EB-2009-0038

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

AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities;

OPG BRIEF OF AUTHORITIES

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TAB 1

Ontario Energy Board
Commission de l'Énergie de l'Ontario

EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

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

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error of law or jurisdiction, including a breach of natural justice;

(ii) error in fact;

(iii) a change in circumstances;

(iv) new facts that have arisen;

(v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

(vi) an important matter of principle that has been raised by the order or decision;

(b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, ...

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4^{th}) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms..."

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference..."

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,..., make orders for (a) the exchange of documents, ..."

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out ... any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;..." While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words "may include" in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board's rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word "shall".

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be "special". Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

TAB 2

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

DONALD J.M. BROWN, Q.C.

AND

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three grounds on which *certiorari* may be sought: namely, error of law on the face of the record, breach of the rules of natural justice or fairness, and jurisdictional error or want of authority. Moreover, it has been held to be a breach of the principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* to base a decision on a finding of fact supported by no evidence.[59]

15:2121 *Error of Law on the Face of the Record*

A decision reviewable for error of law on the face of the record may be set aside if it is based on a material finding of fact that is not supported by evidence, and if the absence of evidence is apparent on the face of the record of the tribunal's proceedings.[60] However, review of administrative action on this basis has three limitations. First, any action that is not amenable to review by *certiorari*, which includes the exercise of a power that is of a legislative or general policy nature,[61] cannot be set aside on the ground that it was based on a finding of fact for which there was no evidence. Second, if the tribunal does not provide reasons for its decisions, as a practical matter it will generally be impossible to establish this ground of review.[62] Third, where there is a preclusive clause a court may not review the decision of a tribunal for mere error of law on the face of the record.[63]

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review of findings of fact, see topic 15:2141, *post*.

[59] *Demaria v. Canada (Regional Transfer Board)*, [1988] 2 F.C. 480 (FCTD).

[60] See in particular *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128 (P.C.); see also *Amalco Foods (Dominion Stores Div.) v. C.A.W., Local 597* (2000), 196 P.E.I.R. 20 (Nfld. S.C.); *Leduc (County) v. Safety Codes Council* (1999), 252 A.R. 350 (Alta. Q.B.) (inadequate reasons); *Doiron v. Duplisea* (1998), 515 A.P.R. 15 (NSCA); *Huerto v. Saskatchewan (Minister of Health)*, [1999] 1 W.W.R. 471 (Sask. Q.B.); *McCann, Re* (1970), 10 D.L.R. (3d) 103 (Ont. C.A.); *Canadian Odeon Theatres Ltd. v. Saskatchewan (Human Rights Commn.)* (1985), 39 Sask. R. 81 (Sask. C.A.), leave to appeal to SCC refd (1985), 18 D.L.R. (4th) 93(n); *Harmatiuk v. Pasqua Hospital* (1987), 56 Sask. R. 241 (Sask. C.A.); *Bennie v. Prince Edward Island (Grievance Review Board)(No. 2)* (1978), 18 Nfld. & P.E.I.R. 18 (PEICA); *Michelin Tires (Can.) v. Ross* (1979), 33 N.S.R. (2d) 357 (NSCA); *Ontario v. O.P.S.E.U.* (1990), 37 O.A.C. 218 (Ont. Div. Ct.); *C.U.P.E. v. Saskatoon Gallery & Conservatory Corp.* (1987), 57 Sask. R. 262 (Sask. C.A.). For the duty to give reasons, and the adequacy of reasons, including the need to make findings of fact, see topic 12:5000, *ante*. And on the definition of the "record" in this context, see topic 6:5400, *ante*.

[61] See topic 1:2220, *ante*.

[62] *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128 (P.C.).

[63] E.g. *Thorpe v. Village Motor Hotel Ltd.* (1969), 8 D.L.R. (3d) 186 (Sask. C.A.); *Farrell v. British Columbia (Workmen's Compensation Board)*, [1962] S.C.R. 48; *Noranda*

Today, however, as a result of the expansion of the concept of jurisdictional error by the courts to include an absence of evidence, and the statutory reforms in Ontario, British Columbia, Prince Edward Island and the federal jurisdiction, these limitations are much diminished.

15:2122 *"No Evidence" as Jurisdictional Error*

For nearly 60 years, it was generally accepted that an adjudicative tribunal did not exceed its statutory authority merely by basing its decision on a finding of fact that was unsupported by any evidence,[64] unless the fact in question was "jurisdictional" in nature. Since the late 1970s, however, the courts have quietly abandoned this restrictive approach,[65] and have elevated "no evidence" to an independent ground of review with the essential characteristics of jurisdictional error. That is, it can be proved by evidence extraneous to the tribunal's record, and judicial review is not subject to ouster by a preclusive clause.

In the case that marked the most decisive rejection of the earlier law, a decision of a labour arbitrator was held to be invalid on the ground that arbitrators have no jurisdiction to base their awards on findings of fact that are supported by "no evidence."[66] Moreover, the court admitted evidence not in the tribunal's record to establish the error.[67] And subsequently, the Supreme Court of Canada affirmed that

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Mines Ltd. v. R., [1969] S.C.R. 898.

[64] *R v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128 (P.C.) was the leading authority. Although the case concerned a summary criminal conviction from which there was no statutory right of appeal, it was regarded as equally applicable to decisions of administrative tribunals. For one of the last decisions in which the learning of *Nat Bell* was followed, see *Woodward Stores (Westmount) Ltd. v. Alberta (Assessment Board Division No. 1)* (1976), 69 D.L.R. (3d) 450 (Alta. T.D.).

[65] E.g. *Quebec (Attorney General) v. Labrecque*, [1980] 2 S.C.R. 1057 at 1076-79.

[66] *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). In the event, the court did not quash the decision, because the unsupported finding of fact was not material to the arbitrator's award, in the sense that there were other findings that amply justified his conclusion that the dismissal of the employee was justified. For an earlier statement of this position, see *Sooke Forest Products Ltd. v. I.W.A., Local 1-118* (1970), 1 D.L.R. (3d) 622 (BCCA). See also *Telus Communications Inc. v. Canadian Radio-television and Telecommunications Comm'n* (2004), 246 D.L.R. (4th) 1 (FCA) (part of earlier decision had been rendered in absence of evidence to support it; akin to jurisdictional error so part of decision a nullity).

[67] See also *Securicor Investigation & Security Ltd. v. Ontario (Labour Relations Board)* (1985), 18 D.L.R. (4th) 151 (Ont. Div. Ct.); *Windsor (City) Board of Education v. Windsor Women Teachers Assn.* (1991), 86 D.L.R. (4th) 345 (Ont. C.A.); and see also

decisions may be quashed for "no evidence," despite the presence of a preclusive clause.[68] As the majority in that case stated:

> An unreasonable error of fact has been characterized as an error of law. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.[69]

Accordingly, the findings of fact of a wide range of administrative adjudicators have been subject to review, including a rent control tribunal,[70] labour arbitration boards,[71] labour relations boards,[72] workers' compensation boards,[73] the National Energy Board,[74] a

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MacDonald v. Nova Scotia (Workers' Compensation Board) (1995), 33 Admin. L.R. (2d) 294 (NSTD), which sets out the situations in which affidavit evidence will be admitted in judicial review proceedings. And see *Rendez-Vous Inn Ltd. v. St. Paul (Town)* (1999), 253 A.R. 276 (Alta. Q.B.); ("no evidence" finding did not appear on face of record, so *certiorari* not available on this basis). As to the evidence in support of applications for judicial review generally, see topic 6:5000, *ante*.

[68] *Blanchard v. Control Data Canada Ltée*, [1984] 2 S.C.R. 476; and see *Dairy Producers Co-operative Ltd. v. Teamster, Dairy & Produce Workers, Local 834* (1993), 16 Admin. L.R. (2d) 77 (Sask. C.A.); *Maritime Electric Co. v. I.B.E.W., Local 1432* (1993), 350 A.P.R. 119 (PEICA).

[69] *Blanchard v. Control Data Canada Ltée*, [1984] 2 S.C.R. 476 at 494.

[70] *Blanco v. Rental Commn.*, [1980] 2 S.C.R. 827 at 832.

[71] *Toronto Professional Fire Fighters' Assn. v. Toronto (City)* (2002), 215 D.L.R. (4th) 100 (Ont. Div. Ct.), aff'd (2003), 231 D.L.R. (4th) 559 (Ont. C.A.); *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.); *Foothills Provincial General Hospital v. U.N.A., Local 115* (1993), 10 Alta. L.R. (3d) 254 (Alta. Q.B.); *Regina School Division No. 4 v. Teachers of Saskatchewan* (1996), 140 D.L.R. (4th) 300 (Sask. C.A.); and see *Midland Courier v. Gomes* (1994), 73 F.T.R. 286 (FCTD) (labour adjudicator).

[72] *U.A., Local 740 v. W.W. Lester (1978) Ltd.*, [1990] 3 S.C.R. 644; *Securicor Investigations & Security Systems Ltd. v. Ontario (Labour Relations Board)* (1985), 18 D.L.R. (4th) 151 (Ont. Div. Ct.); *Okanagan College Faculty Assn. v. British Columbia (Labour Relations Board)* (1988), 33 B.C.L.R. (2d) 149 (BCCA); see also *Cadillac Fairview Corp. v. R.W.D.S.U.* (1989), 42 Admin. L.R. 214 (Ont. C.A.), where the Ontario Court of Appeal reviewed findings of a labour relations board for "no evidence."

[73] E.g. *Metropolitan Entertainment Group v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2007), 278 D.L.R. (4th) 674 (NSCA) (patently unreasonable findings

university senate committee,[75] a human rights tribunal[76] and the Canadian International Trade Tribunal.[77] Moreover, while one influential ruling was premised on the implicit requirement that an adjudicative decision-maker base any findings of fact exclusively on the evidence adduced at the hearing,[78] the extension of the duty of fairness to more informal adjudicative decision-making[79] may also result in review of those types of decisions for jurisdictional error based on "no evidence."[80]

On the other hand, while applicants may resort to evidence outside the tribunal's record to establish that there was no evidence for a particular finding of fact,[81] they will not be permitted to introduce evidence that was not before the administrative decision-maker,[82]

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of fact amount to error of law); *Osmond v. Workers' Compensation Board (Newfoundland)* (2001), 603 A.P.R. 202 (Nfld. C.A.) (finding of fact based on no evidence is patently unreasonable); *Stevens v. Nova Scotia (Workers' Compensation Appeal Board)* (1987), 189 A.P.R. 342 (NSCA); **see also** *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 2 Admin. L.R. (3d) 178 (Nfld. S.C.).

[74] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 178; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

[75] *McInnes v. Simon Fraser University* (1982), 140 D.L.R. (3d) 694 (BCSC), aff'd (1983), 3 D.L.R. (4th) 708 (BCCA).

[76] *Potter v. Korn* (1996), 134 D.L.R. (4th) 437 (BCSC).

[77] *National Corn Growers Assn. v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324.

[78] *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.).

[79] This has most obviously occurred in connection with the courts' imposition of procedural requirements through the duty of fairness: **see** topic 7:2000, *ante*; and for the analogous extension of the availability of the orders of *certiorari* and prohibition: **see** topic 1:2200, *ante*.

[80] E.g. *LGS Group Inc. v. Canada (Attorney General)* (1995), 34 Admin. L.R. (2d) 208 at 226 (FCTD).

[81] *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.); **see also** *Securicor Investigation & Security Ltd. v. Ontario (Labour Relations Board)* (1985), 18 D.L.R. (4th) 151 (Ont. Div. Ct.); *MacDonald v. Nova Scotia (Workers' Compensation Board)* (1995), 33 Admin. L.R. (2d) 294 (NSTD).

[82] *Page v. Registered Nurses' Assn. (Saskatchewan)* (1983), 26 Sask. R. 108 (Sask. Q.B.); *VIA Rail Canada Inc. v. Canada (Human Rights Commission)*, [1998] 1 F.C. 376 (FCTD); *Ontario Hydro v. Ontario (Assistant Information and Privacy Commissioner)* (1996), 97 O.A.C. 324 (Ont. Div. Ct.), leave to appeal to Ont. C.A. ref'd Feb. 24, 1997; *LGS Group Inc. v. Canada (Attorney General)* (1995), 34 Admin. L.R. (2d) 208 at 226 (FCTD); *MacDonald v. Nova Scotia (Workers' Compensation Board)* (1995), 33 Admin. L.R. (2d) 294 (NSTD); *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.); *Medis Health and Pharmaceutical Services Inc. v. Teamsters etc. Local 132* (2001), 147 O.A.C. 334 (Ont. Div. Ct.). **See also** *Hinds v. Ontario*

unless, possibly, the decision-maker ought to have been aware of it.[83] The reasons for this limitation would seem to be twofold: to preserve the integrity of the administrative decision-making process, and to give effect to the public interest in finality.[84]

15:2123 *"No Evidence" as a Breach of the Duty of Procedural Fairness*

It has been said that it is a breach of the duty of fairness for an administrative adjudicator to base a decision on a finding of fact that is supported by "no evidence," since to allow decision-makers to exercise their power without regard to the material put before them would render the right to make representations a mere formality.[85] Similarly,

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(Superintendent of Pensions) (2002), 58 O.R. (3d) 367 (Ont. C.A.); *Arduengo v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 468 (FCTD); *Buck v. Canada (Human Rights Commission)* (1996), 105 F.T.R. 250 (FCTD). And see topics 5:2130, 6:5300, *ante*.

[83] Compare *Secretary of State for Education & Science v. Tameside Metropolitan Borough Council*, [1977] A.C. 1014 at 1030 (C.A. and H.L.), *per* Scarman L.J. And it has been held to be a breach of the duty of fairness for a human rights commission to fail to conduct a reasonably thorough investigation of a complaint before deciding whether to dismiss it or to refer it for adjudication: see *Canadian Broadcasting Corp. v. Canada (Human Rights Commn.)* (1993), 71 F.T.R. 214 (FCTD); *Boahene-Agbo v. Canada (Human Rights Commn.)* (1994), 86 F.T.R. 101 (FCTD); *Bell Canada v. Communications, Energy & Paperworkers Union of Canada* (1997), 127 F.T.R. 44 (FCTD).

[84] For the apparently greater willingness of English courts to intervene to correct obvious factual errors, see T.H. Jones, "Mistake of Facts in Administrative Law" [1990] *Public Law* 507; I. Yeats, "Findings of Fact: The Role of the Courts" in G. Richardson & H. Genn, eds., *Administrative Law & Government Action* (Oxford: Clarendon Press, 1994) c. 6; and see generally S.A. de Smith, Lord Woolf & J. Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) c. 5-090-96.

[85] E.g. *R. v. Deputy Industrial Injuries Commissioner, Ex p. Moore*, [1965] 1 Q.B. 456 at 488 (C.A.); *Minister for Immigration & Ethnic Affairs v. Pochi* (1980), 31 A.L.R. 666 at 689 (Aust. Fed. Ct.); *Mahon v. Air New Zealand Ltd.*, [1984] A.C. 808 at 821 (P.C.); *Australian Broadcasting Tribunal v. Bond* (1990), 170 C.L.R. 321 at 365-67 (H.C.), *per* Deane J., but contrast the view of Mason C.J. at 357. Until recently, courts in Canada have been reluctant to commit themselves to this proposition, perhaps because to do so could result in review for "correctness" rather than by some standard of deference: see topic 15:2140, *post*. The closest that they have generally come is to hold that ignoring evidence is a breach of the duty of fairness: e.g. *O.P.S.E.U. v. Ontario* (1984), 5 D.L.R. (4th) 651 (Ont. Div. Ct.); and see *Sheddy v. Law Society of British Columbia* (2007), 58 Admin. L.R. (4th) 48 (BCCA) (breach of natural justice to make decision on basis of no evidence, and on issue not before tribunal); *Okanagan College Faculty Assn. v. British Columbia (Labour Relations Board)* (1988), 33 B.C.L.R. (2d) 149 (BCCA). As well, the courts have linked the failure of a human rights commission adequately to investigate a complaint with a breach of the duty of fairness: e.g. *Bell Canada v. Communications, Energy & Paperworkers Union of Canada*, (1997), 127 F.T.R. 44 (FCTD). However, see now *Morneault v. Canada (Attorney General)*, [2000] F.C.J. No. 705 (FCA), where a

TAB 3

Case Name:

Sheddy v. Law Society of British Columbia

Between
Lee Murray Bill Sheddy, Appellant, and
The Law Society of British Columbia, Respondent

[2007] B.C.J. No. 495

2007 BCCA 96

237 B.C.A.C. 121

58 Admin. L.R. (4th) 48

156 A.C.W.S. (3d) 470

2007 CarswellBC 528

Vancouver Registry No. CA034053

British Columbia Court of Appeal
Vancouver, British Columbia

Finch C.J.B.C., Huddart and Chiasson JJ.A.

Oral judgment: February 7, 2007.
Released: March 14, 2007.

(33 paras.)

[Editor's note: Supplementary reasons for judgment were released October 12, 2007. See [2007] B.C.J. No. 2212.]

Administrative law -- The hearing -- Procedure -- Appeal by lawyer from decisions by Law Society panel, finding he acted incompetently and imposing reprimand, allowed -- Lawyer allegedly had witness swear affidavit without having all exhibits attached -- Panel erred in making finding regarding practice of having exhibits attached on no evidence -- Panel should not have permitted amendment of error in citation without following proper procedure -- Panel erred in finding incompetence where professional misconduct was only allegation against lawyer.

Administrative law -- Statutory appeal and judicial review -- When available -- Error of law -- Appeal by lawyer from decisions by Law Society panel, finding he acted incompetently and imposing reprimand, allowed -- Lawyer allegedly had witness swear affidavit without having all exhibits attached -- Panel erred in making finding regarding practice of having exhibits attached on no evidence -- Panel should not have permitted amendment of error in citation without following proper procedure -- Panel erred in finding incompetence where professional misconduct was only allegation against lawyer.

Legal profession -- Barristers and solicitors -- Relationship with client -- Duty of competence -- Appeal by lawyer from decisions by Law Society panel, finding he acted incompetently and imposing reprimand, allowed -- Lawyer allegedly had witness swear affidavit without having all exhibits attached -- Panel erred in making finding regarding practice of having exhibits attached on no evidence -- Panel should not have permitted amendment of error in citation without following proper procedure -- Panel erred in finding incompetence where professional misconduct was only allegation against lawyer.

Professional responsibility -- Discipline -- Appeals and judicial review -- Grounds -- Unprofessional conduct -- Appeal by lawyer from decisions by Law Society panel, finding he acted incompetently and imposing reprimand, allowed -- Lawyer allegedly had witness swear affidavit without having all exhibits attached -- Panel erred in making finding regarding practice of having exhibits attached on no evidence -- Panel should not have permitted amendment of error in citation without following proper procedure -- Panel erred in finding incompetence where professional misconduct was only allegation against lawyer.

Professional responsibility -- Professions -- Legal -- Lawyers -- Appeal by lawyer from decisions by Law Society panel, finding he acted incompetently and imposing reprimand, allowed -- Lawyer allegedly had witness swear affidavit without having all exhibits attached -- Panel erred in making finding regarding practice of having exhibits attached on no evidence -- Panel should not have permitted amendment of error in citation without following proper procedure -- Panel erred in finding incompetence where professional misconduct was only allegation against lawyer.

Appeal by Sheddy from two decisions of the Benchers of the Law Society, concluding Sheddy acted incompetently in permitting a witness to swear an affidavit, and imposing a reprimand. The case had proceeded on the basis that the sole allegation against Sheddy was professional misconduct. The Review Panel of the Bencher concluded professional misconduct was not proven, but nonetheless made a finding of incompetence against Sheddy, for allowing a witness to swear an affidavit with an exhibit missing. The panel noted there was no judicial authority or rule specifying the circumstances relating to the swearing of affidavits, but made reference to a British Columbia practice of having all exhibits before the deponent at the time the affidavit was made. Prior to the hearing, the panel permitted the amendment of the citation against Sheddy to correct an error identifying the deponent as his client rather than a witness.

HELD: Appeal allowed. Since the issue of incompetence was not before the panel, it was fundamentally unfair for the panel to make such a finding. No evidence was presented regarding the practice or convention in the handling of exhibits relative to affidavits. To make a finding of fact on no

evidence was an error of law. Regardless of whether or not such a practice existed, this was not in issue before the panel. The panel also failed to follow proper procedure in amending the citation.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 51(8)

Law Society Rules, Rule 15-5

Legal Profession Act, s. 38(4), s. 46

Counsel:

M.L. Smith: Counsel for the Appellant.

