EB-2008-0381

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

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the accuracy of the final account balances with respect to account 1562 Deferred PILs (for the period October 1, 2001 to April 30, 2006) for certain 2008 and 2009 distribution rate applications before the Board.

ELECTRICITY DISTRIBUTORS ASSOCIATION
BRIEF OF AUTHORITIES

November 20, 2009

Ogilvy Renault LLP
Suite 3800
Royal Bank Plaza, South Tower
200 Bay Street, P.O. Box 84
Toronto, Ontario
M5J 2Z4

Kelly Friedman
Tel: (416) 216-2985
Fax: (416) 216-3930

Counsel for the Electricity Distributors Association

INDEX

TAB 1

SUPREME COURT OF CANADA

CITATION: ATCO Gas & Pipelines Ltd. *v.* Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

DATE: 20060209
DOCKET: 30247

BETWEEN:

City of Calgary
Appellant/Respondent on cross-appeal
v.
ATCO Gas and Pipelines Ltd.
Respondent/Appellant on cross-appeal
- and -
Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 87)	Bastarache J. (LeBel, Deschamps and Charron JJ. concurring)
DISSENTING REASONS: (paras. 88 to 149)	Binnie J. (McLachlin C.J. and Fish J. concurring)

ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

Indexed as: ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board)

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

on appeal from the court of appeal for alberta

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly,

(

ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

Cases Cited

By Bastarache J.

Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R.

982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984; *Re Union Gas Ltd. and*

(

Ontario Energy Board (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, March 23, 1987; *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities*

Board (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

Statutes and Regulations Cited

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, ss. 13, 15, 26(1), (2), 27.

Gas Utilities Act, R.S.A. 2000, c. G-5, ss. 16, 17, 22, 24, 26, 27(1), 36 to 45, 59.

Interpretation Act, R.S.A. 2000, c. I-8, s. 10.

Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).

Public Utilities Board Act, R.S.A. 2000, c. P-45, ss. 36, 37, 80, 85(1), 87, 89 to 95, 101(1), (2), 102(1).

Authors Cited

Anisman, Philip, and Robert F. Reid. *Administrative Law Issues and Practice*. Scarborough, Ont.: Carswell, 1995.

(

Black, Alexander J. "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349.

Blake, Sara. *Administrative Law in Canada*, 3rd ed. Markham, Ont.: Butterworths, 2001.

Brown, David M. *Energy Regulation in Ontario*. Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* Toronto: Butterworths, 1981.

Canadian Institute of Resources Law. *Canada Energy Law Service: Alberta*. Edited by Steven A. Kennett. Toronto: Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Cross, Phillip S. "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44.

Depoorter, Ben W. F. "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass.: Edward Elgar, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina. *Resetting Price Controls for Privatized Utilities: A Manual for Regulators*. Washington, D.C.: World Bank, 1999.

Kahn, Alfred E. *The Economics of Regulation: Principles and Institutions*, vol. 1, *Economic Principles*. Cambridge, Mass.: MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233.

Milner, H. R. "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101.

Mullan, David J. *Administrative Law*. Toronto: Irwin Law, 2001.

Netz, Janet S. "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass.: Edward Elgar, 2000.

Reid, Robert F., and Hillel David. *Administrative Law and Practice*, 2nd ed. Toronto: Butterworths, 1978.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002.

Trebilcock, Michael J. "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada*. Toronto: Macmillan of Canada, 1978, 94.

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Brian K. O'Ferrall and *Daron K. Naffin*, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, Q.C., *Lawrence E. Smith, Q.C.*, *H. Martin Kay, Q.C.*, and *Laurie A. Goldbach*, for the respondent/appellant on cross-appeal.

J. Richard McKee and *Renée Marx*, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh* and *Michael W. Lyle*, for the intervener the Ontario Energy Board.

Written submissions only by *J. L. McDougall, Q.C.*, and *Michael D. Schafler*, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by *Michael A. Penny* and *Susan Kushneryk*, for the intervener Union Gas Limited.

The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public

from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

4 As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

1.1 *Overview of the Facts*

8 ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire

the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

9 In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that

those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest" (p. 16).

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

> In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

12 On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.
>
> The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already

considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

16 The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

17 The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it

held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

22 Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

24 First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

> **26(1)** Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.
>
> **(2)** Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made
>
> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
>
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at

(

para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

28 Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

29 The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and

"conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> . . . the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

33 The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all

suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

34 As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

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

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as

(

necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

40 As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA,

(

ss. 15(1) and 15(3)(d) of the AEUBA and s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

(2) No owner of a gas utility designated under subsection (1) shall

. . .

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them

. . .

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

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

. . .

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

. . .

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

. . .

PUBA

(

> **37** In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

42 Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

43 There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited,

(

if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale proceeds after the initial stage in the statutory interpretation analysis,

because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 <u>Implicit Powers: Entire Context</u>

49 The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A.

2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have

in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

52 I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

53 After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

54 The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

55 Pursuant to *The Public Utilities Act*, the first public utility board was established as a three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

58 It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority

to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

59 Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

60 Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. <u>This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.</u> [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".
>
> (R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers

(

any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

64 Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

65 The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company

> in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
>
> (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment.

(

The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

68 Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

69 In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for

> ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when <u>they have paid only for the use of those assets</u>. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299

(1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case, the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

71 From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-

(

setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

72 As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

> * [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
>
> * [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
>
> * [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

> In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

75 In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

76 MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also

require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to

the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

80 If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

81 Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my

disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.
>
> (Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence,

(

notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to

encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

89 I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position

to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

90 ATCO's argument boils down to the proposition announced at the outset of its factum:

> In the absence of any property right or interest and of any harm to the customers arising from the withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.
>
> (Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more

immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

> In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> (Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .
>
> (Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

93 ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the

hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

96 Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

(

97 The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services <u>nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding*. On that basis</u> the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]
>
> (Decision 2002-037, at para. 13)

98 In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

> (a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

(

101 The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

102 The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

103 I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA). The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be

made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "*'Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

(This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

(

106 A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

107 This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

108 Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer*

(

Holdings Ltd. and Ontario Securities Commission (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

> . . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

> A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.
>
> (*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

112 I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

113 There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

114 Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.
>
> (P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. <u>If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital.</u> In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

(

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. <u>To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale.</u> We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

> the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.* mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.
>
> (P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

> To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

121 Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.
>
> The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

127 Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

128 In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

1. The Confiscation Issue

129 In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

> In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in

mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

> We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. <u>Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses.</u> In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

(

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

> No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

133 The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

134 My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply

is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

(

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate-making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

138 More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> . . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in ratebase. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

139 The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

140 The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

(

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for ratemaking purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. <u>The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets.</u> [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. <u>Lack of Reciprocity</u>

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

> the Board considers that any profit <u>or loss</u> (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets <u>should accrue to the customers of the utility</u> and not to the owner of the utility. [Emphasis added.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

> The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be

entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

APPENDIX

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

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

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

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

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

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

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

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

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

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

(

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

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

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

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

(

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to

(

be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

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

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

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

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

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

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

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

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

(d) the Board shall by order approve

(i) the method by which, and

(

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

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

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

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

Jurisdiction and powers

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

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

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

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

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that

(

the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

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

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

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

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

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

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

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as

(

determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, MCLACHLIN C.J. *and* BINNIE *and* FISH JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

TAB 2

SUPREME COURT OF CANADA

CITATION: Bell Canada *v.* Bell Aliant Regional Communications, 2009 SCC 40

DATE: 20090918
DOCKET: 32607, 32611

BETWEEN:

Bell Canada
Appellant
v.
Bell Aliant Regional Communications, Limited Partnership, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Société en commandite Télébec and TELUS Communications Inc.
Respondents
- and -
Canadian Radio-television and Telecommunications Commission
Intervener

AND BETWEEN:

TELUS Communications Inc.
Appellant
v.
Bell Canada, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Canadian Radio-television and Telecommunications Commission, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Saskatchewan Telecommunications and Société en commandite Télébec
Respondents

AND BETWEEN:

Consumers' Association of Canada and National Anti-Poverty Organization
Appellants
v.
Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc.
Respondents

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 78)
Abella J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)

Bell Canada *Appellant*

v.

