Yukon case distinguished an earlier decision of the Saskatchewan Court of Appeal in *Re Public Utilities Review Commission (Sask.)*, 1986 CarswellSask 121, 52 Sask. R. 53, 26 Admin. L.R. 126 (Sask. C.A.). The Saskatchewan Court

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30.1 The Court found this to be an improper delegation of authority by the Minister. But it could also amount to the Minister simply failing to exercise his discretion at all.

31 *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 15 D.L.R. (2d) 689 (S.C.C.); *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming & Liquour Commission)* (1999), CarswellAlta 167, 241 A.R. 45, 18 Admin. L.R. (2d) 121 (Alta. Q.B.) (both cases involved decision-makers acting on the direction of other levels of government or government official).

31.1 The British Columbia Supreme Court made a similar decision in *H.E.U. v. Northern Health Authority* (2003), 2 Admin. L.R. (4th) 99 (B.C.S.C.) where, in a passing reference, the Court acknowledged that a statutory provision requiring a regional health board "to comply with any general or special direction made by regulation of the minister with respect to the exercise of the powers and the performance of the duties of the board" gave a minister the authority to "issue directions to board members, which they must follow."