J.A. Doyle: Counsel for the Respondent.

Reasons for judgment were delivered by Finch C.J.B.C., concurred in by Huddart J.A.. Separate concurring reasons were delivered by Chiasson J.A. (para. 25).

1 FINCH C.J.B.C. (orally):-- Mr. Sheddy, a member of the Law Society of British Columbia, appeals from two decisions of the Benchers of the Society pronounced 2 February 2005 and 19 April 2006. In the first of those decisions, a Review Panel of the Benchers held that Mr. Sheddy's conduct in permitting a witness to swear an affidavit, with one exhibit not attached, was incompetent. In the second decision, a Hearing Panel imposed a reprimand as penalty for the incompetence.

2 Mr. Sheddy raises many grounds of appeal. They include whether:

1. the Review Panel had jurisdiction to find incompetence in a proceeding which, by consent, had been treated as an allegation of professional misconduct;
2. there was an evidentiary basis for a finding of incompetence; and
3. there was a breach of the rules of natural justice in failing to provide Sheddy an opportunity to make full answer to the allegation of incompetence.

3 There are other grounds of appeal, but they were not addressed on this appeal and, in my view, it is not necessary to go beyond the three just mentioned.

4 An issue arose in these proceedings as to whether Mr. Sheddy's notice of appeal was filed and served out of time. The Law Society applied to quash the appeal as out of time, Mr. Sheddy applied for an extension of time, if necessary.

5 Those applications were heard by Mr. Justice Donald in Chambers. He gave written reasons for judgment holding that an extension of time was necessary, and that the extension of time should be granted in the interests of justice.

6 In the course of those reasons, Donald J.A. provided a sufficient summary of the basic facts giving rise to this appeal. He wrote:

[5] The Law Society cited Mr. Sheddy for presenting in court an affidavit which he had, in the Law Society's view, completed in an irregular manner. The Law Society issued a notice of hearing dated 28 April 2004, which said, in part:

> TAKE NOTICE THAT by direction of the Chairman of the Discipline Committee of the Law Society of British Columbia, a Hearing Panel of the Law Society will, on the day and at the time hereinafter mentioned, conduct a Hearing to inquire into your conduct or competence, as a member of the Law Society of British Columbia, the nature of which is stated in the Schedule attached hereto to determine:
>
> a) whether you have done one or more of the following:
>
> i) professionally misconducted yourself;
> ii) conducted yourself in a manner unbecoming a member;
> iii) contravened the Legal Profession Act or a rule made under it;
> iv) incompetently carried out duties undertaken by you in your capacity as a member of the Society.

[Emphasis added.]

[6] I have given emphasis to the references to competence in the notice because a Review Panel of the Benchers ultimately determined that Mr. Sheddy's conduct was not professional misconduct as found by the Hearing Panel, but incompetence. The Review Panel remitted the question of penalty to the Hearing Panel which issued a reprimand to Mr. Sheddy.

[7] The Hearing Panel was constituted by a single bencher, Robert W. McDiarmid, Q.C. The hearing began on 4 August 2004 and the parties presented an agreed statement of facts, recorded in the Hearing Panel's decision:

1. Mr. Lee Murray (Bill) Sheddy is a member of the Law Society of British Columbia and was called to the Bar in 1992.
2. At all material times the Respondent was a sole practitioner, practicing in the areas of matrimonial, employment and personal injury litigation.
3. Between 2001 and 2003, the Respondent acted for Ms. S in matrimonial proceedings where custody and access were in issue. Her husband, Mr. J.S. was represented by three different counsel over this period.
4. The Respondent was originally retained by Ms. S on a legal aid certificate. The legal aid certificate was withdrawn following changes

in funding criteria. Thereafter the Respondent proceeded on a disbursement-only retainer such that he was effectively acting "pro bono".

5. On November 8, 2002, the Respondent appeared before the Honourable Mr. Justice Groberman. J.S. and his counsel were also in attendance. The Respondent handed up an Affidavit sworn by T. Mr. J.S.'s counsel objected on the basis of late service.

6. The following exchange took place between the Respondent and the Court:

> The Court: Is there an explanation for why this Affidavit is so late in the day?
>
> Mr. Clokie: You should note that it was sworn October 25th. My friend had ample time to get it over to my office. He should not have left it ...
>
> The Court: No, I'll hear you in a moment.
>
> Mr. Sheddy: It wasn't ... It wasn't delivered to my friend immediately because the ... the attachments were not forwarded to our office until just two or three days ago. Mrs. T. had to go through her tapes and find the ... find the ... We are talking three or four years worth of tapes to find the ... find the materials which she wanted to give to me, and in addition to that she also had to consult her bookkeeper to get a copy of the cheque, which is attached as exhibit B. So as a result we couldn't give the Affidavit without the ...
>
> The Court: I am having some difficulty following this.
>
> Mr. Sheddy: Well the ...
>
> The Court: She swore this Affidavit without the exhibits?
>
> Mr. Sheddy: She swore it without the ... Well she swore it without the exhibits and said she would ... she would bring them in.

7. The Respondent withdrew the Affidavit.

THE AFFIDAVIT

8. On October 25, 2002, T attended at the Respondent's office. Her Affidavit referred to exhibits "A" and "B" but exhibit "A" was not appended to the Affidavit when it was sworn by T. and notarized by

the Respondent. To the best of the Respondent's recollection, exhibit "B" was appended to the Affidavit when it was sworn.

9. Exhibit "A" was subsequently faxed to the Respondent's office on November 6, 2002.
10. The Affidavit was then filed in the Vancouver Registry on November 6, 2002.
11. The identical Affidavit, with exhibits, was then re-sworn on November 20, 2002 by T. The Respondent notarized the Affidavit and exhibits using the date of November 20, 2002 for the Affidavit and two exhibits.

[8] The citation was presented by Law Society counsel as a matter of professional misconduct. It does not appear that either side contemplated the alternative finding of incompetency.

[9] In the course of the hearing, an error in the Schedule to the citation (which functions as particulars) was noted, referring to an affidavit of Mr. Sheddy's client rather than the witness, T. Law Society counsel sought to amend the citation to conform to the evidence and Mr. Sheddy's counsel said he had no objection. However, the Hearing Panel took a different view and, while saying that he thought Mr. Sheddy's behaviour was professional misconduct, he refused to make such a finding because the citation could not be amended after the close of evidence and an essential averment, the name of the affiant, was wrong.

[10] The Hearing Panel issued a report dismissing the citation on 23 August 2004.

[11] On 2 September 2004, the Discipline Committee of the Law Society referred the matter to the Benchers for review. The review commenced on 30 November 2004, but one of the members of the Review Panel ceased to be a Bencher before the matter was concluded and the matter had to proceed before a newly constituted Review Panel. That review commenced on 14 July 2005.

[12] On 2 November 2005, the Review Panel issued a written report reversing the Hearing Panel's refusal to amend the citation and substituting for the Hearing Panel's opinion of professional misconduct an alternate finding of incompetence.

[13] One of the seven members of the Review Panel was appointed to the Provincial Court and, in the Law Society's view, there was a loss of quorum once again. As a result, the President of the Law Society directed on 1 December 2005 that the matter proceed before the Hearing Panel to determine penalty.

[14] The penalty phase of the citation hearing proceeded on 23 March 2006 before Mr. McDiarmid, Q.C., and, on 19 April 2006, he issued his report imposing the least onerous penalty available, a reprimand.

7 Although the citation against Mr. Sheddy included an allegation of incompetence, it is not disputed that the case proceeded on the basis that the sole allegation was professional misconduct. The reasons of the initial Hearing Panel dated 4 August 2003 contain this:

> [9] The narrow issue I am asked to decide then is whether the Respondent's failure to have Exhibit A before him when the affidavit was sworn constitutes professional misconduct.

8 When the matter went before the Review Panel in July 2005, counsel recognized an error in the citation, in that it referred to the affidavit of the "client" rather than of a "witness". The Review Panel ordered the citation amended. The Review Panel then said:

> [19] The next matter to be dealt with in this Review is the application by the Respondent for a review of the Hearing Panel's determination that his conduct with respect to the Affidavit and its exhibits amounted to professional misconduct.

9 After a review of the evidence and counsel's submissions, the Review Panel concluded that professional misconduct had not been proven, but that Mr. Sheddy was nonetheless shown to have been incompetent. The Panel's reasons conclude:

> [31] The approach adopted by the Respondent with respect to the Affidavit in question departs significantly from the practice that this Panel believes is appropriate with respect to exhibits to Affidavits for use in our Courts. The manner in which this Affidavit was taken and the exhibits purported to be sworn was incompetent and contrary to the accepted practice. However, while the Respondent's approach is far from acceptable, we are of the view that his conduct, in these circumstances, does not amount to professional misconduct. His procedure, while sloppy, misinformed or confused, lacks the degree of dishonourable conduct or moral shortcoming necessary to be viewed as professional misconduct.
>
> [32] Accordingly, the Review Panel finds that the Law Society has failed to meet the onus placed upon it to establish that the conduct of the Respondent amounts to professional misconduct. However, we find that the Respondent acted incompetently in the performance of his duties respecting the Affidavit and exhibits thereto.

10 Section 15(5) of the Law Society Rules says:

> A Notice of Review must contain the following summary form:
>
> (a) a clear indication of the decision to be reviewed by the Benchers:
> (b) the nature of the order sought;
> (c) the issues to be considered on the review of the decision.

11 The Notice of Review in this case did not include an allegation of incompetence. That issue was never before the Review Panel for consideration. It was fundamentally unfair to make a finding of incompetence on a review when that issue was not included in the notice of review. The only issue before the Discipline Panel was professional misconduct, and it was an error for the Review Panel to substitute a decision that the Discipline Panel could not have made.

12 In my opinion the appeal should succeed on the first ground.

13 I am also of the view that the appeal should succeed on the second ground. In its reasons of 2 November 2005, the Review Panel said:

> [30] While there appears to be little, if any, judicial authority or rules specifying the circumstances relating to the swearing of Affidavits and, in particular, the appending of exhibits thereto, a practice and convention has developed in British Columbia, which this Review Panel believes is appropriate. That practice to have all exhibits before the maker of the Affidavit at the time of the making of the Affidavit, in order that the deponent can review same and swear that they are correct. The Courts are entitled to be ensured to the highest degree possible that matters being placed before them as evidence are done so with maximum certainty.

14 As the Discipline Panel noted in its reasons of 19 April 2006:

> [9] There is nothing in the decision of the Benchers on Review which analyzes the finding of incompetence, nor was there placed in evidence the sort of evidence often used to show incompetence, such as, for example, a history of practice. Similar facts in similar situations are often evidence of incompetence; no such evidence was put forward in this case.

15 There was no evidence before the Review Panel concerning any practice or convention in the handling of exhibits to affidavits. The relevant Supreme Court Rule reads:

> 51(8) An exhibit referred to in an affidavit need not be filed, but must be made available for the use of the court and for the prior inspection of a party to the proceeding and, in the case of a documentary exhibit not exceeding 5 pages, a true reproduction must be attached to the affidavit and to all copies served or delivered.

16 In this case, the exhibit not attached to the affidavit apparently exceeded five pages in length, and there was therefore an argument to be made as to whether it should have been attached to the affidavit.

17 The Review Panel made findings of fact based on its own experience. Their view of accepted practice may or may not be sound. But the practice or convention, if such there is, was not in issue before the panel, and Mr. Sheddy had no opportunity to challenge the views held by the panel members, or adduce evidence to the contrary. There is no suggestion that the practice suggested is so notorious that the Review Panel could take "judicial notice" of it, if indeed an administrative tribunal can take "judicial notice" of facts.

18 It is not necessary to decide on this appeal what sort of evidence if any must be adduced to establish an allegation of incompetence in a citation against a member of the Law Society. In this case there is an absence of evidence which could reasonably support a finding of incompetence. There is no rule, either in the Law Society's Rules, or in the Supreme Court Rules governing the facts that gave rise to this citation. To make a finding of fact on no evidence in the absence of a clear rule is an error of law. In my opinion this ground of appeal should also succeed.

19 These errors lead, in my opinion, to the conclusion that the appeal should also succeed on the third ground, namely a breach of the rules of natural justice. The Review Panel decided the citation on an issue that was not before it, and without any evidence to support it, other than the opinion of the panel members. This case does not conform to minimum requirements of natural justice: See: D.J. Mullen, "***Administrative Law***", ch. 13 and Brown & Evans, "***Judicial Review of Administrative Action in Canada***" (Toronto, 2005)

20 There is an issue as to costs. The Hearing Panel on 19 April 2006 held that each party to the discipline proceedings should bear their own costs. That may well have been an appropriate disposition in the exercise of the panel's discretionary power (see s. 46 of the ***Legal Profession Act***) if the finding of incompetence had been sustained. I would, as it is apparent, set that finding aside.

21 I would not accede to the Law Society's request that the matter be remitted to the Benchers. I question whether the substance of this complaint should have been made the subject of a formal citation. The process has been prolonged through no fault of the member. A further hearing in my view is not merited in the circumstances.

22 In my opinion, Mr. Sheddy is entitled to his costs throughout the discipline proceedings, and to the costs of the appeal, subject to any agreement that may bind the parties.

23 I would allow the appeal and set aside the order of the Review Panel dated 2 November 2005 and the order of the Discipline Panel dated 19 April 2006, with costs to the appellant throughout pursuant to s. 46 of the ***Legal Profession Act***.

24 **HUDDART J.A.**:-- I agree.

The following is the judgment of

25 **CHIASSON J.A.** (concurring):-- I agree, but I wish to add some comments concerning the process followed in this case.

26 First, I question the authority of the hearing panel to make its finding of professional misconduct. I do so on the basis of s. 38(4) of the ***Legal Profession Act*** which states:

> 38 After a hearing, a panel must do <u>one</u> of the following:
>
> (a) dismiss the citation;
> (b) determine that the respondent has committed one or more of the following:
>
> (i) professional misconduct;
> (ii) conduct unbecoming a lawyer;
> (iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

(c) make any other disposition of the citation that it considers proper.

[emphasis added.]

27 Having made the determination to dismiss the citation, I question whether the Hearing Panel should have made a determination with respect to professional misconduct.

28 Concerning the review brought by the member, I also question the basis for that review because the member had been successful at the proceeding before the Hearing Panel. By failing to adhere to the dictates of s. 38, the Hearing Panel left the appellant in the invidious position of having the citation dismissed with a finding of misconduct.

29 The respondent's notice of review in the sections stating the relief sought and the issues identified did not put in issue the finding of professional misconduct. This may have lead to the appellant initiating a review for which there was no legal foundation.

30 We are told that counsel took the position before the review panel that it should substitute a finding of professional misconduct for the dismissal. Be that as it may, that does not accord with the respondent's notice of review. In that notice counsel stated that the request was to substitute a decision to amend the schedule to the citation to disallow the amendment in place of the Hearing Panel's decision to disallow the amendment and that the dismissal should be set aside.

31 In the statement of issues in that notice, which is a statement required by Rule 15-5 of the Law Society Rules, the issues were confined to consideration of the amendment to the citation. There was no request to substitute a finding of professional misconduct for the dismissal let alone to substitute a finding of incompetence for dismissal. In my view, the proper procedure should have been to determine that the amendment should have been made, to set aside the dismissal and to have the citation proceed in a normal course.

32 For these reasons, and for the reasons given by the Honourable Chief Justice, I agree that the appeal should be allowed.

33 **FINCH C.J.B.C.**: The appeal is allowed and there will be an order in the terms earlier described.

FINCH C.J.B.C.
CHIASSON J.A.

cp/e/qlemo/qljxh

TAB 4

Indexed as:

Singh v. Canada (Minister of Employment and Immigration)

Between
Gurmeet Singh and Jaswant Narang, Applicant, and
The Minister of Employment and Immigration, Respondent

[1993] F.C.J. No. 1034

[1993] A.C.F. no 1034

69 F.T.R. 142

44 A.C.W.S. (3d) 767

Action No. IMM-888-93

Federal Court of Canada - Trial Division
Toronto, Ontario

Reed J.

Heard: October 6, 1993
Judgment: October 8, 1993

(8 pp.)

Aliens -- Immigration -- Refugees -- Judicial review -- Reasonableness of decision -- Evidentiary findings or conclusions of Board.

Application for judicial review. The applicant was a claimant of Convention Refugee status whose claim was denied by the Convention Refugee Determination Division of the Immigration and Refugee Board. He sought a review of the Board's decision on the ground that its determination that he was not a credible witness was based on misconstructions of the evidence, disregard of the evidence and improper inferences.

HELD: Application allowed. There were a large number of findings and inferences drawn by the Board which could not be supported on a review of the evidence. Given the many misconstructions and inferences not obvious from the evidence, the whole decision of the Board must be treated as tainted. The wording in section 18(1)(4)(d) of the Federal Court Act allowed the court to set aside a

tribunal decision which was unreasonable in light of all the evidence before it. This was the proper test for setting aside a decision of the Immigration and Refugee Board impugned on the basis of erroneous findings.

STATUTES, REGULATIONS AND RULES CITED:

Federal Court Act, R.S.C. 1985, c. F-7, s. 18.1(4)(c), 18.1(4)(d).

Lorne Waldman, for the Applicant.
Phillip R. Pike, for the Respondent.

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1 **REED J.** (Reasons for Order):-- The applicant seeks to have a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") set aside. Two grounds for this challenge are asserted: the Board's decision that the applicant was not a credible witness is based on misconstructions of the evidence, disregard of the evidence and improper inferences; the Board did not properly consider the law and the facts relating to the internal flight alternative.

2 Both parties agree that the Board erred in making its assessment of an internal flight alternative. Thus the only issue before me is whether the finding of credibility should be set aside.

3 Counsel for the applicant indicated that he perceived some variation between the decisions of the Trial Division and those of the Appeal Division of this Court with respect to the kind of circumstances under which evidenciary findings or conclusions drawn therefrom by a Board will be set aside. It was suggested to me that the Trial Division is applying a much higher standard than that applied by the Appeal Division. It was suggested that the Trial Division is requiring that the findings on the evidence be "perverse" before they can be successfully challenged while the Court of Appeal applies a much lower threshold. Reference was made, for example, to the recent decision in Soto Giron v. M.E.I. (A-387-89, May 28, 1992 [Please see [1992] F.C.J. No. 481]) where Mr. Justice MacGuigan stated:

> The Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") chose to base its finding of lack of credibility here for the most part, not on internal contradictions, inconsistencies, and evasions, which is the heartland of the discretion of triers of fact, but rather on the implausibility of the claimant's account in the light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, if any, better position than others to draw.

4 The decision in Punithavathy Rajaratnam v. The Minister of Employment and Immigration (A-824-90, December 5, 1991 [Please see [1991] F.C.J. No. 1271]) was also quoted:

> In many cases, this among them, the claimant's evidence has been given through interpreters, usually different at each proceeding. The process is fraught with the possibility of innocent misunderstanding.
>
> These views were echoed by Mr. Justice Hugessen in Attakora v. MEI (1989), 99 N.R. 168 (F.C.A.), at page 169:
>
> I have mentioned the Board's zeal to find instances of contradiction in the applicant's testimony. While the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of the evidence of persons who, like the present applicant, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.

5 I am not convinced that the test which the Trial Division has been applying is all that different from those found in the Court of Appeal decisions. The reference to perversity, I think arises as one example of the kind of circumstance in which a decision of a Board will be set aside. Paragraph 18.1(4)(d) of the Federal Court Act states that:

> The Trial Division may grant relief ... if it is satisfied that the federal board ... based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

I read that paragraph as setting out disjunctive conditions under which a decision will be set aside, of which perversity is only one.

6 As I understand counsel's argument, he was suggesting that findings of fact were reviewable under two paragraphs of section 18.1(4), paragraphs (d) and (c). Paragraph (c) provides that relief may be granted when a board:

> "erred in law in making a decision or an order, whether or not the error appears on the face of the record".

As I understand counsel's argument, it is that if paragraph (d) does not allow the Court to review Board decisions for unreasonableness, paragraph (c) does.