Bell Aliant Regional Communications, Limited Partnership, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS Allstream Inc., Société en commandite Télébec and TELUS Communications Inc. *Respondents*

and

Canadian Radio-television and Telecommunications Commission *Intervener*

- and -

TELUS Communications Inc. *Appellant*

v.

Bell Canada, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Canadian Radio-television and Telecommunications Commission, Consumers' Association of Canada, National Anti-Poverty Organization, Public Interest Advocacy Centre, MTS

Allstream Inc., Saskatchewan Telecommunications and Société en commandite Télébec *Respondents*

- and -

Consumers' Association of Canada and National Anti-Poverty Organization *Appellants*

v.

Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc. *Respondents*

Indexed as: Bell Canada *v.* Bell Aliant Regional Communications

Neutral citation: 2009 SCC 40.

File Nos.: 32607, 32611.

2009: March 26; 2009: September 18.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Telephone — Regulation of rates charged by telecommunications carriers — Canadian Radio-television and Telecommunications Commission ordering carriers to create deferral accounts — Accounts being collected from urban residential telephone service revenues to enhance competition — CRTC directing that accounts be disposed of to increase accessibility of telecommunications services for persons with disabilities and to expand broadband coverage — Remaining amounts, if any, being distributed to subscribers — Whether Telecommunications Act authorizes CRTC to direct disposition of deferral account funds as it did — Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47.

Administrative law — Appeals — Standard of review — Canadian Radio-television and Telecommunications Commission — Standard of review applicable to CRTC's decision to direct disposition of deferral accounts — Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47, 52(1).

In May 2002, the Canadian Radio-television and Telecommunications Commission ("CRTC"), in the exercise of its rate-setting authority, established a formula to regulate the maximum prices to be charged for certain services offered by incumbent local exchange carriers, including for residential telephone services in mainly urban non-high cost serving areas (the "Price Caps Decision"). Under the formula established by the Price Caps Decision, any increase in the price charged for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market. The CRTC ordered the carriers to establish deferral accounts as separate accounting entries in their ledgers to record funds representing the difference between the rates actually charged and those as otherwise determined by the formula. At the time, the CRTC did not direct how the deferral account funds were to be used.

In December 2003, Bell Canada sought approval from the CRTC to use the balance in its deferral account to expand high-speed broadband internet services in remote and rural communities. The CRTC invited submissions and conducted a public process to determine the appropriate disposition of the deferral accounts. In February 2006, it decided that each deferral account should be used to improve accessibility for individuals with disabilities and for broadband expansion. Any unexpended funds were to be distributed to certain current residential subscribers through a one-time credit or via prospective rate reductions. This was known as the "Deferral Accounts Decision".

Bell Canada appealed the order of one-time credits, while the Consumers' Association of Canada and the National Anti-Poverty Organization appealed the direction that the funds be used for broadband expansion. The Federal Court of Appeal dismissed the appeals, finding that the Price Caps Decision regime always contemplated that the disposition of the deferral accounts would be subject to the CRTC's directions and that the CRTC was at all times acting within its mandate. TELUS Communications Inc. joined Bell Canada as an appellant in this Court.

Held: The appeals should be dismissed.

The CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits was authorized by the provisions of the *Telecommunications Act* which lays out the basic legislative framework of the Canadian telecommunications industry. In particular, s. 7 of the Act sets out certain broad telecommunications policy objectives and s. 47(*a*) directs the CRTC to implement them when exercising its statutory authority, balancing the interests of consumers, carriers and competitors. A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates. [1] [28] [36]

The issues raised in these appeals go to the very heart of the CRTC's specialized expertise. The core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. The standard of review is therefore reasonableness. [38]

In ordering subscriber credits and approving the use of funds for broadband expansion, the CRTC acted reasonably and in accordance with the policy objectives of the *Telecommunications Act*. In the Price Caps Decision, the CRTC indicated that the amounts in the deferral accounts would help achieve the CRTC's objectives. When the CRTC approved the rates derived from the Price Caps Decision, the portion of the revenues that went into the deferral accounts remained subject to the CRTC's further directions. The deferral accounts, and the fact that they were encumbered by the possibility of the CRTC's future directions, were therefore an integral part of the rate-setting exercise. The allocation of deferral account funds to consumers was neither a variation of a final rate nor, strictly speaking, a rebate. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the CRTC determined the appropriate allocation. [64-65] [77]

There was no inappropriate cross-subsidization between residential telephone services and broadband expansion. The *Telecommunications Act* contemplates a comprehensive national telecommunications framework. The policy objectives that the CRTC is always obliged to consider demonstrate that it need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. It properly treated the statutory objectives as guiding principles in the exercise of its rate-setting authority, and came to a reasonable conclusion. [73] [75] [77]

Cases Cited

Referred to: Telecom Decision CRTC 2002-34; Telecom Decision CRTC 2005-69; Telecom Decision CRTC 2003-15; Telecom Decision CRTC 2003-18; Telecom Public Notice CRTC 2004-1; Telecom Decision CRTC 2006-9; Telecom Decision CRTC 2008-1; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 2 S.C.R. 339; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] 1 S.C.R. 308; Telecom Decision

CRTC 97-9; Telecom Decision CRTC 94-19; *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007] 3 S.C.R. vii; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; Telecom Decision CRTC 93-9; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281; *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60.

Statutes and Regulations Cited

Railway Act, R.S.C. 1985, c. R-3, s. 340(1).

Telecommunications Act, S.C. 1993, c. 38, ss. 7, 24, 25(1), 27, 32(*g*), 35(1), 37(1), 42(1), 46.5(1), 47, 52(1).

Authors Cited

Ryan, Michael H. *Canadian Telecommunications Law and Regulation*, loose-leaf ed. Scarborough: Carswell, 1993 (updated 2008).

APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Noël and Sharlow JJ.A.), 2008 FCA 91, 375 N.R. 124, 80 Admin. L.R. (4th) 159, [2008] F.C.J. No. 397 (QL), 2008 CarswellNat 544, affirming a decision of the Canadian Radio-television and Telecommunications Commission, 2006 LNCRTCE 9 (QL), 2006 CarswellNat 6317. Appeals dismissed.

Neil Finkelstein, Catherine Beagan Flood and *Rahat Godil*, for the appellant/respondent Bell Canada.

Michael H. Ryan, John E. Lowe, Stephen R. Schmidt and *Sonya A. Morgan*, for the appellant/respondent TELUS Communications Inc. and the respondent TELUS Communications (Québec) Inc.

Richard P. Stephenson, Danny Kastner and *Michael Janigan*, for the appellants/respondents the Consumers' Association of Canada and the National Anti-Poverty Organization and the respondent the Public Interest Advocacy Centre.

Michael Koch and *Dina F. Graser*, for the respondent MTS Allstream Inc.

John B. Laskin and *Afshan Ali*, for the respondent/intervener the Canadian Radio-television and Telecommunications Commission.

No one appeared for the respondents Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, and Saskatchewan Telecommunications.

The judgment of the Court was delivered by

ABELLA J. —

[1] The *Telecommunications Act*, S.C. 1993, c. 38, sets out certain broad telecommunications policy objectives. It directs the Canadian Radio-television and Telecommunications Commission ("CRTC") to implement them in the exercise of its statutory authority, balancing the interests of consumers, carriers and competitors in the context of the Canadian telecommunications industry. The issue in these appeals is whether this authority was properly exercised.