7 I understand both the provisions in question to be statutory codifications of the common law principles of judicial review. As I understand those principles, courts have long been prepared to characterize findings of fact which are unsupported by adequate evidence as errors of law:

> "A tribunal which has made a finding of primary fact wholly unsupported by evidence, or which has drawn an inference wholly unsupported by any of the primary facts found by it, will be held to have erred in point of law."[1]

8 This so-called "no-evidence" situation is clearly one which the courts have characterized as an error of law. There has been I think more debate as to whether decisions could be set aside as an error of law on the ground that they were unreasonable. Paragraph 18.1(4)(d) of the Federal Court Act, however, allows the court to set aside a decision which is made by a tribunal "without regard for the material before it". This in my view grants a broader right of review than the traditional "no

evidence" test. I think the wording in paragraph (d) encompass the setting aside of tribunal decisions when they are unreasonable. Counsel cited many cases of our court, both the Appeal Division and Trial Division. I frankly do not have time to consider them all if a decision in this case is to be made expeditiously. At the same time, I am aware of a review of the scope of the phrase "perverse or capricious manner or without regard for the material before it," in J.A. Kavanagh, A Guide to Judicial Review (1978) at 57-58[2]. That text is now somewhat dated but I do not think it is inaccurate:

> In practice, the test applied by the Federal Court to findings of fact seems to be whether on the whole of the evidence, the finding of fact was one that a reasonable person acting judicially could make: [citations omitted]
>
> . . .
>
> This is basically the same test that is used by appellate courts. If an Appeal Court cannot come to the conclusion that the trial judge, with the advantage of having heard and tried the case, was plainly wrong in his findings of fact, it will defer to his judgment. The credibility, trustworthiness and cogency of evidence are all best left to the tribunal to determine: [citations omitted]
>
> . . .
>
> Technical findings of fact in particular are thought to be best left undisturbed because they are usually made by a specialized tribunal with background knowledge not available to the Court: McCulloch Ltd. v. Anti-Dumping Tribunal (1977), 16 N.R. 337 at 342 and 345 (Fed. C.A.) (whether a power unit was within the relatively new class of machine called a chainsaw was a matter with respect to which the Court would need very complete evidence before second guessing the tribunal).

9 Thus, I have no doubt that the proper test for setting aside Board decisions on the basis of erroneous findings of fact is to ask whether they are unreasonable on the basis of all the evidence. What are characterized as findings of fact can of course be divided into two classifications: findings of primary facts (e.g. whether a physical phenomenon occurred) and inferences of fact which are drawn from the primary facts. Courts are reluctant to interfere with findings of primary facts made by tribunals, as are courts of appeal with those of a trial judge. The readiness to review the inferences which are drawn from primary facts is however another matter. In areas where a tribunal has particular expertise or experience in drawing the kinds of inferences which need to be drawn for the making of the decision courts are inclined to treat those inferences with deference. If however the inference is of a type which is based on the common experience of mankind, then, the court, as Mr. Justice MacGuigan said in Soto Giron, is in as equally good a position to make it as the tribunal. In that case deference is often not shown.[3]

10 While I accept counsel's argument that when determining refugee status, the Immigration and Refugee Board is not given a discretion but must make a judicial type decision, the court is unlikely to be quick to interfere with decisions regarding the existence or not of primary facts or with infer-

ences drawn by the Board which are particularly within its area of expertise and experience unless it is clear that they are not supported by the evidence.

11 In this case there are a large number of findings or inferences drawn by the Board which do not stand up on a review of the evidence. I will refer to some of them.

12 The Board's first credibility finding reads as follows:

> When his counsel asked him where these Sikhs moved to, the claimant answered that some cut their hair, but that he did not like that idea, and that Sikhs have to keep their hairstyle. The panel did not consider this to be a satisfactory answer to the question.

13 The evidence in question reads:

> COUNSEL My question is that if it was a safe village, why would other Sikhs leaving one by one [sic]?
>
> CLAIMANT It is quite a fear in their mind because of those happenings and if it can happen in the cities, same thing will happen in the villages too.
>
> COUNSEL Do you have any idea where they moved to?
>
> CLAIMANT I don't know about this; I think it's the one's own individual thing.
>
> COUNSEL What were you -- sorry; go ahead.
>
> CLAIMANT Some people moved out by cutting their hair and I didn't like that idea.
>
> COUNSEL What would happen if you say some people cut their hair; what -- how would it change the situation?
>
> CLAIMANT It is entirely in the hands of the government.
>
> COUNSEL I think my question was that if a Sikh cuts hir [sic] hair, what difference it would make to that person to continue to live in his place, in Haryana.
>
> CLAIMANT To keep the Sikh religion, one has to keep those [sic] hair as symbols.

14 The Board made the following finding:

When his counsel asked him if he could not have moved to a safer place in Karnal, the claimant answered that he had his business there. The panel also did not find this to be a satisfactory answer.

15 In his evidence, the applicant did not state that he did not move to a safer place in Karnal because he had his business there. The applicant stated that he was living in the Karnal area and would flee to the Punjab and return to Karnal. He did state that he had his business there, but the business was not connected to his decision to move or not to move, as suggested by the panel. When specifically asked by counsel as to whether or not there was any other part of the Haryana district that he could move to, the applicant stated that there was no part of Haryana that he could be safe in, because he was a Sikh.

16 The Board went on to find as follows:

> Shiv Sena appears to be a terrorist Hindu organization, using intimidation, extortion and death threats, according to the unsigned letters, allegedly sent to the male claimant. When his counsel asked him if he suffered at the hands of any people other than Shiv Sena, the claimant answered with: yes, they are all Hindus. However, the claimant also stated that it was hard to say, because they are mostly clean shaven. From this the panel concludes that the claimant is not sure whether he suffered at the hands of any people other than Shiv Sena. The panel considers this to be an inconsistency in his testimony.

17 There is no inconsistency in the applicant's evidence in this regard. When questioned about the problems that he had with the Shiv Sena, the applicant testified that although he believed that all of the people were members of the Shiv Sena, he could not be absolutely sure because they were clean shaven. This evidence was not inconsistent with any other evidence. There was no inconsistency here but rather an uncertainty on the part of the applicant with respect to who his tormentors were.

18 The panel found that the applicant was inconsistent in his evidence because at one point he stated that he did not go to the police, but then later on stated that he did go to the police. Again the tribunal's summation is not correct. The applicant's evidence was that if he went to the police, they would not assist him. When asked specifically if he had gone to the police, he answered that after his first letter, he did go to the police but that they did not assist him; as a result, after the second letter, he did not bother going to the police.

19 The Board drew an adverse inference from the fact that the applicant had not mentioned two letters in his PIF which he mentioned in his oral testimony. It drew an adverse inference from the fact that his wife went to Canada and then returned to India. It drew an adverse inference from the fact that he did not know the expiry date of his visitors visa. The Board stated: "The Panel finds it inconceivable that the claimant was not aware of that date".

20 It is difficult to understand why the Board drew adverse inferences from these facts. The PIF is supposed to be a brief recitation of the applicant's claim, not a documentation of his whole case. There was no evidence that it was unsafe for his wife to return to India, or even to the area from which the applicant alleged he was fleeing. Also, why is it inconceivable that the applicant would not know the expiry date of his visitor's visa?

21 It may be that these last inferences are ones made by the Board because of special expertise and experience but they look like the kind of inferences which are based on general knowledge and experience.

22 I have only referred to some of the aspects of the Board's decision which are not soundly based on the evidence. I have also not cited several findings which do seem somewhat solidly based. The question becomes whether this is the kind of a decision which should be sent back for rehearing or about which one can say that there remains enough, that is not challengeable, to support the Board's decision. The Court does not have authority to substitute its decision for the Board's the way an appeal court may with respect to a decision of a trial judge.

23 In any event, applying the above described test, I have decided that because there are such a large number of misconstructions and inferences which are not obvious from the evidence that the whole decision is tainted.

24 I have decided, on reading the Board's decision in the context of the evidence as a whole, to set the decision aside and to refer it back for reconsideration.

REED J.

1 S.A. de Smith, Judicial Review of Administrative Act (4th ed. 1980) at 133.

2 see also Toro v. Minister of Employment and Immigration [1981] 1 F.C. 652.

3 I owe much of this analysis to de Smith (supra) at pp 126-139.

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Mignault J.

The petition is therefore dismissed with costs.

Petition dismissed with costs.

Solicitors for the petitioner: *Griffin, Montgomery & Smith.*

Solicitor for the respondent: *R. W. Ginn.*

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*Oct. 24.

1929

*Feb. 5.

NORTHWESTERN UTILITIES, LIMITED ..... APPELLANT;

AND

THE CITY OF EDMONTON AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA..... RESPONDENTS.

THE CITY OF EDMONTON.....APPELLANT;

AND

NORTHWESTERN UTILITIES, LIMITED, AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Public utilities—Public Utilities Act, Alta.—Hearings and investigations by Board of Public Utility Commissioners—Powers of Board—Obtaining of evidence—Absence of evidence—Order of Board fixing rates for gas supply in municipality by franchise holder—Return on investment—Inclusion in "rate base" of discount on sale of bonds—Appeal from Board's order—"Question of law."

The Board of Public Utility Commissioners of Alberta made an order in 1922 fixing rates chargeable for gas proposed to be supplied in the city of Edmonton by the predecessor of the appellant company. The Board fixed the rates on the basis of an allowance of 10% as a fair return on the investment in the enterprise, and in determining the "rate base" (the amount to be considered as invested in the enterprise) it included as a capital expenditure a sum which was the discount on the sale of the company's bonds. The rates were to continue in force for three years from the date on which gas was first

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*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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supplied. In 1926 the appellant company applied for continuation of the rates. On this application the city objected to such a high rate of return and to the inclusion in the rate base of the item for bond discount. The Board continued said item in the rate base, but reduced the return to 9% "in view of the elements which go to make up the rate base, and in view of the altered conditions of the money market." The parties appealed (by leave) to the Appellate Division, Alta., and then to this Court, the company against the reduction of the rate of return, and the city against the inclusion of the bond discount item in the rate base. The company contended that no evidence was adduced before the Board of "altered conditions of the money market," and that, without hearing evidence upon the point and giving the company opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board acted without jurisdiction in making the reduction. Under s. 47 of *The Public Utilities Act, 1923*, Alta., c. 53, as amended 1927, c. 39, an appeal lies from the Board upon a question "of jurisdiction" or "of law," upon leave obtained.

Held 1. The company's last mentioned contention involved a "question of law," and therefore it had a right to appeal.

2. The city's appeal failed; the question raised thereon was not one of jurisdiction or law.

3. The company's appeal failed. The Board had power to reduce the rate of return, notwithstanding that at the hearing before it no witnesses testified as to altered conditions of the money market. The company's contention that to alter the rate of return would be unfair to its shareholders who had invested in the enterprise after the order fixing the rates in 1922, was not a matter open for consideration upon the appeal, as it did not involve a question of jurisdiction or law.

Per Rinfret and Lamont JJ.: A consideration of ss. 21 (4) (5), 25, 43, and 44 of the said Act, the purposes of the Act, and the extent of the powers vested in the Board, leads to the conclusion that the intention of the legislature was to leave it largely to the Board's discretion to say in what manner it should obtain the information required for the proper exercise of its functions; it was not to be bound by the technical rules of legal evidence, but was to be governed by such rules as, in its discretion, it thought fit to adopt. An inference that it had not the proper evidence before it as to the altered conditions of the money market could not be drawn from the fact that no oral testimony in respect thereof was given at the hearing. The company had notice that a reduction was sought and that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This put the whole question of a fair return at large and informed the company that it would have to establish to the Board's satisfaction every element and condition necessary to justify a continuation of the 10% rate; and there was nothing in the record to justify the conclusion that the company had not the opportunity of making proof at the hearing as to the conditions of the money market.

Per Smith J.: The Board has power to reduce the rate of return without evidence; the question of a fair rate of return is largely one of opinion, 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.

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APPEALS by Northwestern Utilities, Limited, and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals from the award of the Board of Public Utility Commissioners for the Province of Alberta fixing rates to be paid by consumers of natural gas, for the supply of which within the city of Edmonton the said company, Northwestern Utilities, Limited, has a franchise.

The company applied to the Board for an order continuing the rates which had been fixed for a certain period by an order of the Board made in 1922. The Board made an award fixing the rates, from which each party appealed to the Appellate Division. Under s. 47 of *The Public Utilities Act* of Alberta, 1923, c. 53, as amended 1927, c. 39, an appeal lies from the Board to the Appellate Division "upon a question of jurisdiction or upon a question of law," if leave to appeal is obtained as therein provided. Such leave to appeal was obtained, it being reserved to each party to move before the Appellate Division to set aside the order granting leave to the other party, on the ground that the matters as to which leave to appeal was given did not involve any question of law or jurisdiction.

The company's objection to the Board's award was that it fixed the rates on the basis of an allowance of only 9%, instead of 10% which was allowed under the order made in 1922, as the "rate of return" on the investment in the enterprise. The Board in its award said:—

> In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

The company contended that there was before the Board no evidence of any "altered conditions of the money market," that the "elements which go to make up the rate base" were the same as in 1922, and afforded no reason for changing the rate of return, that to reduce the rate of return would be unfair to its shareholders, who had invested in the enterprise after the order fixing the rates in 1922, that the money was invested and the plant constructed on the strength of the principles laid down in the 1922 award, and that it was clearly understood that the principles then adopted would govern all future revisions.

The city's objection to the award was that, in determining the "rate base" (the amount to be considered as invested in the enterprise) it included (as it had done in the 1922 award) as a capital expenditure a sum which was the discount on the sale of the company's bonds.

The Appellate Division dismissed both appeals (no written reasons being given). Subsequently it made separate orders giving each party leave to appeal to the Supreme Court of Canada. On an application by both parties in the Supreme Court of Canada, the appeals were consolidated.

By the judgment of this Court both appeals were dismissed with costs.

E. Lafleur K.C. and *H. R. Milner K.C.* for Northwestern Utilities, Limited.

O. M. Biggar K.C. for the City of Edmonton.

The judgment of Anglin C.J.C. and Mignault J., was delivered by

ANGLIN C.J.C.—While, with my brother Smith, I incline to the view that the appellant company may have some reason to complain of unfairness in the judgment of the Board of Public Utility Commissioners reducing the rate of return from 10% to 9%, I agree with the conclusion reached by my brother Lamont and concurred in by my brother Smith that it is not open to us to entertain the appeal of the company on that ground. It does not seem to raise either a question of law or jurisdiction within the purview of the statute on which the right of appeal rests. I would dismiss the appeal.

The judgment of Rinfret and Lamont JJ. was delivered by

LAMONT J.—These are separate but consolidated appeals by the Northwestern Utilities, Limited (hereinafter called the Company) and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals against the award made by the Board of Public Utility Commissioners on an application by the company for an

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order fixing the price to be paid by the consumers of natural gas within the city. Subsequent to the dismissal of the appeals, the Appellate Division made separate orders giving each party leave to appeal to this Court. By a further order the appeals were consolidated.

The company is the successor of the Northern Alberta Natural Gas Development Company, which held a franchise from the city for the supply of natural gas to the inhabitants thereof.

Disputes having arisen between the Development Company and the city, and an action having been commenced, the parties, on August 28, 1922, agreed to a settlement of their difficulties. One of the terms of the settlement was that the prices or rates to be paid by the inhabitants of the city should be fixed by the Board of Public Utility Commissioners. An application was accordingly made to the Board, the parties were heard, and, on November 27, 1922, an order was made fixing the rates to be paid. These rates were to continue in force for three years from the date on which gas was first supplied to consumers.

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.

In the award of 1922, which came into operation in the fall of 1923, the Board included in the rate base as a capital expenditure the sum of $283,900 (10% of the cost of plant) as, "an allowance for the promotion and financing" of the company, and the sum of $650,000 which was the discount on the sale of the Development Company's bonds. It also determined that 10% was a fair return on the investment. The rates thus fixed by the Board, with certain alterations made with the consent of all parties, continued in force for three years. In October, 1926, the appellant company, which had succeeded to the rights of the Development Company, applied to the Board for an order continuing the rates for such period as the Board might see fit. In its

reply to the application the city submitted (par. 23) that the order of November, 1922, should in certain respects be disregarded. One of these was the following:—

(e) Rate of Return. It is submitted that the methods and principles adopted in the fixing of the rate of return are erroneous and that the rate of return allowed is too high.

The city also protested against including in the rate base the item for the promotion and financing of the company and the item for bond discount.

In its answer to the city's reply the company alleged (par. 10) that at the hearing in 1922 the city was fully and adequately represented, that it had submitted evidence, that upon the award being delivered it raised no objection to any part thereof, and, therefore, was now estopped from contending that the principles then laid down were wrong in principle or in fact.

In its award the Board continued both the above mentioned sums in the rate base, but reduced the rate of return to the company from 10% to 9%. The reason assigned by the Board for this reduction is as follows:—

In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the Company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

From the award the parties appealed, first to the Appellate Division of the Supreme Court of Alberta, and now to this Court. The company appealed against the reduction of the rate of return on its capital expenditure to 9%. Referring to the reasons given by the Board for making the reduction the company in its factum says:—

1. The city adduced no evidence as to "altered conditions of the money market" and

2. "The elements which go to make up the rate base" in 1927 are the same as in 1922.

The city appealed against the inclusion in the rate base of the item of the bond discount above mentioned.

The *Public Utilities Act* allows an appeal from the Board only upon a question of jurisdiction, or upon a question of law, and even then only when leave to appeal has first been obtained from a judge of the Appellate Division.

As against the company's appeal the city raises the preliminary objection that no question either of jurisdiction or law is involved therein. In my opinion the objection cannot be sustained. The substance of the company's

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appeal is that the Board in making a reduction in the rate of return did so for two reasons, one of which was the "altered conditions of the money market," and that of this no evidence was adduced before the Board. The company contends that, without hearing evidence upon the point, and without giving it an opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board was without jurisdiction to make the reduction. This contention was not stated in this form in the order granting leave to appeal to the Appellate Division, but the fixing of the rate of return at 9% only, was there set out as an error of the Board in respect of which leave to appeal was granted.

Whether or not the Board can properly base an order (in part at least) on the existence of a state of fact of which no evidence was adduced before it at the hearing and as to which the party affected has not had any opportunity of being heard is, in my opinion, a question of law which depends for its answer upon the construction to be placed upon the *Public Utilities Act*.

I am, therefore, of opinion that the company had a right to appeal.

The question involved in this appeal is: Had the Board jurisdiction to find as a fact how the conditions of the money market had altered between November, 1922, and July, 1927, without any witness testifying at the hearing that an alteration had taken place.

As the Board was determining what would be a fair return on the capital invested by the company in the enterprise, and as it reduced the return from 10% to 9%, it can, I think, be taken that by "the altered conditions of the money market" the Board meant that the returns for money invested in securities in which moneys were ordinarily invested had decreased during the period in question. In other words, that the rate of interest obtainable for moneys furnished for investment was, generally speaking, lower by a certain percentage in 1927 than it was in 1922. That, in my opinion, is all that is involved in the finding.

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. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) 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. In fixing this net return the Board should take into consideration the rate of interest which the company is obliged to pay upon its bonds as a result of having to sell them at a time when the rate of interest payable thereon exceeded that payable on bonds issued at the time of the hearing. To properly fix a fair return the Board must necessarily be informed of the rate of return which money would yield in other fields of investment. Having gone into the matter fully in 1922, and having fixed 10% as a fair return under the conditions then existing, all the Board needed to know, in order to fix a proper return in 1927, was whether or not the conditions of the money market had altered, and, if so, in what direction, and to what extent.

For the city it was argued that, as one of the statutory powers of the Board was to deal with the financial affairs of local authorities (s. 20 (*d*)), and as this included the power to authorize the issue of new debentures by these authorities and to determine the rate of interest to be paid thereon and also the power to order a variation of the rate of interest payable upon any debt of the local authority (s. 103), the Board must necessarily be familiar with the rate of interest prevailing from time to time and therefore did not require to have witnesses called to furnish it with information which in the regular performance of its duty it was obliged to possess. In view of the powers and duties of the Board under the Act there is, in my opinion, considerable to be said for the city's contention. It is not necessary, however, to determine this question, for in the statute itself I find sufficient to justify the conclusion that the intention of the Legislature was to leave it largely to the discretion of the Board to say in what manner it should obtain the information required for the proper exercise of its functions.

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The material provisions of the Act on this point are as follows:—

21. (4) The Board may in its discretion accept and act upon evidence by affidavit or written affirmation or by the report of any officer or engineer appointed by it or obtained in such other manner as it may decide.

(5) All hearings and investigations before the Board shall be governed by rules adopted by the Board, and in the conduct thereof the Board shall not be bound by the technical rules of legal evidence.

Section 25 provides that upon a complaint being made to the Board that any proprietor of a public utility has unlawfully done or unlawfully failed to do something relating to a matter over which the Board has jurisdiction, the Board shall "after hearing such evidence as it may think fit to require" make such order as it thinks fit under the circumstances. Section 43 provides that the Board may "appoint or direct any person to make an inquiry and report upon any application * * * before the Board." And by section 44 the Board may "review, rescind, change, alter or vary any decision or order made by it." A perusal of these statutory provisions and a consideration of the purposes of the Act and the extent of the powers vested in the Board leads me to the conclusion that the Legislature intended to create a Board which in the exercise of its functions should not be bound by the technical rules of legal evidence but which would be governed by such rules as, in its discretion, it thought fit to adopt (s. 21 (5)). We have not been made acquainted with the rules, if any, adopted by the Board to govern its investigations. Nor do we know what information it possessed as to the altered conditions of the money market; but, as it had authority to act on evidence "obtained in such manner as it may decide" (s. 21 (4)), an inference that it had not the proper evidence before it cannot be drawn from the fact that no oral testimony in respect thereof was given at the hearing. If, in this case, the Board had asked its secretary to inquire from the various financial institutions in Edmonton if there had been any alteration in the conditions of the money market between 1922 and 1927, and the secretary had reported that there had been a certain decrease in the returns from invested capital, would it have been necessary to call witnesses to verify the report? In my opinion it would not. Nor would it have been necessary to afford to either party an opportunity to controvert before the

Board the information so obtained. Then would it have been necessary to mention in the award that the fact that such altered conditions had been established to the satisfaction of the Board by a report of its secretary? I can find nothing in the Act requiring mention to be made of the evidence or of the manner of obtaining it.

Reference was made to s. 86, which provides that no order involving any outlay, loss or depreciation to the proprietor of any public utility or to any municipality or person shall be made without due notice and full opportunity to all parties concerned to make proof to be heard at a public sitting of the Board, except in the case of urgency. A reduction in the rate of return to the company would, in my opinion, come within this section. The Board was, therefore, without jurisdiction to make the reduction unless the company had notice that a reduction was sought and had an opportunity of proving that under the circumstances existing at the time of the hearing the existing rate of return was fair and reasonable. That the company had notice that the city was demanding a reduction is beyond question (par. 23 (*e*)). It had more. It had notice that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This, in my opinion, put the whole question of a fair return at large and informed the company that it would have to establish to the satisfaction of the Board every element and condition necessary to justify a continuation of the 10% rate. The company does not say that it was refused an opportunity of putting in evidence as to the conditions of the money market. Nowhere does it deny that it could have put in evidence had it so desired. What it does say is that the city did not adduce evidence on the point and that no witnesses were called to testify before the Board in regard thereto. There is nothing before us to justify an inference that the company was not at liberty to call witnesses as to the conditions of the money market had it so desired. Moreover, in the order which the company obtained giving it leave to appeal it did not even suggest that it had no opportunity of submitting evidence as to the existing market conditions. The ground upon which the company relied to meet the city's demand for a reduction, as set out in the answer which it filed, was that as the city had ac-

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cepted the award when it was delivered and had raised no objection thereto, it was now precluded from seeking to set aside the principles upon which the rate of return was based. In its factum it went further and contended that, even if there was no estoppel, the principles then adopted should now be adhered to because it was on the strength of their having been adopted that the shareholders of the company invested their money in the enterprise. This contention cannot be made effective. In the first place, it involves neither a question of jurisdiction nor of law. In the second place, it is the duty of the Board to fix rates which, in its opinion, will be fair and reasonable at the time the order is made and for the period for which they are fixed. If any wrong principle or erroneous view has been adopted it is the duty of the Board at the next revision to correct the error. The argument that it would be unfair to the shareholders now to alter the rate of return is not a matter open for consideration on appeal. Moreover, when these shareholders invested their money they knew that the rates fixed were to be in force for three years only and that it would be the duty of the Board on the next revision to fix rates which at that time would be fair and reasonable under the circumstances then existing.

Our attention was also called to s. 47 (1*a*) as indicating an intention that evidence must be taken on all material points. That subsection reads as follows:—

(1a) On the hearing of any appeal referred to in subsection 1 of this section no evidence other than the evidence which was submitted to the Board upon the making of the order appealed from shall be admitted, and the Court shall proceed either to confirm or vacate the order appealed from, and in the latter event shall refer the matter back to the Board for further consideration and redetermination.

In my opinion this subsection means no more than that no new evidence is to be admitted on appeal.

The appeal of the company should therefore be dismissed with costs.

The appeal of the city should likewise be dismissed with costs. The items which should be included in the rate base cannot, in my opinion, be considered a question of jurisdiction or of law.

SMITH J.—The City of Edmonton had made an agreement with the Northern Alberta Natural Gas Development Company, by which the company obtained a fran-

chise to supply natural gas to the city, and agreed to construct the necessary works. The company failed to construct the works, and the city sued for damages for breach of contract. The actions were settled by an agreement dated 22nd August, 1922, under which the determination of the rates to be charged by the company for gas was referred to the Board of Public Utility Commissioners, and the company was, within six months after the fixing of the rates, to deposit $50,000 with the city, which was to be forfeited to the city as liquidated damages in case the company did not complete the construction of the works as agreed.

A rate hearing was held by the Board after this settlement, at which the company and the city were represented, and the Board made an award, setting out a rate basis and fixing prices for gas on this basis.

The difficulty about proceeding with the works had been the procuring of capital on the basis of prices provided in the original agreement and amendments made. The whole object of fixing a rate base and prices in advance of construction was to facilitate financing by the company. It would necessarily be on the basis of the award that investors would buy bonds and stock of the company. The company had the option of proceeding with the works or abandoning them and forfeiting the $50,000, after seeing the award. In July following the making of the award, the company assigned its franchise and property to the appellant, the Northwestern Utilities, Limited, which, by sale of its bonds and stock, raised the necessary capital, constructed the works, and put them in operation. The rate to be charged for gas was fixed by the award for three years, and at the end of this period the company applied to the Board for continuation of the rates fixed by the award. The rate base fixed by the Board in the award of 1922 contained many items, such as total investment, operating cost, depletion reserve, reserve for repayment of cost of plant, total necessary revenue, amounts of gas to be sold, and the rate of return on capital to be allowed. It is evident that, with the exception of the last of these items, the amounts fixed must have been estimates, liable to be varied by actual results.

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The rate of return to be allowed on capital was fixed in the award at 10%, not based on the ordinary rate of money on the market at the time or on an estimated future rate, but on consideration of the rate that would induce investors to risk their capital in an extremely hazardous and doubtful venture. At the hearing before the Board in 1922, the company had asked a 12% rate of return on capital, and the city had conceded 10%, which the Board fixed, though it stated that under the circumstances a return of more than 10% would not seem to be unjust. The reason set out for not fixing this higher rate was that it might so restrict the market that the higher rate would not compensate for the restriction of the market, and would therefore not be to the advantage of the company. It is, however, stated that in case of future revision, it may be found desirable, under certain circumstances, to increase this rate.

On the revision at the end of three years, this rate was not increased, but was reduced from 10% to 9%, at the instance of the city, and this reduction constitutes the ground of appeal.

In the reasons given by the Board in fixing the new rates, it is pointed out that, where rates have been fixed in advance of construction and financing, the Board is not precluded from subsequently making changes that may appear from subsequent reconsideration to be necessary, and it is then stated that

> those investing in such a case must depend on the fairness of the Board in seeing that the Company is allowed a fair and reasonable return upon its investment, but the Board may, and indeed it should, take into consideration the circumstances under which such investment was made.

In discussing these circumstances in reference to a request by the city for elimination from the rate base of the 1922 award of the item for bond discount, the Board says:

> There is, moreover, an additional factor to be considered in the present case and that is, that in 1922 the inclusion of the allowance for bond discount was practically agreed to by the city in its case and the item was not questioned by the city until at the recent hearing. It is only fair to assume that the fact of the inclusion of the bond discount in the rate base formed part of the inducement for the making of the investment. Under the circumstances, therefore, the Board does not feel justified in adopting the City's contention in this regard.

This lays down a principle with which one heartily agrees, and which applies exactly to the city's application for reduction of the rate of return on capital fixed in the award

of 1922 at 10%. The Board fixed this rate with the assent of the city, and this rate, coupled with the suggestion by the Board that it might be increased, "formed part of the inducement for the making of the investment."

The altered condition of the money market, given as a reason for the reduction of the rate to 9%, seems to me to have no bearing on the matter. The representation to the investor in 1922 was, for the risk you take in placing your capital in a hazardous undertaking, you will be allowed as a basis in fixing rates to be charged for gas a return of 10%. What the regular money market might be three years later could have nothing to do with the decision to invest. The whole question was, viewing the risk, and the chances, as matters then stood, was the chance of 10% on the money worth the risk of a bad investment, with the possibility of the loss of all or part of the capital?

The Board then, in my opinion, laid down a proper principle, and applied it in other instances, but failed to apply it to this item, as to which I think it was particularly applicable. The question is, can this Court set aside the finding of the Board as to this item on the appeal? I agree with my brother Lamont that, whether or not under the Act the Board was entitled to reduce the rate to 9% without evidence, because of a change in money market conditions, is a question of law, and that there is therefore a right of appeal, and it is with some regret that I feel bound to agree with him that the Board had jurisdiction to make the change in rate without evidence, and without giving the company an opportunity to offer evidence. 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.

I am not entirely in accord with the observations of my brother Lamont in reference to the sending out of someone to gather evidence of the state of the money market and acting on that party's report without the knowledge of the company. The objection in such a case would not be the failure to set out in the award the fact of such evidence and its nature, but the failure to disclose it to the company with an opportunity to answer it. If it were a case where, evi-

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dence being necessary, it had been taken in the manner suggested, or otherwise, and a finding based on it without disclosure of it to the company and an opportunity to answer it, I would regard such a proceeding as contrary to elementary principles of justice, and as affording, under the statute, a ground for setting the award as to this item aside and referring it back for reconsideration. It does not, however, appear that any evidence was taken, and as stated, I have concluded that there was power to make the change without evidence.

I therefore concur with my brother Lamont in the disposal of this appeal.

Appeals dismissed with costs.

Solicitors for Northwestern Utilities, Limited: *Milner, Carr, Dafoe & Poirier.*

Solicitor for the City of Edmonton: *John C. F. Bown.*

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*Oct. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15.

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*Feb. 5.

IN THE MATTER OF A REFERENCE AS TO THE RELATIVE RIGHTS OF THE DOMINION AND PROVINCES IN RELATION TO THE PROPRIETARY INTEREST IN AND LEGISLATIVE CONTROL OVER WATERS WITH RESPECT TO NAVIGATION AND WATER-POWERS CREATED OR MADE AVAILABLE BY OR IN CONNECTION WITH WORKS FOR THE IMPROVEMENT OF NAVIGATION.

Constitutional law—Water-powers—Navigable river—Public right of navigation—Right of the Dominion as to the use of the bed of a river and as to expropriation of provincial property—Relative rights of the Dominion and provinces over water-power created by works done by the Dominion—Boundary waters—Interprovincial and provincial rivers—B.N.A. Act, ss. 91, 92, 102 to 126.

The questions referred to this court by the Governor General in Council were answered as follows: (1)

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) *Reporter's Note.*—In view of the difficulties which the court found in dealing with the questions before it and of the impossibility of giving precise and categorical answers, it was thought best in order to avoid misleading as to what was decided, to put as a head-note the text of the formal judgment.

TAB 6

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indiqué à la compagnie défenderesse les faits dont il entendait se prévaloir pour inférer en droit la renonciation de la compagnie à s'en tenir rigidement à la loi régissant le contrat en ce qui concerne la production des preuves de perte. Ces faits, l'intimée en connaissait tous les détails; c'était les siens ou, et à son entière connaissance, ceux de son agent. L'intimée n'a fait d'ailleurs aucune objection à la preuve de ces faits.

Je maintiendrais l'appel, rétablirais le jugement de première instance, avec dépens, tant en cette Cour qu'en Cour d'Appel.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Garmaise & McNally, Rouyn-Noranda.

Attorney for the defendant, respondent: Philippe Pothier, St. Hyacinthe.

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*May 4, 5, 6
Oct. 4

BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD. ..... APPELLANT;

AND

THE PUBLIC UTILITIES COMMISSION OF BRITISH COLUMBIA, BRITISH COLUMBIA LUMBER MANUFACTURERS' ASSOCIATION, THE CORPORATION OF THE CITY OF VICTORIA, THE CORPORATION OF THE DISTRICT OF OAK BAY, THE CORPORATION OF THE DISTRICT OF SAANICH, CORPORATION OF THE TOWNSHIP OF ESQUIMALT AND CITY OF VANCOUVER ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Case stated by Public Utilities Commission—Matters to be considered by Commission in changing rates—Order of priority to be given to factors considered—The Public Utilities Act, R.S.B.C. 1948, c. 277, s. 16(1)(a) and (b).

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

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The first of a series of questions submitted for the consideration of the Court of Appeal for British Columbia, in a case stated for the opinion of the Court, asked if the Public Utilities Commission of that Province was right in deciding "that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion."

The question was answered in the affirmative. The appellant appealed from that portion of the judgment of the Court of Appeal which comprised this answer.

Held (Kerwin C.J. *dissenting*): The appeal should be allowed.

Per Locke J.: There is an absolute obligation on the part of the Commission on the application of the utility to approve rates which will produce the fair return to which the utility has been found entitled, and the obligation to have due regard to the protection of the public is also to be discharged. It is not a question of considering priorities between "the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of s. 16", but consideration of these matters is to be given by the Commission in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

Per Cartwright, Martland and Ritchie JJ.: The combined effect of the two clauses referred to is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but it must when actually setting the rate, meet the requirements specifically mentioned in clause (*b*), i.e., the rate to be imposed should be neither excessive for the service nor insufficient to provide a fair return on the rate base. These two factors should be given priority over any other matters which the Commission may consider.

Although there is no priority directed by the Act as between these two matters, there is a duty imposed on the Commission to have due regard to both of them, and accordingly there must be a balancing of the interests concerned.

Per Kerwin C.J., *dissenting*: The statute does not require that any weight be given to the matters and things referred to in the two clauses after they have been considered, and therefore the weight to be assigned is a question of fact for the Commission to decide in each instance.

APPEAL from a portion of a judgment of the Court of Appeal for British Columbia[1], comprising the answer to the first of five questions submitted to it by the Public Utilities Commission. Appeal allowed, Kerwin C.J. dissenting.

J. W. de B. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. R. Dodd*, for the appellant;

[1] (1959), 29 W.W.R. 533.

J. A. Clark, Q.C., for The Public Utilities Commission of British Columbia, respondent;

T. P. O'Grady, for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of the District of Saanich and Corporation of The Township of Esquimalt, respondents;

R. K. Baker, for City of Vancouver, respondent.

THE CHIEF JUSTICE (*dissenting*):—Pursuant to s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission stated a case for the opinion of the Court of Appeal for that Province. The case was stated in respect of five questions but we are concerned only with Question 1 as, by order of this Court, British Columbia Electric Railway Company, Limited was granted leave to appeal only from that portion of the judgment of the Court of Appeal comprising the answer given thereto. That question is as follows:

1. (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?

(*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

The Court's answer to Question 1 reads:

The Commission was right in deciding as appears in its Reasons for Decision of 14th July, 1958 that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the Public Utilities Act R.S.B.C. 1948, chapter 277 should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion.

At the conclusion of the argument the judgment of the Court of Appeal appeared to me to be correct and further consideration has confirmed me in that view. Reasons were given by Sheppard J.A. on behalf of himself and the other four members of the Court who heard the argument on the

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stated case. I adopt all that he said and would have nothing to add were it not for an argument presented on behalf of the appellant. Section 16(1)(*a*) and (*b*) read as follows:

16. (1) In fixing any rate:—

(*a*) The Commission shall consider all matters which it deems proper as affecting the rate:

(*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

Mr. Farris submitted that the Court of Appeal had not taken into consideration the words in (1)(*b*) "The Commission shall have due regard.....and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:". However, I am satisfied upon a review of the reasons of Sheppard J.A., relevant to Question 1, and particularly of the extract transcribed below, which is the substance of his reasoning upon the matter, that he did consider and apply these words. The extract reads:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16 (1) (*b*) and particularly to the "fair and reasonable return". Under Sec. 16 (1) (*b*), the Commission is required to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16 (1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16 (1) (*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16 (1) (*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

Furthermore, as Mr. Clark pointed out, the Commission when dealing with the electric rates applications, had, under heading "III.—A Fair Return", discussed that subject; and that in their reasons for decision with reference to the transit fares applications the Commission speaks "of the misunderstanding which arose from the recent decision on

electric rates"; and that later, in the same paragraph, they said: "The 6.5% rate remains the standard of the fair and reasonable return to which the Commission has due regard".

The appeal should be dismissed but there should be no costs.

LOCKE J.:—The sections of the *Public Utilities Act*, R.S.B.C. 1948, c. 277, which must be considered in deciding the first question are quoted in the reasons of my brother Martland which I have had the advantage of reading.

The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

Some assistance in interpreting the sections of the Act is to be obtained by an examination of the earlier legislation dealing with the control of rates charged for electrical power in British Columbia.

The first statutory provision dealing with the matter appears in the *Water Act Amendment Act* of 1929 which appeared as c. 67 of the statutes of that year. This Act provided for the control of such rates and imposed upon a power company producing electrical energy by water power the duty of supplying electrical energy to the public in the manner defined. Power companies were required to file schedules of their tolls with the Water Board constituted under the *Water Act*, R.S.B.C. 1924, c. 271.

"Unjust and unreasonable" as applied to tolls was declared to include injustice and unreasonableness, whether arising from the fact that the tolls were insufficient to yield fair compensation for the service rendered or from the fact that they were excessive as being more than a fair and reasonable charge for service of the nature and quality furnished.

Section 141B authorized the Board upon the complaint of any person interested that a toll charge was unjust, unreasonable or unduly discriminatory to enquire into the matter,

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to disallow any rate found to be excessive, and to fix the tolls to be charged by the power company for its service or respecting the improvement of the service in such manner as the Board considered just and reasonable.

Section 141C read:

> Every power company shall be entitled to a fair return on the value of all property acquired by it and used in providing service to the public of the nature and kind furnished by such power company or reasonably held by such power company for use in such service and the Board in determining any toll shall have due regard to that principle.

Section 141D read in part:

> In considering any complaint and making any order respecting the tolls to be charged by any power company the Board shall have due regard, among other things, to allowing the company a fair return upon the value of the property of the company referred to in Clause 141C and to the protection of the public from tolls that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the company.

These amendments to the *Water Act* appeared as ss. 138 to 157 in the Revision of the Statutes of 1936 and these sections were repealed when the first *Public Utilities Act* was passed by the Legislature, c. 47 of the statutes of 1938.

It will be seen by an examination of the *Public Utilities Act* that in large measure the language of the amendments to the *Water Act* made in 1929 was adopted. The definition of the terms "unjust" and "unreasonable", which appeared in the 1929 amendment as part of s. 2, was reproduced in s. 2 of the Act of 1938. The prohibition against levying any unjust and unreasonable, unduly discriminatory or unduly preferential rate appearing as s. 8 of the *Public Utilities Act* merely expresses in slightly different terms the prohibition contained in s. 141B. The expression "shall have due regard" which appears in s. 16(1)(*b*) of the *Public Utilities Act* was apparently taken from ss. 141C and D.

The *Public Utilities Act*, however, did not, when first enacted, and does not now contain any section which declares in express terms, as did s. 141C of the *Water Act Amendment Act*, that the power company shall be entitled to a fair return on the value of its property. Had the present Act contained such a provision it appears to me to be perfectly clear that the answer to be made to the first question should differ from that given by the Court of Appeal.

Whether its omission affects the matter is to be determined.

As it has been pointed out, the utility in the present matter is required by the Act to maintain its property in such condition as to enable it to supply an adequate service to the public and to furnish that service to all persons who may be reasonably entitled thereto without discrimination and without delay. It may not discontinue its operations without the permission of the Public Utilities Commission. The utility has, so far as we are informed, a monopoly on the sale of electrical energy in the Cities of Vancouver and Victoria and in my opinion at common law the duty thus cast upon it by statute would have entitled it to be paid fair and reasonable charges for the services rendered in the absence of any statutory provision for such payment.

I consider that, in this respect, the position of such a utility would be similar to that of a common carrier upon whom is imposed as a matter of law the duty of transporting goods tendered to him for transport at fair and reasonable rates. This has been so from very early times. In *Bastard v. Bastard*[1], in an action against a common carrier in the Court of King's Bench for the loss of a box delivered to him for carriage, in delivering judgment for the plaintiff it was said that, while there was no particular agreement as to the amount to be paid for the carriage, "then the carrier might have a *quantum meruit* for his hire".