[2] While distinct questions arise in each of the appeals before us, the common problem is whether the CRTC, in the exercise of its rate-setting authority, appropriately directed the allocation of funds to various purposes. In the Bell Canada and TELUS Communications Inc. appeal, the challenged purpose is the distribution of funds to customers, while in the Consumers' Association of Canada and National Anti-Poverty Organization appeal, the impugned allocation was directed at the expansion of broadband infrastructure. For the reasons that follow, in my view the CRTC's allocations were reasonable based on the Canadian telecommunications policy objectives that it is obliged to consider in the exercise of all of its powers, including its authority to approve just and reasonable rates.

<u>Background</u>

[3] The CRTC issued its landmark "Price Caps Decision"[1] in May 2002. Exercising its rate-setting authority, the CRTC established a formula to regulate the maximum prices charged for certain services offered by incumbent local exchange carriers ("ILECs"), who are primarily well-established telecommunications carriers.

[4] As part of its decision, the CRTC ordered the affected carriers to create separate accounting entries in their ledgers. These were called "deferral accounts". The funds contained in these deferral accounts were derived from residential telephone service revenues in non-high cost serving areas ("non-HCSAs"), which are mainly urban. Under the formula established by the Price Caps Decision, any increase in the price charged for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market.

[5] More specifically, the effect of the inflationary cap was to bar carriers from increasing their prices at a rate greater than inflation. The productivity offset, on the other hand, put downward pressure on the rates to be charged. While market forces would normally serve to encourage carriers to reduce both their costs and their prices, the low level of competition in the non-HCSA market led the CRTC to conclude that an offsetting factor was necessary as a proxy for the effect of competition.

[6] Given the countervailing factors at work in the Price Caps Decision formula, there was the potential for a decrease in the price of residential services in these areas if inflation fell below

[1] Telecom Decision CRTC 2002-34.

a certain level. Rather than mandating such a decrease, however, the CRTC concluded that lower prices, and therefore the prospect of lower revenues, would constitute a barrier to the entry of new carriers into this particular telecommunications market. It therefore ordered that amounts representing the difference between the rates *actually* charged, not including the decrease mandated by the Price Caps Decision formula, and the rates as *otherwise determined* through the formula, were to be collected from subscribers and recorded in deferral accounts held by each carrier. These accounts were to be reviewed annually by the CRTC. The intent of the Price Caps Decision was, therefore, that prices for these services would remain at a level sufficient to encourage market entry, while at the same time maintaining the pressure on the incumbent carriers to reduce their costs.

[7] The principal objectives the CRTC intended the Price Caps Decision to achieve were the following:

> a) to render reliable and affordable services of high quality, accessible to both urban and rural area customers;
>
> b) to balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies;
>
> c) to foster facilities-based competition in Canadian telecommunications markets;
>
> d) to provide incumbents with incentives to increase efficiencies and to be more innovative; and
>
> e) to adopt regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives. [para. 99]

[8] The CRTC discussed the future use of the deferral account funds as follows:

> The Commission anticipates that an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures. The Commission

> also anticipates that the deferral account would be drawn down to mitigate rate increases for residential service that could result from the approval of exogenous factors or when inflation exceeds productivity. Other draw downs could occur, for example, through subscriber rebates or the funding of initiatives that would benefit residential customers in other ways. [Emphasis added; para. 412.]

At the time, it did not specifically direct how the deferral account funds were to be used, leaving the issue subject to further submissions. While some participants objected to the creation of the deferral accounts, no one appealed the Price Caps Decision (*Bell Canada v. Canadian Radio-television and Telecommunications Commission*, 2008 FCA 91, 375 N.R. 124, at para. 14).

[9] The Price Caps Decision was to apply to services offered by Bell Canada, TELUS, and other affected carriers for the four-year period from June 1, 2002 to May 31, 2006. In a decision in 2005, the CRTC extended this price regulation regime for another year to May 31, 2007[2]. The CRTC allowed some draw-downs of the deferral accounts following the Price Caps Decision that are not at issue in these appeals.

[10] In March 2003, in two separate decisions, the CRTC approved the rates for Bell Canada and TELUS[3]. In the Bell Canada decision, the CRTC appeared to contemplate the continued operation of the deferral accounts established in the Price Caps Decision. It ordered, for example, that certain tax savings be allocated to the deferral accounts:

> The Commission, in Decision 2002-34, established a deferral account in conjunction with the application of a basket constraint equal to the rate of inflation less a productivity offset to all revenues from residential services in non-HCSAs. The

---

[2] Telecom Decision CRTC 2005-69.

[3] Telecom Decision CRTC 2003-15, and Telecom Decision CRTC 2003-18.

Commission considers that AT&T Canada's proposal to allocate the Ontario GRT and the Quebec TGE tax savings associated with all capped services to the price cap deferral account is inconsistent with that determination. The Commission finds that Bell Canada's proposal to include the Ontario GRT and Quebec TGE tax savings associated with the residential local services in non-HCSAs basket in the price cap deferral account is consistent with that determination. [Emphasis added; para. 32.]

[11] On December 2, 2003, Bell Canada sought the approval of the CRTC to use the balance in its deferral account to expand high-speed broadband internet service to remote and rural communities. In response, on March 24, 2004, the CRTC issued a public notice requesting submissions on the appropriate disposition of the deferral accounts[4]. Pursuant to this notice, the CRTC conducted a public process whereby proposals were invited for the disposition of the affected carriers' deferral accounts. The review was extensive and proposals were received from numerous parties.

[12] This led to the release of the "Deferral Accounts Decision" on February 16, 2006[5]. In this decision, the CRTC directed how the funds in the deferral accounts were to be used. These directions form the foundation of these appeals.

[13] After considering the various policy objectives outlined in the applicable statute, the *Telecommunications Act*, and the purposes set out in the Price Caps Decision, the CRTC concluded that all funds in the deferral accounts should be targeted for disposal by a designated date in 2006:

> The attachment to this Decision provides preliminary estimates of the deferral account balances as of the end of the fourth year of the current price cap period in 2006.

[4]Telecom Public Notice CRTC 2004-1

[5]Telecom Decision CRTC 2006-9.

> The Commission notes that the deferral account balances are expected to be very large for some ILECs. It also notes the concern that allowing funds to continue to accumulate in the accounts would create inefficiencies and uncertainties.
>
> . . .
>
> Accordingly, the Commission considers it appropriate not only to provide directions on the disposition of all the funds that will have accumulated in the ILECs' deferral accounts by the end of the fourth year of the price cap period in 2006, but also to provide directions to address amounts recurring beyond this period in order to prevent further accumulation of funds in the deferral accounts. The Commission will provide directions and guidelines for disposing of these amounts later in this Decision. [Emphasis added; paras. 58 and 60.]

[14] The CRTC further decided that the deferral accounts should be disbursed primarily for two purposes. As a priority, at least 5 percent of the accounts was to be used for improving accessibility to telecommunications services for individuals with disabilities. The other 95 percent was to be used for broadband expansion in rural and remote communities. Proposals were invited on how the deferral account funds should be applied. If the proposal as approved was for less than the balance of its deferral account, an affected carrier was to distribute the remaining amount to consumers.

[15] In summary, therefore, the CRTC decided that the affected carriers should focus on broadband expansion and accessibility improvement. It also decided that if these two objectives could be fulfilled for an amount less than the full deferral account balances, credits to subscribers would be ordered out of the remainder. It should be noted that customers were not to be compensated in proportion to what they had paid through these credits because of the potential administrative complexity of identifying these individuals and quantifying their respective shares. Instead, the credits were to be provided to certain current subscribers. Prospective rate reductions could also be used to eliminate recurring amounts in the accounts.

[16] At the time, the balance in the deferral accounts established under the Price Caps Decision was considerable. Bell Canada's account was estimated to contain approximately $480.5 million, while the TELUS account was estimated at about $170 million.

[17] It is helpful to set out how the CRTC explained its decision on the allocation of the deferral account funds. Referencing the importance of telecommunications in connecting Canada's "vast geography and relatively dispersed population", it stressed that Canada had fallen behind in the adoption of broadband services (at paras. 73-74). It contrasted the wide availability of broadband service in urban areas with the less developed network in rural and remote communities. Further, it noted that the objectives outlined in the Price Caps Decision and in the *Telecommunications Act* at s. 7(*b*) provided for improving the quality of telecommunications services in those communities, and that their social and economic development would be favoured by an expansion of the national broadband network. In its view, this initiative would also provide a helpful complement to the efforts of both levels of government to expand broadband coverage. It therefore concluded that broadband expansion was an appropriate use of a part of the deferral account funds (at paras. 73-80).

[18] The CRTC also explained that while customer credits would be consistent with the objectives set out in s. 7 of the *Telecommunications Act* and with the Price Caps Decision, these disbursements should not be given priority because broadband expansion and accessibility services provided greater long-term benefits. Nevertheless, credits effectively balanced the interests of the "three main stakeholders in the telecommunications markets" (at para. 115), namely customers,

competitors and carriers. It concluded that credits did not contradict the purpose of the deferral accounts, and contrasted one-time credits with a reduction of rates. In its view, credits, unlike rate reductions, did not have a sustained negative impact on competition in these markets, which was the concern the deferral accounts were set up to address (at paras. 112-16).

[19] A dissenting Commissioner expressed concerns over the disposition of the deferral account funds. In her view, the CRTC had no mandate to direct the expansion of broadband networks across the country. The CRTC's policy had generally been to ensure the provision of a basic level of service, not services like broadband, and she therefore considered the CRTC's reliance on the objectives of the *Telecommunications Act* to be inappropriate.

[20] On January 17, 2008, the CRTC issued another decision dealing with the carriers' proposals to use their deferral account balances for the purposes set out in the Deferral Accounts Decision[6]. Some carriers' plans were approved in part, with the result that only a portion of their deferral account balances was allocated to those projects. Consequently, the CRTC required them to submit, by March 25, 2008, a plan for crediting the balance in their deferral accounts to residential subscribers in non-HCSAs.

[21] Bell Canada, as well as the Consumers' Association of Canada and the National Anti-Poverty Organization, appealed the CRTC's Deferral Accounts Decision to the Federal Court of Appeal. The Deferral Accounts Decision was stayed by Richard C.J. in the Federal Court of Appeal on January 25, 2008. The decision requiring further submissions on plans to distribute the deferral

[6]Telecom Decision CRTC 2008-1.

account balances was also stayed by Sharlow J.A. pending the filing of an application for leave to appeal to this Court on April 23, 2008. Both stay orders were extended by this Court on September 25, 2008. The stay orders do not apply to the funds allocated for the improvement of accessibility for individuals with disabilities.

[22] In a careful judgment by Sharlow J.A., the court unanimously dismissed the appeals, concluding that the Price Caps Decision regime always contemplated the future disposition of the deferral account funds as the CRTC would direct, and that the CRTC acted within its broad mandate to pursue its regulatory objectives. For the reasons that follow, I agree with the conclusions reached by Sharlow J.A.

Analysis

[23] The parties have staked out diametrically opposite positions on how the balance of the deferral account funds should be allocated.

[24] Bell Canada argued that the CRTC had no statutory authority to order what it claimed amounted to retrospective "rebates" to consumers. In its view, the distributions ordered by the CRTC were in substance a variation of rates that had been declared final. TELUS joined Bell Canada in this Court, and argued that the CRTC's order for "rebates" constituted an unjust confiscation of property.

[25] In response, the CRTC contended that its broad mandate to set rates under the *Telecommunications Act* includes establishing and ordering the disposal of funds from deferral accounts. Because the deferral account funds had always been subject to the possibility of disbursement to customers, there was therefore no variation of a final rate or any impermissible confiscation.

[26] The Consumers' Association of Canada was the only party to oppose the allocation of 5 percent of the deferral account balances to improving accessibility, but abandoned this argument during the hearing before the Federal Court of Appeal. Together with the National Anti-Poverty Organization, it argued before this Court that the rest of the deferral account balances should be distributed to customers in full, and that the CRTC had no authority to allow the use of the funds for broadband expansion.

[27] These arguments bring us directly to the statutory scheme at issue.

[28] The *Telecommunications Act* lays out the basic legislative framework of the Canadian telecommunications industry. In addition to setting out numerous specific powers, the statute's guiding objectives are set out in s. 7. Pursuant to s. 47(*a*), the CRTC must consider these objectives in the exercise of *all* of its powers. These provisions state:

> **7.** It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives
>
> (*a*) <u>to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;</u>

(*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(*d*) to promote the ownership and control of Canadian carriers by Canadians;

(*e*) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(*g*) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(*h*) to respond to the economic and social requirements of users of telecommunications services; and

(*i*) to contribute to the protection of the privacy of persons.

. . .

47. The Commission shall exercise its powers and perform its duties under this Act and any special Act

(*a*) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27;

The CRTC relied on these two provisions in arguing that it was required to take into account a broad spectrum of considerations in the exercise of its rate-setting powers, and that the Deferral Accounts Decision was simply an extension of this approach.

[29] The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for

services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:

> **24.** The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.
>
> **25.** (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.
>
> . . .
>
> **32.** The Commission may, for the purposes of this Part,
>
> . . .
>
> (*g*) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.

[30] The guiding rule of rate-setting under the *Telecommunications Act* is that the rates be "just and reasonable", a longstanding regulatory principle. To determine whether rates meet this standard, the CRTC has a wide discretion which is protected by a privative clause:

> **27.** (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.
>
> . . .
>
> (3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.
>
> . . .
>
> (5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

. . .

> **52.** (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.

[31] In addition to the power under s. 27(5) to adopt "any method or technique that it considers appropriate" for determining whether a rate is just and reasonable, the CRTC also has the authority under s. 37(1) to order a carrier to adopt "any accounting method or system of accounts" in view of the proper administration of the *Telecommunications Act*. Section 37(1) states:

> **37.** (1) The Commission may require a Canadian carrier
>
> (*a*) to adopt any method of identifying the costs of providing telecommunications services and to adopt any accounting method or system of accounts for the purposes of the administration of this Act;

[32] The CRTC has other broad powers which, while not at issue in this case, nevertheless further demonstrate the comprehensive regulatory powers Parliament intended to grant. These include the ability to order a Canadian carrier to provide any service in certain circumstances (s. 35(1)); to require communications facilities to be provided or constructed (s. 42(1)); and to establish any sort of fund for the purpose of supporting access to basic telecommunications services (s. 46.5(1)).

[33] This statutory overview assists in dealing with the preliminary issue of the applicable standard of review. Although the Federal Court of Appeal accepted the parties' position that the applicable standard of review was correctness, Sharlow J.A. acknowledged that the standard of review could be more deferential in light of this Court's decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paras. 98-100. This was

an invitation, it seems to me, to clarify what the appropriate standard is.

[34] Bell Canada and TELUS concede that the CRTC had the authority to approve disbursements from the deferral accounts for initiatives to improve broadband expansion and accessibility to telecommunications services for persons with disabilities, and that they actually sought such approval. In their view, however, this authority did not extend to what they characterized as retrospective "rebates". Similarly, in the Consumers' appeal the crux of the complaint is with whether the CRTC could direct that the funds be disbursed in certain ways, not with whether it had the authority to direct how the funds ought to be spent generally.

[35] This means that for Bell Canada and TELUS appeal, the dispute is over the CRTC's authority and discretion under the *Telecommunications Act* in connection with ordering credits to customers from the deferral accounts. In the Consumers' appeal, it is over its authority and discretion in ordering that funds from the deferral accounts be used for the expansion of broadband services.

[36] A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Together with its rate-setting power, the CRTC has the ability to impose *any* condition on the provision of a service, adopt *any* method to determine whether a rate is just and reasonable and require a carrier to adopt *any* accounting method. It is obliged to exercise all of its powers and duties with a view to implementing the Canadian telecommunications policy objectives set out in s. 7.