In *Great Western Railway v. Sutton*[2], Blackburn J. said in part:

> The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing.

The result of the authorities appears to me to be correctly summarized in Browne's Law of Carriers, at p. 42, where it is said:

> We have already seen that the law imposes very onerous duties, and very considerable risks, upon a person who is designated a common carrier. As to his duty, he is bound by law to undertake the carriage of goods. Another man is free from any such duty until he has entered into a special agreement; but the law holds that the common carrier, by the very fact of his trade and business, has, on his side, entered into an agreement with the public to carry goods, which becomes at once a complete and binding contract when any person brings him the goods,

[1] (1679), 2 Show. 81, 89 E.R. 807.
[2] (1869), L.R. 4 H.L. 226 at 237, 38 L.J Ex. 177.

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and makes the request that he should carry them to a certain person or place. To make such a contract binding upon him as a common carrier, it is not necessary that a specific sum of money should be promised or agreed upon; but where that is not the case, there is an implied undertaking upon the part of the bailor that the remuneration shall be reasonable.

The *Water Act Amendment Act* of 1929 appears to have followed closely the form of public utilities legislation in certain of the United States. There had been statutes of this nature in force in various parts of the Union for a considerable time prior to the year 1929.

I do not find that the American statutes generally declared in terms as did s. 141C of the *Water Act Amendment Act* that a power company providing service to the public should be entitled to a fair return on the value of all property acquired by it and used in providing service to the public. This method, however, of establishing a fair and reasonable rate would appear to have been followed universally.

The authorities in the American cases are to be found summarized in Nichols—Ruling Principles of Utility Regulation, at p. 49—where a passage from the judgment of the Supreme Court of the United States in *Bluefield Water Works & Improvement Co. v. West Virginia Public Service Commission*[1] is quoted reading:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary.

In *New Jersey Public Utility Commissioners v. New York Telephone Company*[2], Butler J. said:

> The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for public service. And rates not sufficient to yield that return are confiscatory.

While without the provision made in s. 141C of the *Water Act Amendment Act* a power company compelled by the amendment to furnish electrical service on demand

[1] (1923), 262 U.S. 679.

[2] (1925), 271 U.S. 23 at 31.

upon the conditions prescribed would in my opinion have been entitled to a fair and reasonable payment for such service, the Legislature, by s. 141C, defined the manner in which fair and reasonable rates should be established.

As I have said, the *Public Utilities Act* does not contain any provision which in terms declares the right of the utility to a fair return on the value of its property. It does, however, by the definition of the terms "unjust" and "unreasonable" adopted from the *Water Act Amendment Act* declare that these expressions include rates that are insufficient to yield fair compensation for the service rendered, and the Public Utilities Commission in the present matter have interpreted this in its context as indicating the yardstick to be used in determining the fair and reasonable return to which the appellant was entitled.

Under the powers given to the Commission by s. 45 of the Act the value of the property of the appellant used, or prudently or reasonably acquired to enable the company to furnish its services was determined as at December 31st, 1942, and since then has been kept up to date. On September 11th, 1952, the Commission, after public hearings, decided that until some change in the financial and market circumstances convinced the Commission that a different rate should be applied, the Commission would apply the rate of 6.5 per cent. on the rate base as a fair and reasonable rate of return for the company.

That decision remains unchanged and is not questioned by anyone in these proceedings.

In interpreting the statute, the position at common law of the utility after the repeal of the sections of the *Water Act* must be considered. Had the statute imposed upon the appellant the obligation to furnish service of the natures defined upon demand, without more, it would have been entitled as a matter of law to recover from a person demanding service reasonable and fair compensation. It will not in my opinion be presumed that it was the intention of the Legislature to deprive a utility of that common law right.

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In *Colonial Sugar Refining Company v. Melbourne Harbour Trust Commissioners*[1], the Judicial Committee said:

> In considering the construction and effect of this Act the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation, unless the intention to do so is expressed in clear and unambiguous terms.

In Maxwell on Statutes, 10th ed., at p. 286, the authorities are thus summarized:

> Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt.

Subsection 6 of s. 23 of the *Interpretation Act*, R.S.B.C. 1948, c. 1, directs that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

The appellant in addition to the sale of electrical energy operates a public transportation system and sells gas and by an Order-in-Council made under the provisions of s. 15(1)(*c*) of the Statutes of 1938 it was directed that these three categories of service should be considered as one unit in fixing the rates. In the reasons delivered by the Commission upon the application to increase the rates for electricity, it is said that the appellant has never earned the approved rate of return and that the rates proposed by it, and which were not approved, would not enable it to do so even in respect of the electrical system alone.

[1] [1927] A.C. 343 at 359, 96 L.J.P.C. 74.

Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute.

The fair compensation referred to in s. 2 of the *Water Act Amendment Act* of 1929 referred, and could only refer, to an aggregate produced by tolls sufficient to yield to the power company the fair return on the value of its property to which s. 141C declared it was entitled. The fair compensation referred to in s. 2 of the *Public Utilities Act* is in its context, in my opinion, to be construed in the same manner. The Order of the Commission of September 11th, 1952, determined what that compensation should be. The rates to be put into force to yield such fair compensation, which, at least in the case of electricity, vary in accordance with the use to which it is put and the quantities purchased, are matters to be determined by the Commission. The direction to the Commission in s. 16(1)(*b*) to have due regard to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for the services requires it, in my opinion, to approve rates which are in its judgment fair and reasonable having in mind the purpose for which the electricity is used, the quantities purchased and such other matters as it considers justify the approval of rates which differ for different users.

I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or

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to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required.

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. As the reasons delivered by the Commission show, the present appellant did not ask the approval of rates which would yield a return of 6.5 per cent. to which it was entitled under the Order of the Board.

I do not consider that Question (1) can be answered by a simple affirmative or negative. The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute, which does not mean that the obligation of the Commission to have due regard to the protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

In my opinion the answer to be made to Question (1)(*a*) is that the Commission was wrong in deciding that it was not required to approve rates which in the aggregate would produce for the utility the fair return which by its order of September 11, 1952, the Commission found it to be entitled or such lower rates as the utility might submit for approval. The duty of the Commission to have due regard to the protection of the public from excessive rates referred to in the first four lines of s. 16(1)(*b*) refers to the approval of rates according to the use to be made by and the quantities supplied to those to whom the service is rendered.

The second part of Question (1) reads:

> If the answer to (1)(*a*) is "No", what decision should the Commission have reached on the point?

As to this I agree with the answer proposed by my brother Martland.

I would allow this appeal but make no order as to costs.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:

> (1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?
>
> (*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

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The relevant circumstances involved are contained in the case stated by the Public Utilities Commission and are as follows:

The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.

The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act*.

By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".

By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.

On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.

The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act*, to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.

Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.

Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:

> The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.
>
> The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user.

At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

During the hearings it was contended by counsel for the Company that, the Commission, having determined on a fair and reasonable return to the Company, namely, 6.5%, the Commission should authorize rates which would yield that return, or whatever lesser return the Company's application requested for the time being. The Commission did not accept this contention and the rates which were approved by the Commission would yield approximately $750,000 less per annum than those applied for by the Company would yield. The rates for which the Company sought approval themselves would not have yielded to the Company the full allowed rate of return of 6.5%.

The relevant portions of s. 16(1) of the *Public Utilities Act* provide as follows:

> 16. (1) In fixing any rate:—

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(*a*) The Commission shall consider all matters which it deems proper as affecting the rate:

(*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

(*c*) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate:

In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:

With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion.

The Court of Appeal concurred in this view. The judgment of the Court[1], delivered by Sheppard J.A., refers to this question in the following words:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the "fair and reasonable return". Under Sec. 16(1)(*b*), the Commission is required

[1] (1959), 29 W.W.R. 533 at 538.

to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16(1)(*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

From this decision the present appeal is brought.

To determine the intent and meaning of clauses (*a*) and (*b*) of s. 16(1) of the Act it is necessary to consider them in relation to the other provisions of the Act, with which they must be read.

Section 5 imposes upon a public utility the duty to maintain its property and equipment in such condition as to enable it to furnish, and to furnish, service to the public in all respects adequate, safe, efficient, just and reasonable. Section 7 prevents a public utility which has been granted a certificate of public convenience and necessity or a franchise from ceasing its operations or any part of them without first obtaining the permission of the Commission.

Section 6 requires every public utility, upon reasonable notice, to furnish to all persons who may apply therefor, and be reasonably entitled thereto, suitable service without discrimination and without delay.

Sections 38, 42 and 43 contain provisions whereby, in the circumstances therein defined, a public utility may be ordered by the Commission to extend its existing services.

These four sections last mentioned involve a statutory obligation on the part of a public utility to make capital outlays for extensions of its service. A public utility which operates in a rapidly expanding community may be required to make substantial expenditures of that nature in order to keep pace with increasing demands. It must, if it is to fulfil those obligations, be able to obtain the necessary

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capital which is required, which it can only do if it is obtaining a fair rate of return upon its rate base. The meaning of a fair return was defined by Lamont J. in *Northwestern Utilities, Limited v. City of Edmonton*[1]:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) 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.

The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words "unjust" and "unreasonable" in s. 2(1), which is as follows:

> "Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:

The word "service", which appears in this definition, is defined in the Act to include:

> the use and accommodation afforded consumers or patrons, and any product or commodity furnished by a public utility; and also includes, unless the context otherwise requires, the plant, equipment, apparatus, appliances, property, and facilities employed by or in connection with any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which the public utility is engaged and to the use and accommodation of the public:

These defined words appear in two sections of the Act which relate to the rates to be charged by a public utility.

Section 8, which is among a group of sections dealing with the duties and restrictions imposed on public utilities, provides:

> 8. (1) No public utility shall make demand or receive any unjust, unreasonable, unduly discriminatory, or unduly preferential rate for any service furnished by it within the Province, or any rate otherwise in violation of law; and no public utility shall, as to rates or service, subject any person or locality, or any particular descripiton of traffic, to any undue prejudice or disadvantage, or extend to any person any form of agreement, or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons under substantially similar circumstances and conditions in respect of service of the same description, and the Commission may by regulations declare what constitute substantially similar circumstances and conditions.

[1] [1929] S.C.R. 186 at 193, 2 D.L.R. 4.

(2) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, or whether service is offered or furnished under substantially similar circumstances and conditions. 1938, c. 47, s. 8; 1939, c. 46, s. 5.

Section 20, which empowers the Commission to determine rates, reads as follows:

20. The Commission may upon its own motion or upon complaint that the existing rates in effect and collected or any rates charged or attempted to be charged by any public utility for any service are unjust, unreasonable, insufficient, or discriminatory, or in anywise in violation of law, after a hearing, determine the just, reasonable, and sufficient rates to be thereafter observed and in force, and shall fix the same by order. The public utility affected shall thereupon amend its schedules in conformity with the order and file amended schedules with the Commission.

It will be noted that this section, in addition to the use of the words "unjust" and "unreasonable", also uses the terms "insufficient" and "sufficient" in relation to rates.

Both of these sections contemplate a system of rates which would be fair to the consumer on the one hand and which will yield fair compensation to the public utility on the other hand.

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

(i) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and

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(ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss. 8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.

In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.

The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*) and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).

Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as

between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

In my view the appeal should be allowed, but no costs should be payable.

Appeal allowed, Kerwin C.J. *dissenting.*

Solicitor for the appellant: A. Bruce Robertson, Vancouver.

Solicitors for The Public Utilities Commission of British Columbia, respondent: Clark, Wilson, Clark, White & Maguire, Vancouver.

Solicitors for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of The District of Saanich and Corporation of The Township of Esquimalt, respondents: Straith, O'Grady, Buchan, Smith & Whitley, Victoria.

Solicitor for City of Vancouver, respondent: R. K. Baker, Vancouver.

TAB 7

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Date: 20040405

Docket: A-327-03

Citation: 2004 FCA 149

CORAM: ROTHSTEIN J.A.

NOËL J.A.

SHARLOW J.A.

BETWEEN:

TRANSCANADA PIPELINES LIMITED

Appellant

and

THE NATIONAL ENERGY BOARD, CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, CENTRA GAS MANITOBA INC., CORAL ENERGY CANADA INC., INDUSTRIAL GAS USERS ASSOCIATION, MIRANT CANADA ENERGY MARKETING, LTD., and ONTARIO MINISTER OF ENERGY

Respondents

Heard at Toronto, Ontario, on February 16, 2004.

REASONS FOR JUDGMENT BY: ROTHSTEIN J.A.

CONCURRED IN BY: NOËL J.A.

SHARLOW J.A.

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Respondents

REASONS FOR JUDGMENT

ROTHSTEIN J.A.

INTRODUCTION

[1] This is an appeal from a February 2003 decision of the National Energy Board (RH-R-1-2002), pursuant to leave granted by this Court under section 22 of the *National Energy Board Act*, R.S.C. 1985, c. -7.

[2] There are two issues in the appeal. The first is whether the National Energy Board ("Board") erred in taking customer or consumer interests into account in determining the rate of return on capital it would allow the appellant's Canadian Mainline natural gas transmission system ("the Mainline") to earn. The second is whether the Board erred by fettering its discretion by refusing to depart from an automatic adjustment mechanism it had used to establish the Mainline's rate of return on equity.

[3] In order to understand the issues under appeal, it is first necessary to provide some background and the procedural history leading to the February 2003 decision.

BACKGROUND

[4] The National Energy Board regulates interprovincial natural gas transmission pipelines.

The Mainline is considered a Group 1 pipeline by the Board. Group 1 pipelines are major pipelines which are audited by the Board on a regular basis and whose operating results are continuously monitored by the Board.

[5] The tolls charged for transporting natural gas on the Mainline are regulated by the Board on a cost of service basis. That means that for a future period, referred to as a "test" year, the Board, based on the evidence before it, estimates the costs to be incurred by the Mainline. The tolls which the Board allows the Mainline to charge its customers are designed to generate sufficient revenue to recover these approved costs while at the same time fairly allocating charges to users in relation to the costs and benefits of different services. Included in the cost of service, and indeed, the largest single component of the Mainline's costs, is the Mainline's cost of capital.

[6] The cost of capital to a utility is equivalent to the aggregate return on investment investors require in order to keep their capital invested in the utility and to invest new capital in the utility. That return will be made in the form of interest on debt and dividends and capital appreciation on equity. Usually, that return is expressed as the rate of return investors require on their debt or equity investments.

[7] The rate of return on debt is not usually controversial. It normally consists of the weighted average interest rate for the test year on the utility's outstanding long-term debt. On the other hand, the rate of return on equity is often the subject of controversy and of much debate by expert witnesses.

[8] Unlike debt, where the interest rate payable is directly observable, the rate of return on equity cannot be accurately determined in advance. There are various methods experts use to estimate the rate of return on equity required by investors. The one adopted by the Board is an Equity Risk Premium methodology whereby the Board estimates a risk-free rate based on government bond rates and adds a risk premium to account for the risk associated with equity investment in a "benchmark" pipeline.

[9] Once the separate rates of return on debt and equity are established, they are consolidated into a composite rate of return on capital, based on the relative amounts of debt and equity in the utility's capital structure. In order to account for varying levels of risk between pipelines, the Board constructs for each pipeline a capital structure, i.e. the relative portions of debt and equity capital needed to finance its prudently acquired assets plus its working capital, on the basis of expert evidence. The greater the risk attributed to each pipeline, the greater the required equity component of its capital structure. That is because bond investors, who are more risk averse than equity investors, will not lend funds to an enterprise unless there is sufficient equity capital invested in the enterprise to give them confidence that they will be able to recover their investment from the assets of the enterprise in the event of default.

[10] For example, if the required rate of return on debt is 5%, the required rate of return on equity is 10% and the utility's capital structure, as determined by the Board, consists of 60% debt and 40% equity, the composite rate of return on capital would be 5% H 0.60 + 10% H 0.40 = 7%.

[11] The composite rate of return on capital is then multiplied by a rate base which consists of the Board's determination, according to its accounting regulations, of the net book value of the utility's prudently acquired assets plus its working capital. Multiplying the rate of return required by investors by this rate base gives the total dollar amount of return required by investors. The product is equivalent to the utility's estimated cost of capital for the test year. That cost is added to all other costs to get the

utility's total cost of service. The total is then allocated amongst the utility's customers.

[12] Even though cost of capital may be more difficult to estimate than some other costs, it is a real cost that the utility must be able to recover through its revenues. If the Board does not permit the utility to recover its cost of capital, the utility will be unable to raise new capital or engage in refinancing as it will be unable to offer investors the same rate of return as other investments of similar risk. As well, existing shareholders will insist that retained earnings not be reinvested in the utility.

[13] In the long run, unless a regulated enterprise is allowed to earn its cost of capital, both debt and equity, it will be unable to expand its operations or even maintain existing ones. Eventually, it will go out of business. This will harm not only its shareholders, but also the customers it will no longer be able to service. The impact on customers and ultimately consumers will be even more significant where there is insufficient competition in the market to provide adequate alternative service.

PROCEDURAL HISTORY

[14] In 1994, the Board conducted a public hearing into the cost of capital of certain Group 1 pipelines including the Mainline. The purpose of the hearing was to fix the cost of capital for those pipelines for the period commencing January 1, 1995, and to establish, if possible, an automatic mechanism to adjust the rate of return on equity in the future in order to avoid the expense of litigating annual or biennial changes to the rate of return on equity.

[15] As a result of that proceeding, the Board issued reasons for decision (RH-2-94) in March 1995 fixing the Mainline's return on equity for the 1995 test year at 12.25% based on a deemed capital structure of 70% debt and 30% equity. The Board's deemed capital structure did not provide for any explicit preferred share capital. Therefore, all references to equity refer to common equity.

[16] The Board also established an adjustment mechanism by which the rate of return on equity would be adjusted on January 1 in 1996 and each subsequent calendar year. This mechanism was based upon the Equity Risk Premium methodology whereby:

1. a risk free (Government of Canada) bond yield forecast would be forecasted for the forthcoming year;

2. this bond yield forecast would be deducted from the bond yield forecast of the immediately preceding year;

3. this difference would be multiplied by a factor of 0.75 to determine the adjustment to the rate of return on equity;

4. the product derived in step 3 would be added to or deducted from the rate of return on equity determined by the Board for the preceding year;

5. the sum resulting from step 4 would be rounded to the nearest 25 basis points (1/100th of a percent).

[17] The Mainline's rate of return on equity was adjusted according to this formula in 1996 and subsequent years, although in 1997, the Board abandoned the rounding adjustment, i.e. step 5 above.

[18] By 2001, the appellant had concluded that application of the formula was understating its required rate of return on capital. Therefore, the appellant applied, pursuant to subsection 21(1) of the *National Energy Board Act*, for "review and variance of the [1995 decision] to allow for the determination of a fair return for TransCanada for the years 2001 and 2002." Subsection 21(1) provides:

21. (1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.	21. (1) Sous réserve du paragraphe (2), l'Office peut réviser, annuler ou modifier ses ordonnances ou décisions, ou procéder à une nouvelle audition avant de statuer sur une demande.

[19] The appellant submitted that the Board should approve a new methodology for determining the Mainline's cost of capital - the After-Tax Weighted-Average Cost of Capital (ATWACC) methodology. Alternatively, if the ATWACC methodology was not accepted, the appellant submitted that the required rate of return on equity for the Mainline should be 12.5% for 2001 and 2002 and that based on its risk, the deemed equity component of the Mainline's capital structure should be increased to 40%.

[20] As a result of the appellant's submissions, the Board conducted a hearing in February, March and April 2002. The issues at the hearing were:

1. Is the Rate of Return on Common Equity (ROE) formula, established by the Board in its RH-2-94 Decision, still appropriate for determining TransCanada's ROE?

2. Is the After Tax Weighted-Average Cost of Capital (ATWACC) methodology an appropriate regulatory approach to determining cost of capital?

3. In the event the Board decides to adopt the ATWACC methodology, what is the appropriate ATWACC for TransCanada?

4. In the event the Board declines to adopt the ATWACC methodology and it is determined that the ROE formula is no longer suitable:

a) What would be an appropriate methodology for determining return on capital and capital structure for TransCanada?

b) In applying the above-determined methodology, what would be an appropriate return on capital and capital structure for TransCanada?

5. What is the appropriate effective date for changes to TransCanada's cost of capital? (RH-4-2001 at 4).

[21] By reasons for decision (RH-4-2001) dated June 2002, the Board:

1. rejected the appellant's ATWACC proposal;

2. determined that the rate of return on equity for the Mainline should continue to be based on the

adjustment formula established in its 1995 decision; and

3. increased the deemed equity component of the Mainline's capital structure from 30% to 33% to account for increased business risk.