[37] The CRTC's authority to establish the deferral accounts is found through a combined reading of ss. 27 and 37(1). The authority to establish these accounts necessarily includes the disposition of the funds they contain, a disposition which represents the final step in a process set in motion by the Price Caps Decision. It is self-evident that the CRTC has considerable expertise with respect to this type of question. This observation is reflected in its extensive statutory powers in this regard and in the strong privative clause in s. 52(1) protecting its determinations on questions of fact from appeal, including whether a carrier has adopted a just and reasonable rate.

[38] In my view, therefore, the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. This argues for a more deferential standard of review, which leads us to consider whether the CRTC was reasonable in directing how the funds from the deferral accounts were to be used. (See *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; and *VIA Rail Canada Inc.*, at paras. 88-100.)

[39] This brings us to the nature of the CRTC's rate-setting power in the context of this case. The predecessor statute for telecommunications rate-setting, the *Railway Act*, R.S.C. 1985, c. R-3, also stipulated that rates be "just and reasonable" (s. 340(1)). Traditionally, those rates were based on a balancing between a fair rate for the consumer and a fair return on the carrier's investment. (See, e.g., *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93 and

ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 65.)

[40] Even before the expansive language now found in the *Telecommunications Act*, regulatory agencies had enjoyed considerable discretion in determining the factors to be considered and the methodology that could be adopted for assessing whether rates were just and reasonable. For instance, in dismissing a leave application in *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), Taschereau J. wrote:

> [I]f the Board is bound to grant a relief which is just to the public and secures to the railways a fair return, it is not bound to accept for the determination of the rates to be charged, the sole method proposed by the applicant. <u>The obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere.</u> [Emphasis added; p. 13.]

In making this determination, he relied on Duff C.J.'s judgment in *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308, for the following proposition in the particular statutory context of that case:

> The law dictates neither the order to be made in a given case nor the considerations by which the Board is to be guided in arriving at the conclusion that an order, or what order, is necessary or proper in a given case. True, it is the duty of all public bodies and others invested with statutory powers to act reasonably in the execution of them, but the policy of the statue [*sic*] is that, subject to the appeal to the Governor in Council under s. 52, in exercising an administrative discretion entrusted to it, the Board itself is to be the final arbiter as to the order to be made. [p. 315]

(See also Michael H. Ryan, *Canadian Telecommunications Law and Regulation* (loose-leaf ed.), at §612.)

[41] The CRTC's already broad discretion in determining whether rates are just and reasonable has been further enhanced by the inclusion of s. 27(5) in the *Telecommunications Act* permitting the CRTC to adopt "any method", language which was absent from the *Railway Act*.

[42] Even more significantly, the *Railway Act* contained nothing analogous to the statutory direction under s. 47 that the CRTC must exercise its rate-setting powers with a view to implementing the Canadian telecommunications objectives set out in s. 7. These statutory additions are significant. Coupled with its rate-setting power, and its ability to use any method for arriving at a just and reasonable rate, these provisions contradict the restrictive interpretation of the CRTC's authority proposed by various parties in these appeals.

[43] This was highlighted by Sharlow J.A. when she stated:

> Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* . . ., the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. Section 47 of the *Telecommunications Act* expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the *Telecommunications Act*. What that means, in my view, is that in rating decisions under the *Telecommunications Act*, the CRTC is entitled to consider any or all of the policy objectives listed in section 7. [para. 35]

[44] It is true that the CRTC had previously used a "rate base rate of return" method, based on a combination of a rate of return for investors in telecommunications carriers and a rate base calculated using the carriers' assets. This resulted in rates charged for the carrier's services that would, on the one hand, provide a fair return for the capital invested in the carrier, and, on the other, be fair to the customers of the carrier.

[45] However, these expansive provisions mean that the rate base rate of return approach is not necessarily the only basis for setting a just and reasonable rate. Furthermore, based on ss. 7, 27(5) and 47, the CRTC is not required to confine itself to balancing only the interests of subscribers and carriers with respect to a particular service. In the Price Caps Decision, for example, the CRTC chose to focus on maximum prices for services, rather than on the rate base rate of return approach. It did so, in part, to foster competition in certain markets, a goal untethered to the direct relationship between the carrier and subscriber in the traditional rate base rate of return approach. A similar pricing approach was adopted by the CRTC in a decision preceding the Price Caps Decision[7].

[46] The CRTC has interpreted these provisions broadly and identified them as responsive to the evolved industry context in which it operates. In its "Review of Regulatory Framework" decision[8], it wrote:

> The Act ... provides the tools necessary to allow the Commission to alter the traditional manner in which it regulates (i.e., to depart from rate base rate of return regulation).
>
> . . .
>
> In brief, telecommunications today transcends traditional boundaries and simple definition. It is an industry, a market and a means of doing business that encompasses a constantly evolving range of voice, data and video products and services.
>
> . . .
>
> In this context, the Commission notes that the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service. [Emphasis added;

---

[7]Telecom Decision CRTC 97-9.

[8]Telecom Decision CRTC 94-19.

pp. 6 and 10.]

[47] In *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007], 3 S.C.R. vii, the Federal Court of Appeal drew similar conclusions, observing that the *Telecommunications Act* should be interpreted by reference to the policy objectives, and that s. 7 justified in part the view that the "Act should be interpreted as creating a comprehensive regulatory scheme" (at para. 46). A duty to take a more comprehensive approach was also noted by Ryan, who observed:

> Because of the importance of the telecommunications industry to the country as a whole, rate-making issues may sometimes assume a dimension that gives them a significance that extends beyond the immediate interests of the carrier, its shareholders and its customers, and engages the interests of the public at large. It is also part of the duty of the regulator to take these more far-reaching interests into account. [§604]

[48] This leads inevitably, it seems to me, to the conclusion that the CRTC may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods, taking into account a variety of different constituencies and interests referred to in s. 7, not simply those it had previously considered when it was operating under the more restrictive provisions of the *Railway Act*. This observation will also be apposite later in these reasons when the question of "final rates" is discussed in connection with the Bell Canada appeal.

[49] I see nothing in this conclusion which contradicts the ratio in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476. In that case, the issue was whether the CRTC could make an order granting cable companies access to certain utilities' power poles. In that decision, the CRTC had relied on the Canadian telecommunications policy objectives

to inform its interpretation of the relevant provisions. In deciding that the language of the *Telecommunications Act* did not give the CRTC the power to grant access to the power poles, Gonthier J. for the majority concluded that the CRTC had inappropriately interpreted the Canadian telecommunications policy objectives in s. 7 as power-conferring (at para. 42).

[50] The circumstances of *Barrie Public Utilities* are entirely distinct from those at issue before us. Here, we are dealing with the CRTC setting rates that were required to be just and reasonable, an authority fully supported by unambiguous statutory language. In so doing, the CRTC was exercising a broad authority, which, according to s. 47, it was required to do "with a view to implementing the Canadian telecommunications policy objectives . . . ". The policy considerations in s. 7 were factors that the CRTC was required to, and did, take into account.

[51] Nor does this Court's decision in *ATCO* preclude the pursuit of public interest objectives through rate-setting. In that case, Bastarache J. for the majority, took a strict approach to the Alberta Energy and Utilities Board's powers under the applicable statute. The issue was whether the Board had the authority to order the distribution of proceeds by a regulated company to its subscribers from an asset sale it had approved. It was argued that because the Board had the authority to make "further orders" and impose conditions "in the public interest" on any order, it therefore had the ability to order the disposition of the sale proceeds.

[52] In holding that the Board had no such authority, Bastarache J. relied in part on the conclusion that the Board's statutory power to make orders or impose conditions in the public interest was insufficiently precise to grant the ability to distribute sale proceeds to ratepayers (at

para. 46). The ability of the Board to approve an asset sale, and its authority to make any order it wished in the public interest, were necessarily limited by the context of the relevant provisions (at paras. 46-48 and 50). It was obliged too to adopt a rate base rate of return method to determine rates, pursuant to its governing statute (at paras. 65-66).

[53] Unlike *ATCO*, in the case before us the CRTC's rate-setting authority, and its ability to establish deferral accounts for this purpose, are at the very core of its competence. The CRTC is statutorily authorized to adopt *any* method of determining just and reasonable rates. Furthermore, it is required to consider the statutory objectives in the exercise of its authority, in contrast to the permissive, free-floating direction to consider the public interest that existed in *ATCO*. The *Telecommunications Act* displaces many of the traditional restrictions on rate-setting described in *ATCO*, thereby granting the CRTC the ability to balance the interests of carriers, consumers and competitors in the broader context of the Canadian telecommunications industry (Review of Regulatory Framework Decision, at pp. 6 and 10).

[54] The fact that deferral accounts are at issue does nothing to change this framework. No party objected to the CRTC's authority to establish the deferral accounts themselves. These accounts are accepted regulatory tools, available as a part of the Commission's rate-setting powers. As the CRTC has noted, deferral accounts "enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year"[9]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one

[9]Telecom Decision CRTC 93-9.

regulatory period to another. While the CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits may have been innovative, it was fully supported by the provisions of the *Telecommunications Act.*

[55] In my view, it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with considerable scope in establishing and approving the use to be made of deferral accounts. They were created in accordance both with the CRTC's rate-setting authority and with the goal that all rates charged by carriers were and would remain just and reasonable.

[56] A deferral account would not serve its purpose if the CRTC did not also have the power to order the disposition of the funds contained in it. In my view, the CRTC had the authority to order the disposition of the accounts in the exercise of its rate-setting power, provided that this exercise was reasonable.

[57] I therefore agree with the following observation by Sharlow J.A.:

> The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. <u>It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the Telecommunications Act.</u> [Emphasis added; para. 52.]

[58] This general analytical framework brings us to the more specific questions in these appeals. In the first appeal, Bell Canada relied on Gonthier J.'s decision *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 ("*Bell Canada (1989)*"), to argue that "final" rates cannot be changed and that the funds in the deferral accounts could not, therefore, be distributed as "rebates" to customers.

[59] In *Bell Canada (1989)*, the CRTC approved a series of interim rates. It subsequently reviewed them in light of Bell Canada's changed financial situation, and ordered the carrier to credit what it considered to be excess revenues to its current subscribers. Arguing against the CRTC's authority to do so, Bell Canada contended that the CRTC could not order a one-time credit with respect to revenues earned from rates approved by the CRTC, whether the rate order was an interim one or not. Gonthier J. observed that while the *Railway Act* contemplated a positive approval scheme that only allowed for prospective, not retroactive or retrospective rate-setting, the one-time credit at issue was nevertheless permissible because the original rates were interim and therefore inherently subject to change.

[60] In the current case, Bell Canada argued that the rates had been made final, and that the disposition of the deferral accounts for one-time credits was therefore impermissible. More specifically, it argued that the CRTC's order of one-time credits from the deferral accounts amounted to retrospective rate-setting as the term was used in *Bell Canada (1989)*, at p. 1749, namely, that their "purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive" (at p. 1749).

[61] In my view, because this case concerns encumbered revenues in deferral accounts (referred to by Sharlow J.A. as contingent obligations or liabilities), we are not dealing with the variation of final rates. As Sharlow J.A. pointed out, *Bell Canada (1989)* is inapplicable because it was known from the outset in the case before us that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction (at para. 53).

[62] It would, with respect, be an oversimplification to consider that *Bell Canada (1989)* applies to bar the provision of credits to consumers in this case. *Bell Canada (1989)* was decided under the *Railway Act*, a statutory scheme that, significantly, did not include any of the considerations or mandates set out in ss. 7, 27(5) and 47 of the *Telecommunications Act*. Nor did it involve the disposition of funds contained in deferral accounts.

[63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374,

346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

[64] The Deferral Accounts Decision was the culmination of a process undertaken in the Price Caps Decision. In the Price Caps Decision, the CRTC indicated that the amounts in the deferral accounts were to be used in a manner contributing to achieving the CRTC's objectives (at paras. 409 and 412). In the Deferral Accounts Decision, the CRTC summarized its earlier findings that draw-downs could occur for various purposes, including through subscriber credits (at para. 6). When the CRTC approved the rates derived from the Price Caps Decision, the portion of the revenues that went into the deferral accounts remained encumbered. The deferral accounts, and the encumbrance to which the funds recorded in them were subject, were therefore an integral part of the rate-setting exercise ensuring that the rates approved were just and reasonable. It follows that nothing in the Deferral Accounts Decision changed either the Price Caps Decision or any other prior CRTC decision on this point. The CRTC's later allocation of deferral account balances for various purposes, therefore, including customer credits, was not a variation of a final rate order.

[65] The allocation of deferral account funds to consumers was not, strictly speaking, a "rebate" in any event. Instead, as in *Bell Canada (1989)*, these allocations were one-time disbursements or rate reductions the carriers were required to make out of the deferral accounts to their *current* subscribers. The possibility of one-time credits was present from the inception of the rate-setting exercise. From the Price Caps Decision onwards, it was understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the CRTC determined the appropriate allocation. It was precisely because the rate-setting mechanism approved

by the CRTC included accumulation in and disposition from the deferral accounts pursuant to further CRTC orders, that the rates were and continued to be just and reasonable.

[66] Therefore, rather than viewing *Bell Canada (1989)* as setting a strict rule that subscriber credits can never be ordered out of revenues derived from final rates, it is important to remember Gonthier J.'s concern that the financial stability of regulated utilities could be undermined if rates were open to indiscriminate variation (at p. 1760). Nothing in the Deferral Accounts Decision undermined the financial stability of the affected carriers. The amounts at issue were always treated differently for accounting purposes, and the regulated carriers were aware of the fact that the portion of their revenues going into the deferral accounts remained encumbered. In fact, the Price Caps Decision formula would have allowed for *lower* rates than the ones ultimately set, were it not for the creation of the deferral accounts. Those lower rates could conceivably have been considered sufficient to maintain the financial stability of the carriers and were increased only in an effort to encourage market entry by new competitors.

[67] TELUS argued additionally that the Deferral Accounts Decision constituted a confiscation of its property. This is an argument I have difficulty accepting. The funds in the accounts never belonged unequivocally to the carriers, and always consisted of encumbered revenues. Had the CRTC intended that these revenues be used for any purposes the affected carriers wanted, it could simply have approved the rates as just and reasonable and ordered the balance of the deferral accounts turned over to them. It chose not to do so.

[68] It is also worth noting that in approving Bell Canada's rates, the CRTC ordered it to

allocate certain tax savings to the deferral accounts[10]. Neither the CRTC, nor Bell Canada, could possibly have expected that the company would be able to keep that portion of its rate revenue representing a past liability for taxes that it was in fact not currently liable to pay or defer.

[69] For the above reasons, I would dismiss the Bell Canada and TELUS appeal.

[70] The premise underlying the Consumers' Association of Canada appeal is that the disposition of some deferral account funds for broadband expansion highlighted the fact that the rates charged by carriers were, in a certain sense, not just and reasonable. Consumers can only succeed if it can demonstrate that the CRTC's decision was unreasonable.

[71] At its core, Consumers' primary argument was that the Deferral Accounts Decision effectively forced users of a certain service (residential subscribers in certain areas) to subsidize users of another service (the future users of broadband services) once the expansion of broadband infrastructure was completed. In its view, this was an indication that the rates charged to residential users were not in fact just and reasonable, and that therefore the balance in the deferral accounts, excluding the disbursements for accessibility services, should be distributed to customers.