[22] By application to the Board dated September 16, 2002, the appellant applied for a review and variance of the 2002 decision. This application was also made pursuant to subsection 21(1).

[23] Section 44 of the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208 sets out the requirements for a review application. Subsection 44(2) provides:

44 (2) An application for review or rehearing shall contain	(2) La demande de révision ou de nouvelle audition contient les éléments suivants :
...	...
(b) the grounds that the applicant considers sufficient, in the case of an application for review, to raise a doubt as to the correctness of the decision or order ... including	b) les motifs que le demandeur juge suffisants pour mettre en doute le bien-fondé de la décision ou de l'ordonnance, s'il s'agit d'une demande de révision, ... notamment :
(i) any error of law or of jurisdiction,	(i) une erreur de droit ou de compétence,
...	...

[24] In its decision on the review & variance application (RH-R-1-2002), dated February 2003, the Board found that the appellant had not raised a doubt as to the correctness of its 2002 decision and dismissed the application for review and variance.

[25] The appellant was granted leave to appeal the Board's 2003 decision to this Court.

ANALYSIS

1. Standard of Review and Approach to the Decision Being Appealed

[26] In view of my conclusion that the appeal should be dismissed, it is not necessary to conduct an extensive standard of review analysis. Even on the most intrusive standard of review (correctness), it has not been demonstrated that the Board erred in law.

[27] There is also a question of the extent to which the Court should consider the Board's 2002 decision, which itself was not appealed. Normally, the Court is to restrict itself to a consideration of the decision under appeal. However, when the question is whether the Board erred or came to an unreasonable or patently unreasonable result in finding in its 2003 decision that the appellant had not raised a doubt as to the correctness of the prior 2002 decision, it is necessary to have regard, at least to

some extent, to that prior decision. Rather than becoming bogged down into the intricacies of the scope of the Court's review, I am satisfied, even on a unrestricted consideration of both the 2002 and 2003 decisions, that the Board made no error of law in either case.

2. Did the Board err in considering customer or consumer interests in determining

the Mainline's rate of return on capital?

[28] As a preliminary point, the appellant drew a distinction between its customers and the ultimate consumers. For purposes of this decision, such a distinction is immaterial. The appellant's position is that the Mainline's return on capital should be determined solely from the perspective of the Mainline, without considering other interests, whether they be direct customers or ultimate consumers.

a) The Board is not required to adopt any specific methodology in

determining tolls.

[29] The *National Energy Board Act* contains no provisions or directions which require the Board to determine a pipeline's rate of return on capital. The Act only requires that "all tolls be just and reasonable." Subsections 60(1) and section 62 provide:

60. (1) A company shall not charge any tolls except tolls that are	60. (1) Les seuls droits qu'une compagnie peut imposer sont ceux qui sont_:
(a) specified in a tariff that has been filed with the Board and is in effect; or	a) soit spécifiés dans un tarif produit auprès de l'Office et en vigueur;
(b) approved by an order of the Board.	b) soit approuvés par ordonnance de l'Office.
62. 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.	62. Tous les droits doivent être justes et raisonnables et, dans des circonstances et conditions essentiellement similaires, être exigés de tous, au même taux, pour tous les transports de même nature sur le même parcours.

[30] The authority of the Board to determine just and reasonable tolls is not limited by any statutory directions. The broad authority of the Board was well articulated by Thurlow C.J. in *British Columbia Hydro and Power Authority v. West Coast Transmission Company Ltd. et al.*, [1981] 2 F.C. 646 at 655-56 (C.A.):

There are no like provisions in part IV of the *National Energy Board Act*. Under it, tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the broadest of terms to make orders with respect to all matters relating to them. Plainly, the Board has authority to make orders designed to ensure that the tolls to be

charged by a pipeline company will be just and reasonable. But its power in that respect is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved. In particular, there are no statutory directions that, in considering whether tolls that a pipeline company propose to charge are just and reasonable, the Board must adopt any particular accounting approach or device or that it must do so by determining cost of service and a rate base and fixing a fair return thereon.

[31] The Board has adopted a cost of service method for determining the Mainline's tolls. Before this Court, counsel for a number of the respondents suggested different methodologies for determining just and reasonable tolls that would be open to the Board, such as:

1. tolls based on agreements between pipelines and shippers;

2. tolls based on charges of other pipelines;

3. use of base year tolls adjusted for inflation;

4. tolls based on mechanisms to encourage utilities towards greater efficiency.

As no particular methodology is required by the *National Energy Board Act*, the Board could have adopted a different methodology for determining just and reasonable tolls for the Mainline.

b) Having adopted a cost of service methodology, the costs determined by the Board must be just and reasonable to both the Mainline and its users.

[32] In the case of the Mainline, the Board has adopted a cost of service methodology whereby the Mainline is to be compensated through tolls for its prudently incurred costs, including its cost of capital, and in particular, its cost of equity capital. Once it did so, it had to faithfully determine the Mainline's costs based on the evidence and its own sound judgment.

[33] Cost of equity for a future year cannot be directly measured and therefore must be based on estimates. The Board must choose an estimate that allows the Mainline to earn what has been termed a "fair return." In *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186 at 192-93, the Supreme Court defined a fair return in the following terms:

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. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) 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.

Tolls which reflect a fair return on capital will be just and reasonable to both the Mainline and its users.

[34] To put the matter another way, when the cost of service methodology is used to determine just and reasonable tolls, if the Board does not permit the Mainline to recover its costs because it has understated the Mainline's cost of equity capital, the Mainline will be unable to earn a fair return on equity. The tolls will therefore not be just and reasonable from the Mainline's point of view. On the

other hand, the tolls must also be just and reasonable from the point of view of the Mainline's customers and the ultimate consumers who rely on service from the Mainline. Therefore, customers and consumers have an interest in ensuring that the Mainline's costs are not overstated. As respondents' counsel pointed out, there are numerous costing issues that may be subject to challenge. Questions may arise about, among other things, the allocation of costs between the Mainline and other divisions of the appellant; whether costs have been, or are being, prudently incurred; and whether the Mainline's compensation plans are reasonable. And, specific to this appeal, customers and consumers have an interest in ensuring that the Mainline's cost of equity is not overstated.

c) The Board did not improperly consider the impact on customers or

consumers of increasing tolls to reflect the appellant's costs.

[35] In oral argument, the appellant conceded that it does not object to its customers having input into the Board's cost determinations and in particular, its cost of capital determination, provided the issues in dispute are restricted to the costs of the Mainline. However, the appellant does object to the Board taking the impact of tolls on customers and consumers into account in determining the Mainline's cost of equity capital. The appellant says that the required rate of return on equity must be determined solely on the basis of the Mainline's cost of equity capital. The impact of any resulting toll increases on customers or consumers is an irrelevant consideration in that determination. The appellant does concede that when the final tolls are being fixed, the impact on the customers and consumers may be relevant, but insists that it is irrelevant when determining the required return on equity.

[36] I think that this argument is sound and in keeping with the decision of the Supreme Court in *Northwestern Utilities*. The cost of equity capital does not change because allowing the Mainline to recover it would cause an increase in tolls. Under the Board's Equity Risk Premium methodology, the cost of equity capital is driven by the Board's estimate of the risk-free interest rate and the degree of risk investors perceive in the "benchmark" pipeline. The higher the risk, the higher their required rate of return. The degree of risk specific to the Mainline is accounted for by adjustments to its deemed capital structure. Accordingly, the cost to the Mainline of providing that rate of return on the equity component of its deemed capital structure is unaffected by the impact of tolls on customers or consumers.

[37] The appellant has not demonstrated that the Board took the impact on customers or consumers into account in making its determination of the Mainline's required rate of return on equity.

[38] It is true that in its 2002 decision, the Board did state:

In respect of the appropriate balance of customer and investor interests, the Board notes that customer interest in rate of return matters relates most directly to the impact the approved return will have on tolls. The Board is of the view that the impact of the rate of return on tolls is a relevant factor in the determination of a fair return (RH-4-2001 at 12).

[39] The appellant says it cannot tell if the Board took the impact on customers or consumers into account in making its determination of the Mainline's required rate of return on equity. There is certainly no indication in its 2002 reasons that the Board adjusted its estimate of the required rate of return on equity based upon the impact it would have on tolls. In fact, the Board simply applied the automatic adjustment formula adopted in its 1995 decision. That formula does not take into account the impact of tolls on customers or consumers.

[40] It is also true that, in relation to an adjustment the Board made in the Mainline's deemed capital structure in its 2002 decision, the Board did state:

In light of the above, the Board is of the view that it would be appropriate to increase the Mainline's deemed common equity ratio from 30% to 33%. The Board notes that this increase will raise the Mainline's annual cost of service and tolls by approximately 2%. The Board has determined that the toll increase is warranted by the prospective business risk facing the Mainline and that it will not impose an undue burden on shippers (RH-4-2001 at 59).

[41] As I understand the Board's reasons, in view of the Mainline's increased business risk, the equity component of its deemed capital structure was increased from 30% to 33%. Because the required rate of return on equity was greater than the required rate of return on debt, this increased the overall estimate of the Mainline's required rate of return on capital, resulting in a 2% increase in tolls.

[42] While the Board observed that the increase would not be an undue burden on shippers, there is no suggestion that the increase in the equity component of the Mainline's deemed capital structure was in any way suppressed by considerations of its impact on customers or consumers. Nor, as I have said, is there any indication that the Board determined a required rate of return on equity for the Mainline and then adjusted it downward based on the impact it would have on tolls. In the absence of some indication in the Board's reasons, there is no basis for such an assumption.

d) The Board may adopt temporary measures to ameliorate "rate shock" so

long as the utility eventually recovers its costs.

[43] I would add one further point. While I agree with the appellant that the impact on customers or consumers cannot be a factor in the determination of the cost of equity capital, any resulting increase in tolls may be a relevant factor for the Board to consider in determining the way in which a utility should recover its costs. It may be that an increase is so significant that it would lead to "rate shock" if implemented all at once and therefore should be phased in over time. It is quite proper for the Board to take such considerations into account, provided that there is, over a reasonable period of time, no economic loss to the utility in the process. In other words, the phased in tolls would have to compensate the utility for deferring recovery of its cost of capital. In the end, where a cost of service method is used, the utility must recover its costs over a reasonable period of time, regardless of any impact those costs may have on customers or consumers (see *Hemlock Valley Electrical Services Ltd. v. British Columbia Utilities Commission et al.*, [1992] 12 B.C.A.C. 1 at 20-21 (C.A.)). In this case, however, there is no suggestion that the Board sought to phase in or otherwise understate the Mainline's cost of capital.

3. Did the Board fetter its discretion?

a) Appellant's arguments

[44] The appellant's second alleged error of law is that the Board fettered its discretion. The appellant submits that the Board placed an inappropriate onus on the appellant to demonstrate that the cost of equity adjustment formula established by the Board in its 1995 decision, but not expressed in the *National Energy Board Act* or in any judicial authority, was to govern unless the appellant could persuade the Board otherwise.

TAB 8

Ontario Energy Board | Commission de l'Énergie de l'Ontario

EB-2005-0421

IN THE MATTER OF AN APPLICATION BY

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

FOR ELECTRICITY DISTRIBUTION RATES 2006

DECISION WITH REASONS

APRIL 12, 2006

5. CAPITALIZATION AND COST OF CAPITAL

5.1 CAPITAL STRUCTURE

5.1.1 In this application, Toronto Hydro uses the deemed capital structure of 35% equity and 65% debt as set out in the Rate Handbook. None of the intervenors object. In the absence of any evidence or argument to the contrary the Board sees no reason to deviate from the Handbook position.

5.2 RETURN ON EQUITY

5.2.1 The Applicant seeks a return on equity of 9%, and claims it is entitled to that rate because that is the rate defined in the Electricity Distribution Rate Handbook. The Applicant argued earlier in these proceedings that this rate could not be contested for the same reason; it was entitled to rely upon the Handbook amount.

5.2.2 The Applicant brought a Motion on January 16, 2006 seeking a ruling on this issue. The Board held that the Handbook was intended for those applicants that were filing on a historical year basis.[4] The Board did, however, find that where the issue was not contested and where there was no contrary evidence, the Handbook values could be relied upon by utilities filing on a forward year basis[5].

5.2.3 However, that is not the case here. This is a contested issue. The Board staff and others have proposed a mechanistic update based on updating the long Canada bond rate. Where an applicant files on a forward test year basis it proposes current data as opposed to outdated data. It does that, of course, for those items where its costs have increased, in order that it might recover those costs. It becomes a problem if the utility can unilaterally determine which of the costs should be updated. As the Board stated in its Decision on the Motion:

[4] EB-2005-0421, transcript Volume 1, p. 113 - 123
[5] Transcript, pp. 118-119

> "it is not unreasonable to assume that with respect to those variables, where automatic, simple updating can be implemented, that should be accomplished as opposed to sticking with outdated '04 data when that's not necessary."

5.2.4 In this case new data has been presented by Board staff. Updating the return on equity based upon current data with respect to the long bond rates yields a return on equity of 8.36% as opposed to 9%. This results in a reduction of the revenue requirement of approximately $3.5 million.

5.2.5 This does not account for any change in the equity risk premium, which is the other component. The Applicant argued that if the return on equity is to be updated to reflect a current long Canada bond rate then the equity risk premium should be updated in the manner proposed by Ms. McShane[6]. That results in a return on equity of 8.65%. The Board believes that both adjustments are legitimate updates.

5.2.6 However, other matters intervene with respect to the return on equity. The return on capital is a different type of cost parameter than operating costs. Operating costs, like many costs a utility faces, are unique to the specific utility and within its control. The cost of capital, however, is determined on a formula basis. Past practice is to have these rates similar for groups of utilities. In other words, the return on equity, and for that matter the cost of capital generally, is usually determined on a generic basis.

5.2.7 While there is a strong argument that the return on equity should be updated utilities that file on a forward year basis, the Board is concerned that this will create confusion on capital markets. It may be perceived that a utility is penalized because it chose to file on a forward year basis. Utilities of course compete with each other in capital markets, which adds another dimension to the problem. And, as a matter of law, utilities are entitled to earn a rate of return that not only enables them to attract capital on reasonable terms but is comparable

[6] Transcript, Volume 4, p. 3

to the return granted other utilities with a similar risk profile[7] The manner in which they file their application does not fall within the jurisprudence.

5.2.8 Toronto Hydro also argues that if the Board only looks at the economic variables in the ROE it amounts to "cherry-picking". The utility claims that it is improper to isolate economic variables without looking at other cost of capital issues such as debt to equity ratios. Toronto Hydro says that it is the most highly leveraged utility in the province with a debt toequity ratio of 65:35. That ratio was initially established in the Board's March 2000 Distribution Rate Handbook.

5.2.9 Toronto Hydro notes that a historic test year filer with a 50/50 debt to equity ratio would attract a 9% return on a higher equity base than Toronto Hydro. The higher equity base and rate, they say, creates an unfair advantage in capital markets. Toronto Hydro believes that a 60/40 ratio would be more appropriate in its case, but accepted the 65/35 debt to equity ratio "as part of the bundle of the OEB's rate-making policies contained in the new Handbook for this next generation of LDC rates."

5.2.10 The Board accepts this argument. The long Canada bonds are just a part of the picture. The cost of capital should be updated to reflect current market conditions, but it should be done on a comprehensive and generic basis. Dealing with it piece-meal just leads to confusion in the markets with potential unfairness to investors, the utility, and ultimately the customers.

5.2.11 Having considered the generic aspect of this particular cost item – the consequences for the financing costs of particular utilities and the consequences of that in turn to ratepayers – the Board has determined it will accept the 9% rate of return on equity for Toronto Hydro. The Board would emphasize that this ruling applies to the 2006 rate year only and should not be taken as a precedent beyond that.

5.2.12 In making this determination the Board is attempting to balance the interests of all parties. It is also relevant that the Board has announced its intention to review the cost of capital, including the equity risk premium, for electricity distributors before 2008.

[7] Northwestern Utilites v Edmonton [1929] SCR 186 at 193; British Columbia Electric Railway Co v British Columbia Utilities Commission [1966] SCR 837 at 854; Federal Power Commission v Hope Natural Gas Co, 320 US S41 (1944) at 603..

5.2.13 In short, cost of capital is one item that is better dealt with on a generic basis. This ruling should not be interpreted as departing from our ruling on the motion with respect to the application of the Rate Handbook to forward test year filers. This ruling relates to the unique aspect of cost of capital, and then only for the 2006 rate year. The manner in which the cost of capital will be updated for all utilities will be addressed by the Board in the near future.

5.3 DEBT RATE

5.3.1 The Toronto Hydro application uses the Handbook's methodology for calculating the weighted average debt rate.

5.3.2 A number of parties were concerned that THESL is paying interest on a loan to its parent, Toronto Hydro Corporation, at an interest rate in excess of current market rates. This loan is in the amount of $980 million at an interest rate of 6.8%. There was general consensus that the current market rate is 5% and the extra 1.8% interest amounts to approximately $16 million per year.

5.3.3 When asked why the utility had not refinanced the debt at a lower rate, the witnesses responded that the decision was solely up to the City of Toronto.

5.3.4 The fact that the Board and most of the parties in this proceeding were concerned about the above-market interest rates during the course of this hearing would have been apparent both the utility and its shareholder the City of Toronto. The response by the City was interesting, to say the least. Once the hearing was over, they chose to extend the note to 2013.

5.3.5 The utility's defence of this interest rate is that it is the deemed rate specified in the Handbook. Toronto Hydro acknowledges that it would be subject to a lower deemed debt rate for any new debt but argues that the 6.8% rate on the existing note should be left in place because it was compliant at the time the note was put in place. Appendix A of the promissory note defines the debt rate applicable to the note as "the rate of interest per annum that at all times is equal to the debt cost rate that is prescribed from time to time by the Ontario Energy Board in its Electricity Distribution Rate Handbook for utilities in the same rate base class."

TAB 9

66 B.C.L.R. (2d) 1, 12 B.C.A.C. 1, 23 W.A.C. 1

C
1992 CarswellBC 88

Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)

HEMLOCK VALLEY ELECTRICAL SERVICES LTD. v. BRITISH COLUMBIA UTILITIES COMMISSION and ATTORNEY GENERAL OF BRITISH COLUMBIA

British Columbia Court of Appeal

Hutcheon, Cumming and Hinds JJ.A.

Heard: February 12 and 13, 1992

Judgment: March 26, 1992

Docket: Doc. Vancouver CA013604

Counsel: Chris W. Sanderson and Barbara Cornish, for appellant.

Gordon A. Fulton, for respondent B.C. Utilities Commission.

Patrick G. Foy, for respondent Attorney General of British Columbia.

Subject: Public

Public Utilities --- Regulatory boards -- Regulation of rates.

Public utilities -- Rates and charges -- Changes -- Utilities Commission Act empowering commission to determine fair and reasonable return upon appraised value of property of regulated utilities -- Commission having duty to set rates to allow opportunity to earn that return.

The appellant was a small special purpose utility which was the sole supplier of electricity to approximately 192 residential customers. In May 1990 the appellant applied to the British Columbia Utilities Commission for a rate increase of 7.32¢ per kW.h on a rate of 8.65¢ per kW.h. In July 1990 the commission allowed an interim increase of 3.7¢ per kW.h. Following a public hearing the commission approved an increase of 3.77¢ per kW.h, but declined to permit the immediate full implementation of the increase and instead directed that it be phased in by increases of 1.51¢ in July 1990, 1.51¢ in May 1990 and 0.75¢ in May 1992. The appellant brought an appeal against the phase-in provisions of the decision.

Held:

Appeal allowed; matter remitted to commission.

The Utilities Commission Act empowers the commission to determine what is a fair and reasonable rate of return upon the appraised value of the property of the regulated utilities, but, having done so, requires the commission to set rates so as to allow recovery of a rate which permits an opportunity to earn that return. Here, the commission correctly exercised its discretion to determine what a just and reasonable return was, but wrongly failed to permit the appellant to charge a

rate which gave it an opportunity to earn that return. The balancing of interests required by the Act was performed by the commission when it settled the rate base, fixed the rate of return and determined the costs of operation allowable for rate-making purposes. In directing the three-year phase-in, the commission was not balancing interests or, if it was purporting to do so, it acted improperly. If it wished to avoid "rate shock" to the appellant's customers by a phase-in period, it would have to do so in a way which met the requirements of the Act.