[72] As previously noted, the deferral accounts were created and disbursed pursuant to the CRTC's power to approve just and reasonable rates, and were an integral part of such rates. Far from rendering these rates inappropriate, the deferral accounts *ensured* that the rates were just and reasonable. And the policy objectives in s. 7, which the CRTC is always obliged to consider,

---

[10] Telecom Decision CRTC 2003-15, at para. 32.

demonstrate that the CRTC need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. The statute contemplates a comprehensive national telecommunications framework. It does not require the CRTC to atomize individual services. It is for the CRTC to determine a tolerable level of cross-subsidization.

[73] Nor does the traditional approach to telecommunications regulation support Consumers' argument. Long-distance telephone users have long subsidized local telephone users (Price Caps Decision, at para. 2). Therefore, while rates for individual services covered by the *Telecommunications Act* may be evaluated on a just and reasonable basis, rates are not necessarily rendered unreasonable or unjust simply because there is some cross-subsidization between services. (See Ryan, at §604, for the proposition that the CRTC can determine the appropriate extent of cross-subsidization for a given telecommunications carrier.)

[74] In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates.

[75] In deciding to allocate the deferral account funds to improving accessibility services and broadband expansion in rural and remote areas, the CRTC had in mind its statutorily mandated objectives of facilitating "the orderly development throughout Canada of a telecommunications system that serves to . . . strengthen the social and economic fabric of Canada" under s. 7(*a*);

rendering "reliable and affordable telecommunications services . . . to Canadians in both urban and rural areas" under s. 7(*b*); and responding "to the economic and social requirements of users of telecommunications services" pursuant to s. 7(*h*).

[76] The CRTC heard from several parties, considered its statutorily mandated objectives in exercising its powers, and decided on an appropriate course of action. Under the circumstances, I have no hesitation in holding that the CRTC made a reasonable decision in ordering broadband expansion.

[77] I would therefore conclude that the CRTC did exactly what it was mandated to do under the *Telecommunications Act*. It had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests. It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion.

[78] I would dismiss the appeals. At the request of all parties, there will be no order for costs.

Appeals dismissed.

Solicitors for the appellant/respondent Bell Canada: Blake, Cassels & Graydon, *Toronto.*

Solicitors for the appellant/respondent TELUS Communications Inc. and the respondent TELUS Communications (Québec) Inc.: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the appellants/respondents the Consumers' Association of Canada and the National Anti-Poverty Organization and the respondent the Public Interest Advocacy Centre: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the respondent MTS Allstream Inc.: Goodmans, Toronto.

Solicitors for the respondent/intervener the Canadian Radio-television and Telecommunications Commission: Torys, Toronto.

TAB 3

Ontario Energy
Board

Commission de l'Énergie
de l'Ontario

RP-2005-0013
EB-2005-0031

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 Great Lakes Power Limited for an order or orders approving or fixing just and reasonable rates.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair and Member

Paul Vlahos
Member

DECISION AND ORDER

This is the majority decision with reasons of Vice Chair Nowina and Board Member Vlahos. The minority reasons of Vice Chair Kaiser follow.

Background

On January 18, 2005, Great Lakes Power Limited ("GLP") submitted an application to the Ontario Energy Board for a distribution rate adjustment related to the recovery of the second interim tranche of regulatory assets pursuant to the Board's instructions found in the filing guidelines issued on December 20, 2004.

On February 16, 2005, Boniferro Mill Works Inc. ("Boniferro") submitted an intervention objecting to its classification as Larger Customer A and to its line loss rates.

On March 30, 2005, the Board issued a Decision and Interim Order approving distribution rate adjustments. In that decision, the Board declared GLP's rates interim effective April 1, 2005 and because of the outstanding matter relating to Boniferro, directed GLP to file written evidence with respect to the issues raised by Boniferro. The oral hearing focusing on Boniferro's issues was held on November 7 and 8, 2005 in the Board's hearing room in Toronto.

The rate classification that currently applies to Boniferro was first approved by the Board on an interim basis on May 13, 2002[1]. At that time, Domtar Wood Products was the distribution customer that owned the specific facilities at the site now owned by Boniferro at 45 Third Line West in Sault Ste. Marie. The interim decision approved the applied-for rates derived from the allocation of costs to proposed customer classes using the results of a study performed for GLP by Navigant Consulting Inc. The Navigant study classified Domtar as "Large Customer A", the only customer in that specific rate class. The basis for this classification was Domtar's unique demand, which was significantly higher than GLP's commercial customers in the General Service > 50 kW rate class, and significantly lower than GLP's largest distribution customer.

In December of 2002, GLP's interim rate order was made final as a result of Ontario Government legislation, Bill 210. By legislation, electricity distribution rates could only be altered with the permission of the Minister of Energy during the period December 2002 to January 2005.

---

1 RP-2002-0109/EB-2002-0249

According to the evidence, Domtar started to wind down its operations in January 2003. The hardwood sawmill did not operate in February and March of 2003. Boniferro took over the hardwood sawmill operations from Domtar on or about the end of March 2003 but Domtar remained the customer of GLP for 45 Third Line West until it exited the site at the end of October 2003. During that time, Boniferro was paying Domtar for part of the electricity bill issued to Domtar from GLP. During that period some consumption was always registered on the meter.

The evidence shows that Boniferro requested electricity service from GLP by letter dated March 24, 2003. In that letter Boniferro indicated its expectations that it would be charged under the General Service > 50 kW rate class and, if not so, to be notified. By response dated April 25, 2003, GLP indicated that it would be classifying Boniferro in the Large Customer A class, the same as Domtar, and provided the reasons for such classification.

By letter to GLP dated January 21, 2004, Boniferro expressed concerns regarding its classification as Large Customer A. In that letter, Boniferro noted that its November and December 2003 average monthly peak demand was 1,113 kW and 1,119 kW respectively and that its future peak demand is expected to be in this range.

Boniferro paid GLP on the basis of the Large Customer A rates until June 2004. Beginning in July 2004, Boniferro began to remit an amount which it calculated would be payable if Boniferro was in the General Service > 50 kW rate class.

In this proceeding, Boniferro argued that the Domtar Large Customer A rate was not applicable as this 'site specific' rate was not related to a site specific cost, that the results of the Navigant study were not fair to Boniferro and that Boniferro should be more appropriately placed in the General Service > 50 kW class.

GLP argued that Boniferro's operations were not significantly different from Domtar's and was opposed to the reclassification of Boniferro on that basis. GLP acknowledged that the Board never had the opportunity to scrutinize the distribution rate application which included the Navigant study as the initial interim rates were made final by Bill 210, and not as a result of a proceeding before the Board. However, GLP maintained that the study was based on standard cost allocation and rate making principles which involved the sharing of costs and subsidies among customer classes.

GLP offered to mitigate the Large Customer A rate by adjusting the allocators in the Navigant study by using the volumes reflecting Boniferro's operations in 2004. This would generate lower Large Customer A rates for Boniferro. GLP also requested that in the event the Board decided to adjust Boniferro's rates due to either a reclassification or GLP's scenario of mitigating the Large Customer A rate, that the Board grant an accounting order to establish a deferral account to record any deficiencies.

With regard to the loss factor issue, Boniferro submitted that in the event that the Board reclassified Boniferro to the General Service > 50 kW class, Boniferro would accept the current line loss factor of 6.9%; otherwise it requested that GLP justify the 6.9% figure as applicable to the Large Customer A class.

GLP submitted that it did not specifically assign a unique loss factor to the Large Customer A class as a result of the specific classification found in the Navigant study. It noted that the currently applied loss factor is appropriate for Boniferro since it was calculated in accordance with the Board's formula for primary metered customers as set out in the Board's Retail Settlement Code. GLP also noted that the current loss factor is lower than the actual recorded loss factors currently experienced in the GLP system.

Board Findings

All panel members agree on the rate classification for Boniferro from April 1, 2005, when the rates became interim. There is disagreement on the appropriate treatment of the period before this. These are the findings of the majority.

The first issue to be dealt with is whether Boniferro should continue to be in the Large Customer A classification. We find that it should not.