Cases considered:

British Columbia Electric Railway Co. 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 -- considered

British Columbia Hydro & Power Authority v. Westcoast Transmission Co. , [1981] 2 F.C. 646, 36 N.R. 33 (C.A.) [leave to appeal to S.C.C. refused 37 N.R. 540, (sub nom. British Columbia Petroleum Corp. v. Canada (National Energy Board)) 38 N.R. 87] -- referred to

California-Pacific Utilities Co., Re, 52 P.U.R. 3d 446 (1964) -- considered

Pacific Telephone & Telegraph Co., Re, 65 P.U.R. 3d 517 (1966) -- considered

Statutes considered:

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

s. 2(1)referred to

s. 16(1)referred to

Utilities Commission Act, S.B.C. 1980, c. 60

s. 65 [am. 1983, c. 10, s. 21 (Sched.)]considered

s. 66(1)(a)considered

s. 66(1)(b)considered

s. 115referred to

s. 118referred to

Water Act Amendment Act, S.B.C. 1929, c. 67 -- referred to.

Appeal from order of British Columbia Utilities Commission.

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

1

Decision Appealed From

2 This is an appeal from O. G-11-91 of the British Columbia Utilities Commission (the "commission") pronounced

January 30, 1991 reaffirming the terms of O. G-77-90, made October 17, 1990, which permitted the appellant utility, Hemlock Valley Electrical Services Ltd. ("HVES"), to increase the rate it charges for the supply of electrical services, but ordered that the rate base costs be phased in over a period of three years.

3 On March 7, 1991, pursuant to s. 115 of the *Utilities Commission Act*, S.B.C. 1980, c. 60, Toy J.A. granted leave to appeal to this court and directed that the operation of commission O. G-11-91 be stayed upon terms to which further reference will later be made.

Facts

4 HVES, a wholly owned subsidiary of Hemlock Valley Resorts Inc., is a small, special purpose utility which is the sole supplier of electrical service to a group of approximately 192 residential customers living in a single community located around the Hemlock Valley ski hill in the lower mainland of British Columbia. HVES also provides service to the ski hill itself.

5 HVES was incorporated in 1979 and on June 20, 1980 was granted a certificate of public convenience and necessity by O. C-23-80 of the British Columbia Energy Commission, the predecessor of the present commission.

6 On November 13, 1982 HVES filed a rate application with the commission (the "1982 application"). A public hearing was held on June 7, 1983 and the commission rendered its decision on July 8, 1983 (the "1983 decision").

7 At that time HVES' operations were described as follows:

> Hemlock is a subsidiary of Hemlock Valley Recreations Ltd. ("Hemlock Recreations"), which company owns and leases land in the Hemlock Valley of the Lower Mainland of British Columbia for year-round recreational use. Hemlock provides underground electric service to residential consumers and to Hemlock Recreations for use in a ski lodge, lifts and a maintenance area; to Hemlock Property Management Ltd. for residential use on residential properties; and to Hemlock Valley Sanitary Service Ltd. for a sewer system serving the recreation area. All three companies are wholly owned subsidiaries of Hemlock Recreations.

8 In the 1983 decision the commission declined to allow HVES a return on its rate base and ordered that electrical rates be set at 11.5¢ per kW.h with a $15 per month minimum charge, effective July 1, 1983. The commission noted:

9 (a) the Hemlock recreational area was still in the developmental stage;

10 (b) the development had been materially affected by a downturn in the provincial economy;

11 (c) HVES had taken significant steps to reduce the cost of power and improve the reliability of service through the interconnection with B.C. Hydro;

12 (d) undertakings were given in the prospectus of Hemlock Valley Estates Limited indicating that a purchaser of property could expect that all services would have been completed and paid for by the developer from its own resources.

13 The commission concluded that in the circumstances of HVES a reasonable approach to rates would be based on a break-even approach between revenue and expenses.

14 In its decision of October 17, 1990 the commission said of the 1983 decision:

> It is clear that in the 1983 decision the interdependency of electric and other services with the resort enterprise at

> Hemlock Valley was fully understood. It is also clear that the commission felt some consternation about the 7.69 per cent negative return on rate base flowing from the 1980 decision. It was also apprehensive that the continued existence of Hemlock Valley as a going concern was being "materially affected by the downturn in the provincial economy." Moreover, it was looking at the changeover from diesel generators to a tie-line with B.C. Hydro. The change in source of power was unquestionably correct in the long-term, but it imposed an annual amortization cost of $98,840.18 for the years immediately ahead. That addition of nearly $100,000 per year materially distorted the profit and loss statement. In the circumstances, the commission, in its 1983 decision, chose to ignore return on rate base as an appropriate means of fixing fair and reasonable rates, and chose instead a pragmatic break-even approach between revenue and expenses. It also added a small allowance for contingencies. Management of the utility was evidently prepared to accept this approach.

15 By commission O. G-65-83, dated August 23, 1983, HVES was again ordered to amend its rates to reflect the sale of a portion of its electric utility plant to B.C. Hydro.

16 On July 10, 1984 HV Recreations, the parent of HVES, went into receivership. HV Recreations remained in receivership until January 15, 1987 when Skipp L.J.S.C. (as he then was) approved the sale of the assets of HV Recreations, including the HVES shares, to one Michael Robbins or his assignee. Sometime after January 15, 1987 the HVES shares were transferred to Hemlock Valley Resorts Inc. ("HV Resorts"). HV Resorts remains the sole shareholder of HVES. Throughout 1987 and 1988 there were various changes in the ownership of HV Resorts and on October 27, 1988 its shares were acquired by Mr. Joseph Peters. There has been no change in the ownership of the assets or shares of HV Resorts since that date.

17 In 1984 and again in 1986 increased rates were approved to reflect, firstly, an increase in B.C. Hydro's water rental fees and, secondly, an increase in the cost to HVES of purchasing power from B.C. Hydro.

18 As of the spring of 1990 the rate being charged by HVES was 8.65¢ per kW.h. That rate had been in effect since September 26, 1986.

19 On May 31, 1990 HVES applied to the commission to increase its tariff rates by 7.32¢ per kW.h, an 84.6 per cent increase. The reasons given were to permit the recovery of recently approved rate increases to B.C. Hydro, forecast operating costs and a return on rate base. In the 1990 application, HVES proposed a rate base of $366,511 with a 13 per cent return on the debt component and a 15 per cent return on the equity component of that rate base.

20 Prior to a public hearing the commission, by O. G-58-90, ordered that effective July 1, 1990 HVES be allowed an interim increase of 3.7¢ per kW.h in its rates to permit the recovery of the increased cost of purchased power from B.C. Hydro and increased operating costs. The operative part of that order read:

> 1. The Rate Base costs included in the Application will not form part of the interim increase allowed in item No. 2 of this Order at this time.
>
> 2. The Commission will accept, subject to timely filing, effective July 1, 1990, an amendment to its Electric Tariff Rate Schedule incorporating an increase of 3.70 cents/kW.h over existing rates on an interim basis, with the interim increase subject to refund with interest calculated at the average prime rate of the bank with which HVES conducts its business.
>
> 3. HVES, by way of a Customer Notice, is to inform each customer, as soon as possible, of the application before the Commission, the approved interim increase and the effect on average annual billings. HVES is to

provide the Commission with a copy of the Customer Notice.

21 On August 2, 1990 the commission directed that a public hearing commencing September 24, 1990 be held in respect of HVES' application of May 31, 1990 and gave directions with respect to notice of the hearing and participation by intervenors and interested persons intending to participate in the public hearing.

22 The Hemlock Valley Ratepayers Association intervened and, we were advised, played a significant role at the hearing. Its submissions covered many areas, correcting a number of statements in the application and disputing a number of forecasts. Among other things, the rate base component in the application was opposed on the basis that the utility systems were fully paid for by the developers.

23 The commission received evidence of complaints of unsatisfactory service, inadequate HVES accounting documentation, concerns about paying for the recreational commercial venture through utility payments (commercial power use is unmetered), detailed comments on HVES' proposed operating and maintenance expenses, comparisons to residential rates in other areas, and other matters.

24 Following the public hearing on September 24 and 25, 1990, by commission O. G-77-90 dated October 17, 1990, the commission issued a decision (the "original decision") with respect to the 1990 application.

25 The operative part of O. G-77-90 reads:

> 1. The Rate Base and Revenue Requirement for the Test Period are set out in Schedules contained in the Decision.
>
> 2. The Commission will accept, subject to timely filing, amended Electric Tariff Rate Schedules which confirm to the terms of the Commission's October 17, 1990 Decision.
>
> 3. HVES is to proceed with refunds to its customers of record on and after July 1, 1990, where necessary. Such refunds are to include interest calculated as specified in O. G-51-90.
>
> 4. HVES will comply with the several directions incorporated in the Commission Decision.

I have appended as App. A to these reasons [pp. 25-30] the schedules referred to in para. 1 of the commission order.

26 By the original decision the commission declined to permit the full implementation of the approved rate increase immediately but instead directed that it be phased in by increases of 1.51¢ per kW.h effective July 1, 1990, and 1.51¢ per kW.h and 0.75¢ per kW.h effective May 1, 1991 and May 1, 1992 respectively.

27 It is this rate adjustment phase-in which is the principal focus of this appeal.

28 By letter dated November 8, 1990, HVES requested that the commission reconsider certain aspects of the original decision pursuant to s. 114 of the Act on the basis that:

29 (a) Reconsideration was appropriate because HVES had not been provided with an opportunity to deal with the phase-in issue in its rate application;

30 (b) Once the commission had determined that there was a rate base and that a 13 per cent return on it was "just and reasonable," pursuant to the Act, the commission was obliged to permit HVES an opportunity to recover sufficient revenue to capture that return.

31 On January 30, 1991, by O. G-11-91, the commission ordered that the request by HVES to vary O. G-77-90 be denied and that HVES was to proceed with refunds to customers and to comply with all other directions in that order.

32 The operative part of O. G-11-91 reads:

> NOW THEREFORE the Commission orders as follows:
>
> 1. The Request, by HVES to vary the October 17, 1990 Commission Decision and Order No. G-77-90, is denied and the Commission's Reasons for Decision is attached as Appendix A.
>
> 2. The Commission reaffirms and orders HVES to proceed with refunds to customers along with other directions incorporated in its October 17, 1990 Decision and Order No. G-77-90.

33 It is from O. G-11-91 that this appeal is taken.

Grounds of Appeal

34 As set out in the appellant's factum the grounds of appeal are:

> that the Commission erred in pronouncing Order No. G-11-91, which reaffirmed Commission Order No. G-77-90 when Order No. G-77-90 contained an error in law...in that the Order:
>
> (a) failed to permit HVES the opportunity to recover a portion of its rate base costs over three years notwithstanding that the Commission had determined that that portion of its rate base costs was necessary for the establishment of rates which were just and reasonable under the *Utilities Commission Act*, S.B.C. 1980, c. 60 (the "Act");
>
> (b) required a refund of monies which the Commission had determined were necessary to permit HVES an opportunity to receive a just and reasonable rate under the Act.

Reasons for the Decisions of the Commission

1. Original Decision

35 In the original decision of October 17, 1990, under the heading "Determination of Rate Base," the commission, after reviewing the 1983 decision, went on to say:

> This division of the commission considers that the 1983 decision was a practical decision to tide the enterprise at Hemlock Valley over a particularly difficult period. Sooner or later, however, longer-term prospects must be faced squarely. The tie-line has been amortized over five years. Evidence (Exs. 14 through 21) clearly indicates that recovery of plant expenditures was anticipated through utility rates. *Therefore the commission believes that a return to more traditional rate-making practice is justified.*
>
> It was proposed to the commission by the intervenors at the hearing that rate base should not be recognized. The cornerstone of rate base is appraised value of utility property, which is usually taken to be original cost of plant. The commission cannot, by a stroke of the pen, eliminate the appraised value of the property; to do so would be confiscation of property ...

And concluded:

The commission has considered alternative calculations for rate base and concludes that no material difference results from any refinements which might be made. Therefore, the commission accepts the company's evidence, and finds the rate base to be $366,511 for the test period.

36 The commission then continued:

4.2 Capital Structure

The company currently has no viable capital structure of its own. Its financing has been by way of loans from the parent company. The applicant proposes a deemed 50/50 per cent debt/equity ratio in this application. It is a frequent practice of regulatory tribunals to use a notional capital structure. While 50 per cent equity is much higher than would be usual for utilities in general, the higher proportion of equity in this case can be considered as reasonable, bearing in mind the relative risks in the case of the company.

4.3 Return on Rate Base

The company has proposed a return of 13 per cent on the debt component, and 15 per cent on the equity component of the rate base. Standing alone, these figures certainly fall within a reasonable range in today's market. Nevertheless, the commission considers it essential to consider the particular circumstances of the company in this decision. While it is true that risky investments typically command higher returns, that position considers primarily the potential investors' point of view in placing funds at the utility's disposal. From the existing shareholders' point of view, the realization of an allowable rate of return depends upon the ability of management to run an efficient organization, and for external factors to favourably affect the prosperity of the company. Bearing in mind the interrelationship of the resort and utility elements at Hemlock, and the current circumstances of the utility, the commission cannot accept a return on equity for rate-making purposes of 15 per cent. *For the foregoing reasons, the commission believes that a 13 per cent return on debt and a 13 per cent return on equity are both just and reasonable within the spirit of s. 65(3) and (4) of the Act*, which states:

> (3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate of service, or whether a service is offered or furnished under substantially similar circumstances and conditions.
>
> (4) In this section a rate is 'unjust' or 'unreasonable' if the rate is
>
> (*a*) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,
>
> (*b*) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or
>
> (*c*) unjust and unreasonable for any other reason.

37 Under the heading "Cost of Service" the commission, over several pages, reviewed in detail various components of the cost of service which HVES estimated it would incur and for which it sought a rate sufficient to enable it to recover, and considered the objections to and criticisms of those cost components raised by the intervenors and various witnesses. It is not necessary here to review this aspect of the material in any great detail: it is sufficient to say that where the commission did not accept in full the submissions of HVES it reduced the eligible cost component by the amounts set out in the schedules to its order (see, in particular, sheet 5 of App. 1) with the result that HVES' revenue requirements, for rate-

making purposes, were reduced accordingly. The commission also made a number of directions and recommendations to the company, of which the following are examples:

> *The commission directs the company to prepare and file with the commission an operating budget at the beginning of each fiscal year ...*
>
> *The commission therefore directs that the company provide the commission with a time schedule for the completion of the work, as well as specific advice when the work is completed. In addition, the company is directed to file a copy of its preventive maintenance program by November 1, 1990,*

but these did not result in any further adjustments to the estimates of allowable and recoverable costs of service.

38 The commission then turned its attention to the question of "quality of service" and reviewed a number of complaints and dissatisfactions expressed by the intervenors. It concludes its discussion of this issue by saying:

> During the course of the hearing, the commission was impressed with the sincerity, variety and degree of expertise shown by the witnesses for the principal intervenor, the Hemlock Valley Ratepayers' Association. It is suggested to the company that consideration might well be given to drawing on this pool of talent. *The commission strongly recommends that a "utility consultation committee" be established by HVES, with members from the utility and representative ratepayers. Quarterly information meetings should serve to improve communications in the interest of the common goals of all the participants on the mountain.*

Apart from the recommendation which the commission made in this passage, nothing else was said by the commission with regard to quality of service and, most importantly, as will be noted later, no further adjustments were made to the rate base, rate of return or the allowable components of recoverable cost of service (other than those specifically referred to) by reason of any concern related to the quality of service provided by HVES to its customers.

39 The commission summarized its decision as follows:

> **7.0 Decision Summary**
>
> ***7.1 Revenue Requirement***
>
> Section 44 of the *Utilities Commission Act* requires that:
>
> > 44. Every public utility shall maintain its property and equipment in a condition to enable it to furnish, and it shall furnish, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.
>
> It is the duty of the commission to see that this is done. It is also the duty of the commission to ensure that the utility has sufficient revenue to enable it to perform these functions. However, it must always be satisfied that the level of funding provided for is within the company's ability to use efficaciously.
>
> *On the basis of the evidence presented, the commission has set a revenue requirement to satisfactorily meet the above objectives (refer to attached schedules).*
>
> ***7.2 Rate Adjustment Phase-In***
>
> As mentioned in s. 1.0, the application contemplated a rate increase of 84.6 per cent in the test year. The adjust-

ments to the cost of service in this decision have mitigated some of the potential rate shock. The commission considers that a return on rate base should be allowed; however, it believes that the ratepayers should be protected from the full impact initially. In arriving at this conclusion, the commission has recognized that there was a hiatus of some seven years between applications. In addition, the future economics and the viability of the mountain are at stake.

Accordingly, the commission orders that the rate base costs be phased in over three years. The commission requires the utility to file amended rate schedules incorporating an increase of 1.51¢ per kW.h over permanent rates effective July 1, 1990, and for further increases of 1.51¢ per kW.h and 0.75¢ per kW.h effective May 1, 1991 and May 1, 1992, respectively.

2. Reconsideration Decision

40 In refusing the request of HVES for reconsideration and confirming its original decision, the commission said, under the heading "Jurisdiction":

> **2.0 Jurisdiction**
>
> The argument made on behalf of HVES has as its essence the jurisdiction of the commission, and it is set out in the letter dated December 14, 1990.
>
> On p. 2 of that letter, s. 65(4) of the Act is quoted in its entirety, as is s. 66(1)(*a*) and (*b*). The submission then goes on:
>
> > The words of Section 65(1)(b) [reference should be s. 65(4)(*b*)] and Section 66(1)(b) of the Act are a clear statutory direction to the Commission on how to determine a just and reasonable rate. In our respectful submission, in the presence of clear language, the Commission may not disregard those statutory provisions and substitute its own opinion of what is just or reasonable in any given case.
>
> It is the commission's view that the submission is flawed in that it evidently invites the commission to ignore the clear language of s. 65(4)(*a*) and (*c*), and concentrate instead only on s. 65(4)(*b*) which supports the position of HVES. The commission holds that, in fixing a rate, it must have due regard to the whole of s. 64. Section 66(1)(*b*) makes this abundantly clear:
>
> > the Commission shall have due regard, among other things, to the fixing of a rate that is not unjust or unreasonable, within the meaning of Section 65.

41 After referring to and distinguishing the decision of the Supreme Court of Canada in *British Columbia Electric Railway Co. 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, the commission continued:

> The point which seems to be missed is that the commission's decision of October 17, 1990 must be taken as a whole and should be read and understood as such. It is not a decision on rate of return, followed by decisions at a later time on other matters. The phase-in is an integral part of the finding on just and reasonable rates. The decision as a whole should make it abundantly clear that the commission had concerns about "the nature and quality (of service) furnished by the utility." The impact on the customers of a large percentage increase suddenly imposed was another example of an "other reason" [s. 65(4)(*c*)] to which the commission gave due regard in deciding to phase in the increase in three steps. The commission was not prepared to grant an immediate increase

> in the amount requested by the applicant, but granted instead a modest increase initially and set a target for an allowable rate of return which HVES could work towards, together with suggestions and commentary on how the company might improve its operation.

42 The commission then turned to the question of "rate shock" and rejected the submission of HVES with respect to the three-year phase-in of the allowed rate increase. It stated its determination as follows:

> The *Utilities Commission Act* places a duty upon the commission to balance all the factors which the Act includes as matters for due regard when fixing rates. HVES has emphasized one element, namely, return on the appraised value of the utility's property in terms of typical costs of money in the financial markets. It refers, in reply to argument by HVES to "the absolute limitation imposed by s. 65(4)(b)." The commission does not accept that any such absolute limitation applies, but is of the view that counsel for HVES, at pp. 4 and 5 [There is an error in Karen Knott's quote.] has correctly recognized the breadth of the commission's mandate.

Issue

43 The issue before us, simply stated, is: "was the commission right?"

Discussion

44 Any discussion of the scope of the commission's rate-making powers begins, of necessity, with the seminal decision of the Supreme Court of Canada in *British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission*, supra. In that case the Supreme Court had before it a legislative scheme prescribed by the *Public Utilities Act*, R.S.B.C. 1948, c. 277 (the "old Act") similar to (and here the appellant submits, identical to) the scheme found in the *Utilities Commission Act* (the "new Act"). It will, I think, be convenient to set out side by side the relevant provisions of the two statutes so that their similarities or differences may be readily apparent.

> **Old Act**
>
> ***Interpretation.***
>
> ***2.(1) In this Act ...***
>
> "Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:
>
> ***16. (1) In fixing any rate***
>
> (*a*) The Commission shall consider all matters which it deems proper as affecting the rate.
>
> (*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service.

(*c*) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate.

New Act

Discrimination in rates

65. (1) A public utility shall not make, demand or receive an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service furnished by it in the Province, or a rate that otherwise contravenes this Act, regulations, orders of the commission or other law.

(2) A public utility shall not, as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description, and the commission may, by regulation, declare the circumstances and conditions that are substantially similar.

(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or whether a service is offered or furnished under substantially similar circumstances and conditions.

(4) In this section a rate is "unjust" or "unreasonable" if the rate is

(*a*) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,

(*b*) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or

(*c*) unjust and unreasonable for any other reason.

Rates

66. (1) In fixing a rate under this Act or regulations

(*a*) the commission shall consider all matters that it considers proper and relevant affecting the rate,

(*b*) the commission shall have due regard, among other things, to the fixing of a rate that is not unjust or unreasonable, within the meaning of section 65, and

(*c*) where the public utility furnishes more than one class of service, the commission shall segregate the various kinds of service into distinct classes of service; and in fixing a rate to be charged for the particular service rendered, each distinct class of service shall be considered as a self contained unit, and shall fix a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates fixed for any other unit.

45 The facts giving rise to the *British Columbia Electric* case are succinctly set forth in the majority judgment of Martland J. (for himself and Cartwright and Ritchie JJ.) at pp. 850-51 of the report [S.C.R.]:

> The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.
>
> The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act*.
>
> By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".
>
> By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.
>
> On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.
>
> The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act*, to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.
>
> Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.
>
> Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:
>
> > The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.
> >
> > The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately

> large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user.
>
> At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

At p. 849 Martland J. had said:

> Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:
>
> > (1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the 'Public Utilities Act' should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?
> >
> > (*b*) If the answer to question (1) (*a*) is 'No', what decision should the Commission have reached on the point?
>
> Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

46 After summarizing the facts as I have set them out from the judgment of Martland J., his Lordship continued, at pp. 852-53:

> In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:
>
> > With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion.
>
> The Court of Appeal concurred in this view. The judgment of the Court, delivered by Sheppard J.A., refers to this question in the following words:

> A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the 'fair and reasonable return' ... Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, 'all matters which it deems proper as affecting the rate' and those falling within Sec. 16(1)(*b*), namely, 'the protection of the public' and 'a fair and reasonable return' to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

47 At p. 854 he observed, "The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words 'unjust' and 'unreasonable' in s. 2(1)" (quoted above).

48 At pp. 855-57, Martland J. said:

> Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.
>
> Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.
>
> Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:
>
> (i) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and
>
> (ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.
>
> As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss.8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.
>
> In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.
>
> The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*)

> and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).
>
> Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

He then answered the question posed as follows:

> Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

49 Locke J. delivered a separate concurring judgment in which, as appears at p. 849 of the report, he agreed specifically with the answer to the second part of the question proposed by Martland J.

50 Both Mr. Sanderson for the appellant and Mr. Foy for the respondent Attorney General of British Columbia relied heavily upon the decision in the *British Columbia Electric* case, each asserting that it supported their opposing points of view.

51 Mr. Foy firstly drew attention to the passage in the judgment of Martland J. at pp. 855-56 where that learned judge focused on the fact that, in s. 16 of the old Act, cl. (*b*) of subs. (1) does not use the word "consider," which is used in cl. (*a*), but directs that the commission "shall have due regard," among other things, to two specific matters. He then pointed to the fact that, by virtue of the wording and structure of ss. 66(1)(*b*) and 65(4), and particularly by s. 65(4)(*c*), of the new Act, a third matter, namely, that a rate may be "unjust and unreasonable for any other reason," has been elevated to being not merely one of the matters which the commission "considers proper and relevant affecting the rate" (its mandate under s. 66(1)(*a*)), but to one of the now three (formerly only two) specific matters to which the commission is directed to "have due regard." Mr. Foy then referred to the statement of Martland J. at p. 856 that "there must be a balancing of interests." From this he argued that the commission, in directing the three-year phase-in of the rate adjustment to ameliorate the rate shock, was simply "balancing" the interests of HVES on the one hand and its customers on the other, and contended that, in so doing, it was correctly applying the law which prescribes its mandate. It was entitled to what it did, he said, because the commission had concerns about "the nature and quality of service furnished by the utility."

52 Mr. Foy argued that to accede to the position of HVES would be to accord to one of the specific matters to which

the commission must have due regard (the matter referred to in s. 65(4)(*b*)) a priority over the other two, something which cannot be done.

53 Mr. Sanderson submitted that once the commission had settled the content of the rate base and determined a rate of return which is both just and reasonable, it cannot fix a schedule of rates which yields less revenue than would be required to provide that rate of return on its rate base. In this respect he relied upon what Martland J. said at p. 856 (above). He also referred at length to the judgment of Locke J. and drew attention firstly to this passage at p. 841:

> The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

54 Locke J., in his reasons commencing at p. 841, reviewed the legislative history of the old Act and of its predecessor, the *Water Act Amendment Act*, S.B.C. 1929, c. 67, American regulatory jurisprudence, and the common law and said at p. 846:

> In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

55 Locke J. continued at p. 847:

> Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute,

And at pp. 847-48:

> I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required,

And finally, at p. 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, which does not mean that the obligation of the Commission to have due regard to the

protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

56 Mr. Sanderson accepted that the commission is required to have due regard to what is referred to in s. 65(4)(*c*) but submitted that, in directing the three-year phase-in of the rate adjustment with no offsetting provision to permit HVES to obtain sufficient revenue to recover the shortfall, the commission has committed the very sin which Mr. Foy charges against the utility, namely, that instead of having due regard -- and giving effect -- to the three specific matters set out in s. 65(4), it has accorded priority to either s. 65(4)(*a*) or (*c*) and relegated s. 65(4)(*b*) to simply "a matter to be considered."

57 Mr. Sanderson contended that if the commission was properly concerned to ameliorate the rate shock of a sharp rise in rates to be charged it could do so but only if, at the same time, it directed the filing of rate schedules which, over a reasonable period of time, would provide sufficient revenues to enable the utility to catch up and recover the shortfall. HVES, he said, is entitled to be made whole by the standards, in terms of the rate base and allowable rate of return thereon, which the commission itself fixed. It is only in this way that the commission can properly discharge its mandate and comply with the direction to have due regard to all the matters referred to in s. 65(4) without according priority to one or another of them.

58 The addition of s. 65(4)(*c*) in the Act, however, is not an *alternative* to s. 65(4)(*a*) and (*b*), but rather is an *additional* basis on which rates may be found to be unjust and unreasonable. Accordingly, while rates may be unjust or unreasonable for reasons other than those set out in s. 65(4)(*a*) and (*b*), it remains the law that if a rate is insufficient to yield a fair and reasonable return on rate base, it is necessarily "unjust and unreasonable" within the meaning of s. 65(4)(*b*).

59 Mr. Sanderson's submissions continued as follows:

60 A distinction has been drawn in the case law between regulatory systems which afford the administrative tribunal an unfettered discretion to fix rates and those which provide the tribunal with specific statutory directions as to how these rates are to be fixed: see *British Columbia Hydro & Power Authority v. Westcoast Transmission Co.*, [1981] 2 F.C. 646, 36 N.R. 33 (C.A.).

61 The current *Utilities Commission Act* is an example of the latter. Sections 65(4)(*b*) and 66(1)(*b*) amount to a statutory direction as to how the commission is to determine a just and reasonable rate. If, as posited by Martland J., a public utility is providing an adequate and efficient service, the statute is clear: a rate is unjust or unreasonable if it fails to yield a just and reasonable return on rate base. Here, while there may be room for improvement, the commission's recommendations with respect to quality of service referred to above are calculated to achieve what is desired. Accordingly, the commission has no discretion to fix rates which do not permit recovery of that return.

62 The virtually identical nature of the relevant provisions of the old Act and the new Act compel the conclusion that pursuant to the new Act, HVES is similarly given a statutory right to the approval of rates which will afford it the opportunity to earn a fair and reasonable rate of return upon the appraised value of its property. Commission O. G-77-90 denies HVES that opportunity.

63 In my view Mr. Sanderson's submissions are sound and must be accepted.

64 The *Utilities Commission Act* empowers the commission to determine what is a fair and reasonable rate of return upon the appraised value of the property of regulated utilities, but, having done so, requires the commission to set rates so as to allow recovery of a rate which permits an opportunity to earn that return. In this case, the commission correctly exercised its discretion to determine what a just and reasonable return was, but wrongly failed to permit HVES to charge a rate which gave it an opportunity to earn that return. For this reason, it is my view that commission O. G-77-90 cannot stand, and that O. G-11-91 must fall with it.

65 With respect to Mr. Foy's able and forceful submissions they are, in my view, flawed, and for these reasons.

66 Firstly, in directing the three-year phase-in, the commission was not balancing interests or, if it was purporting to do, it acted improperly. The proper balancing of interests which the commission carried out was done and completed when it settled the rate base, fixed the rate of return and determined the costs of operation allowable for rate-making purposes. It must be remembered that the rate base itself was the subject of much contention at the public hearing and that only after the commission had considered alternative calculations for rate base did it decide to accept HVES' evidence in this regard. It must be remembered as well that HVES had proposed a rate of return of 13 per cent on the debt component and 15 per cent on the equity component of the rate base. The commission denied HVES' request and fixed 13 per cent as the just and reasonable rate of return on both components. In addition, as can be seen from sheet 5 of the Appendix to these reasons, the commission made substantial downward adjustments to many of HVES' estimates of its costs of operation.

67 This is the balancing of interests which the commission carried out in performing its function. HVES has accepted the commission's decision in these respects. None are the subject of this appeal. Once this balancing of interests had been performed, it was the commission's duty to have due regard to the factors referred to in s. 65(4).

68 Secondly, I cannot accept Mr. Foy's contention that the three-year phase-in was the result of the commission's expressed concern over the quality of service. The analysis I have made of the original decision and of the reconsideration decision in my view refutes this contention. Alternatively, if in fact the commission decreed the three-year phase-in for this suggested reason it was wrong in law in doing so for it gave an unwarranted priority to one or another of the matters set out in s. 65(4) at the sacrifice of s. 65(4)(*b*).

69 Thirdly, Mr. Foy submitted that "rate shock" is a recognized phenomenon which has attracted a number of rate moderation plans, including rate base phase-ins, in the utility regulation field, and he referred to the following authorities: Bonbright, Danielsen and Kamerschen, *Principles of Public Utility Rates* (1988), pp. 260-64; D. Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable" (1983), 112 Public Utilities Fortnightly, September 1, pp. 28-34; I.M. Massella, "Rate Moderation Plans -- Cushioning 'Rate Shock' " (1984), 113 Public Utilities Fortnightly, February 16, pp. 52- 56; *Re California-Pacific Utilities Co.*, 52 P.U.R. 3d 446 (1964); and *Re Pacific Telephone & Telegraph Co.*, 65 P.U.R. 3d 517 (1966).

70 The underlying principle of this theory of gradualism in the implementation of new rate schedules is perhaps best explained in the article by Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable." There the author wrote at p. 28:

> In 1982 two new terms were added to the electric utility industry's lexicon: "rate shock" and "phase-in." Rate shock refers to a sudden and "substantial" increase in electric rates. The concept can be illusive because the demarcation between "substantial" and "nonsubstantial" rate increases is usually a function of local political and economic sensitivities rather than a definitive, universal percentage increase. However, a 50 per cent jolt in rates would generally be considered substantial -- well beyond the tolerance levels of most state commissions and

> ratepayers. Increases in the 20 per cent to 30 per cent vicinity, though, are more ambiguous. Rate shock is really a manifestation of the dollar disparity between rate base and new generating plant investment -- the construction work in progress (CWIP) account. For a number of utilities the CWIP to net plant ratio can exceed 100 per cent, necessitating a high revenue increase -- a rate shock -- to reflect the plan in rate base upon commercial operation. As an alternative to the conventional one-shot hike in rates, new rate-making techniques have been proposed which are designed to spread the revenue impact of new plan investment into the postoperative years -- hence, the term "phase-in".
>
> Post-operational phase-in can be accomplished in a variety of ways, most of which rely on accounting adjustments to protect the integrity of reported earnings. *The basic thesis in each case is the same: Capital recovery is spread over the asset's useful life with no economic loss (at least in theory) to the utility.* (emphasis added)

71 It can be seen that the purpose of "phase-in" is two-fold: to ameliorate the shock of suddenly imposed significant rate increases and, at the same time, to protect the integrity of the utility's earnings. As the title to Mr. Scotto's article itself indicates, it is merely "prolonging the inevitable."

72 The two regulatory decisions, *Re California-Pacific Utilities Co.*, decided in 1964, and *Re Pacific Telephone & Telegraph Co.*, decided in 1966, appear to be out of step with the main stream of American regulatory jurisprudence for, like the decision of the commission under consideration here, they did not provide for any catch up so that the utility could, over time, realize its authorized rate of return. I cannot regard them as binding or even persuasive.

73 The power of the commission to phase in rates was perhaps presaged by Martland J. in the penultimate paragraph in his judgment in the *British Columbia Electric* case, where he said at p. 857:

> ...the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, *until a rate schedule is devised which meets the requirements of clause (b) of s. 16(1).* (emphasis added)

74 What the commission did here fails to meet the requirements of the legislation.

Disposition

75 In Pt. 4 of its factum, under the heading "Nature of Order Sought," the appellant seeks an order that:

> (a) the decision of the British Columbia Utilities Commission, dated January 30, 1991 be quashed;
>
> (b) that portion of the decision of the British Columbia Utilities Commission, dated October 17, 1990 requiring rates to be phased in and directing a refund be quashed;
>
> (c) the British Columbia Utilities Commission be directed to order HVES to file new tariff schedules permitting it to recover 13% on rate base from July 1, 1990;
>
> (d) monies held by Lawson, Lundell, Lawson & McIntosh pursuant to the order of Mr. Justice Toy of March 7, 1990 be paid to HVES;
>
> (e) costs; and

(f) such further relief as to this Honourable Court may seem just.

76 I think the proper course for this court to adopt is to allow this appeal and to refer the matter back to the commission with the direction that it permit, or require, HVES to file new tariff schedules which will enable it to earn 13 per cent on its determined rate base from July 1, 1990.

77 If the commission considers it necessary or appropriate to ameliorate rate shock by directing the phasing in of such revised rates, it shall do so in a way which meets the requirements of s. 65(4) as set out in these reasons.

78 It will be for the commission to make an order for the appropriate disposition of the funds referred to in para. (d) above.

79 Section 118 of the Act exempts the commission from any liability for the costs of this appeal. I do not think it appropriate to order that the Attorney General, and thereby the general public, bear those costs. However, I note from para. 5.3 of the original decision and from sheet 3 of the Appendix that provision was made for the recovery, through the rates to be charged, of the sum of $35,000 for HVES' rate application costs before the commission.

80 Accordingly, I would direct that, failing agreement between the parties, HVES tax its costs for fees and disbursements of and incidental to this appeal and that the amount so determined be included in the rate application costs in the schedule.

Order accordingly.

Appendix A

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY RATE BASE SCHEDULE 1	TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
ASSETS				
Structures and improvements	$5,560			$5,560
Overhead conductors and devices	44,891			44,891
UG Conductors and devices	479,504			479,504
Line transformers	90,693			90,693
PLANT IN SERVICE, opening	$620,648	$0		$620,648
Additions to plant in service	0			0
Disposals	0			0
PLANT IN SERVICE, closing	620,648	0		620,648
Add: Work in progress	0			0
	620, 648	0		620,648
Less:				
Accumulated Depreciation	(178,677)			(178,677)

NET PLANT IN SERVICE	441,971	0	441,971
WORKING CAPITAL			
ALLOWANCE	0		0
RATE HEARING COSTS	0		0
CONTRIBUTIONS IN AID	(75,460)		(75,460)
UTILITY RATE BASE	$366,511	$0	$366,511
RETURN ON RATE BASE	14.01%	-1.01%	13.00%

HEMLOCK VALLEY ELECTRICAL SERVICE LTD.

UTILITY INCOME & RETURN SCHEDULE 2	TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
SALES VOLUME MWh	2,047			2,047
RATES				
Existing Revenue:c/kWh	8.65	0.00		8.65
Interim Increase %	42.77%	0.00%		42.77%
Final Increase %	84.62%			43.54%
First year phase-in: c/KWh		1.51		1.51
Second year phase-in: c/kWh		1.51		1.51
Third year phase-in: c/kWh		0.75		0.75
Final Rate: c/kWh	15.97	-.355		12.42
Interim Rate	12.35			
REVENUE				
Existing Rates	$177,066	$0		$177,066
Interim Rates	75,739			75,739
Required Increase	74,101	(72,740)		1,361
Discounts	0			0
Other Income	0			0
TOTAL REVENUE	326,906	(72,740)		254,166
Less: PURCHASED POWER	125,500	(15,371)	[1]	110,129
GROSS MARGIN	201,406	(57,369)		144,037
% excluding Other Income	61.61%	-4.94%		56.67%
Administration, Accounting and Office	68,300	(25,300)	[2]	43,000
Repairs, Maintenance and Vehicle	31,000	(11,000)	[3]	20,000

UTILITY INCOME & RETURN SCHEDULE 2	TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
Snow Removal	18,000	(18,000)	[4]	0
Depreciation	15,065			15,065
Amortization of Rate Application	10,000	1,667	[6]	11,667
OPERATING EXPENSES	142,365	(52,633)		89,732
Utility income before tax	59,041	(4,735)		54,306
INCOME TAX EXPENSE	7,693	(1,035)		6,658
EARNED RETURN	$51,348	($3,700)		$47,648
RETURN ON RATE BASE	14.01%	-1.01%		13.00%

HEMLOCK VALLEY ELECTRICAL SERVICE LTD.

INCOME TAXES SCHEDULE 3	TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
UTILITY INCOME BEFORE TAX	$59,041	($4,735)		$54,306
Deduct - Interest	(23,823)	0		(23,823)
ACCOUNTING INCOME	35,218	(4,735)		30,482
Timing differences				
Depreciation	15,065	0		15,065
Amort. of hearing costs	10,000	1,667	[6]	11,667
Amortization of Line Costs	0			0
Capital cost allowance	(15,065)			(15,065)
Amort. of contributions				
Overhead capitalized				
Plant removal costs				
Rate application costs	(30,000)	(5,000)	[6]	(35,000)
	(20,000)	(3,333)		(23,333)
TAXABLE INCOME	$15,218	($8,069)		$7,149
Income tax rate - deferred	21.84%	0.00%		21.84%
Income tax rate - current	21.84%	0.00%		21.84%
Income tax expense				

- Deferred	$4,369	$728		$5,097
- Current	3,324	(1,762)		1,561
INCOME TAX EXPENSE	$7,693	($1,034)		$6,658

HEMLOCK VALLEY ELECTRICAL SERVICE LTD.

RETURN ON CAPITAL SCHEDULE 4	TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
Contribution in Aid	$0	$0		$0
proportion	.00%	0.00%		.00%
Capital Loan	$0	$0		$0
proportion	.00%	0.00%		.00%
embedded cost	.00%	0.00%		.00%
$ return	$0	$0		$0
Current Debt	$0	$0		$0
proportion	.00%	0.00%		.00%
embedded cost	.00%	0.00%		.00%
$ return	$0	$0		$0
Notional debt	$183,256	$0		$183,256
proportion	50.00%	$0		50.00%
embedded cost	13.00%	0.00%		13.00%
$ return	$23,823	$0		$23,823
Preferred shares	$0	$0		$0
proportion	.00%	0.00%		.00%
embedded costs	.00%	0.00%		.00%
$ return	$0	$0		$0
Common equity	$183,256	$0		$183,256
proportion	50.00%	0.00%		50.00%
ROE	15.02%	-2.02%	[5]	13.00%
$ return	$27,525	($3,700)		$23,824
TOTAL CAPITAL	$366,511	$0		$366,511

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

ADJUSTMENTS

1. $15,371 Adjust BC Hydro charges for error in Application
2. $25,300 Adjust Administration, Accounting and Office

expenses to approved amount.

3. $11,00 Adjust Repair and Maintenance expenses to approved amount.

4. $18,000 Eliminate Snow Removal expenses.

5. 2.02% Adjust return on equity to 13%

6. $5,000 Adjust Rate Hearing costs.

Rate Increase Phase-in consists of:	Application	Final	First Year
Purchased Hydro	6.13	5.38	5.38
Operating expenses	6.22	3.65	3.65
Rate Base costs	3.62	3.39	1.13
Total	15.97	12.42	10.16
		% Increase	17.42

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