GLP's General Service >50 kW rate class does not contain a maximum threshold. GLP's Large Customer A classification does not state a minimum or maximum threshold. This is the first opportunity for the Board to review the reasonableness of the establishment of GLP's Large Customer A Classification.

GLP's alternative solution in this proceeding, to revise the cost allocation by using the Boniferro loads from 2004, does provide some relief to Boniferro, as the costs assigned to the Large Customer A classification are based on monthly peak loads. However, this does not address the issue of the appropriateness of the Navigant study regarding classification in the first instance. We are not persuaded on the evidence in this proceeding that it is appropriate that one customer should make up a single rate class, especially as there was no direct assignment of costs to the Large Customer A class, only an allocation based on customer loads.

Establishing a single customer class is unusual, and there must be sufficient evidence to demonstrate why it is appropriate for a particular customer to have a unique rate. Although the Board had enough evidence before it to review the rate classification dispute between the two parties, this proceeding was not the forum to specifically address the Navigant study's rationale and methodology. The Board determined that it would review evidence on the issues raised by Boniferro in its intervention of GLP's application, within the context of the 2005 rate adjustment process. The generic Notice issued by the Board for the 2005 rates proceeding limited the scope of the proceeding to a rate adjustment based on changes reflecting (in GLP's case) the next interim instalment of the four year recovery of distributors' regulatory assets.

Intervenors are not limited to addressing issues brought forth by an Applicant. Therefore, the Board was willing to review the issues brought forth by Boniferro, namely their alleged misclassification. Although the Board did not ask for evidence on the Navigant Study itself, GLP had notice that the appropriateness of the Large Customer A rate would have been an issue. However, GLP did not provide sufficient evidence in our view to justify a continuation of the site specific rate for 45 Third Line West in Sault Ste. Marie.

We therefore find that Boniferro should be reclassified to the General Service > 50 kW class. The option remains open for GLP to propose otherwise based on a new study, or a review of the Navigant Study, which would demonstrate that Boniferro, as the occupant of 45 Third Line West in Sault Ste. Marie, should be assigned to a different rate class than the General Service > 50 kW class.

The second issue is the effective date of the reclassification. We find that the reclassification will be retroactive to the date interim rates were set – April 1, 2005. Boniferro's classification will not be changed for the period prior to April 1, 2005.

GLP's rates were approved by the Board on an interim basis by way of an interim order dated May 13, 2002, in the same way as all other electricity distributors in the province received approval for interim rates. By legislation (Bill 210), interim rate orders fixing rates under s. 78 of the *Ontario Energy Board Act, 1998* for electricity distributors were made final. During the period of the rate freeze (December 2002 to January 2005), applications to the Board for rate changes were permitted only with the leave of the Minister of Energy. The Board had not received authority from the Minister to deal with this matter. Therefore, the Board was not able to review the reasonableness of GLP's rate classification prior to this proceeding.

Bill 210 made the interim GLP rate order a final rate order. Therefore we are of the view that changing rates prior to April 1, 2005 would be retroactive ratemaking. As the Board has stated in numerous cases, the Board does not endorse retroactive ratemaking. The Board must be mindful of the negative implications of retroactive rates. When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity.

We are also of the view that the Board is limited in its decision by legal precedent. The Supreme Court of Canada has ruled on the issue of retroactive ratemaking.

In 1989, Bell Canada appealed a decision[2] of the CRTC which retroactively altered an interim rate that had previously been approved by the CRTC. The Court held that:

> It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. [...] It is the interim nature of the order which makes it subject to further retrospective directions.

---

2 *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] 1 S.C.R. 1722

However, with regard to the status of final orders the Court stated that:

> [a] consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike a final decision, subject to retrospective review and remedial orders.

The Supreme Court re-iterated its position on retroactive rate-making in the ATCO decision[3]. Speaking for the majority, Mr. Justice Bastarache noted:

> [i]t is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates.

A decision of the Alberta Court of Appeal[4] also makes findings regarding retroactive rates. The Court found that:

> A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. This principle is based on notions of fairness and the reliability of expectations.

The *Ontario Energy Board Act, 1998* does not contain any provisions that deal specifically with retroactive ratemaking, and the Board is therefore not empowered to alter a final rate order retroactively. Furthermore, the Act requires that balances in deferral accounts should be reviewed by the Board at least annually. We infer from this that there is a policy against adverse impacts and inter-generational inequity that might be caused by out-of-period rate adjustments.

Therefore, for the above reasons, we find that GLP has had a valid order to charge the rates that it has charged to Boniferro for electricity consumption up to March 31, 2005. For consumption on and after April 1, 2005, however, GLP shall

---

3 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* [2006] S.C.C. No. 4

4 *Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)* [2000] A.J. No. 507 (C.A.)

classify and invoice Boniferro on the basis of the General Service > 50 kW rate classification.

Having made the above findings, whether GLP erred or acted unreasonably by not placing Boniferro in the General Service > 50 kW rate class at the time Boniferro became a customer of GLP is not determinative. However, it became a focal point in the proceeding and we feel that we must comment on it. We conclude that GLP did not err or act unreasonably.

The essence of Bonifero's argument is that it should not have been classified as Large Customer A since it never accepted such classification. It argues that once Domtar exited the business, the revenue associated with the Large Customer A class disappeared and Boniferro should have been classified as a completely new customer, different from Domtar.

GLP had established and received Board approval for a rate classification based on a single customer, Domtar Wood Products. However, the rate classification described Large Customer A as the customer located at 45 Third Line West in Sault Ste. Marie and did not specifically name Domtar Wood Products. That classification was put in place at the time GLP had to unbundle its rates to conform with the Board's directions to all the electricity distributors in the province and was derived from the Navigant study. Domtar did not intervene in GLP's application at that time.

It is reasonable to expect that GLP would treat Boniferro the same as the previous owner of the site. It was the same property as Domtar's, the same distribution assets, and essentially the same business as Domtar's, served under the same meter. When Boniferro acquired certain assets from Domtar in 2003 and Boniferro replaced Domtar as the customer of GLP, Boniferro was properly assigned in our view the rate classification that applied to Domtar. The fact that the hardwood sawmill operations ceased for a period of two months does not alter the fact that without experience as to what the changes, if any, would be to the monthly peak demand level of electricity, it would not be reasonable to expect GLP to assign Boniferro to a different classification at that time.

As a utility, GLP has a responsibility to act in a prudent fashion for all its customers. Changing the classification of an existing property without evidence of significant peak demand consumption patterns, would not be consistent with the utility's obligation to other customers who would, in the future, be required to pick up the shortfall.

Mr. Boniferro acknowledged that, prior to continuing his business as a customer of GLP, his assumption of 750 to 800 kW peak demand was his own. He neither received expert advice in forming that assumption, nor did he receive any indication from GLP that his business would be served under the General Service > 50 kW rate class. On the contrary, GLP had informed Boniferro in its response letter of April 25, 2003 that Boniferro would be billed under the same classification as Domtar. Mr. Reid, testifying on behalf of Boniferro, acknowledged that it is difficult to come up with a forecast for peak demand prior to operating a company like Boniferro. As it turned out, Boniferro's average of its 2005 monthly peak demands as of August 2005 was 1,556 kW or 15% lower than the average of Domtar's monthly peak demands in 2000.

For the above reasons, we are of the view that GLP acted reasonably in classifying Boniferro in the Large Customer A classification, replacing Domtar.

Also, by way of context, the Board was first notified of this dispute in October 2004 by way of a complaint lodged by Boniferro to the Board's Compliance Office. The Chief Compliance Officer, in a letter to Boniferro dated February 2005, found no violation of the rate order by GLP. Furthermore, in a letter to GLP dated April 27, 2005 in the context of the instant rates proceeding, the Board stated that, "The Board is of the view that this issue is not about GLPL's compliance with its rate order but rather as to what is an appropriate rate for Boniferro going forward."

Boniferro's objection to be in the Large Customer A classification does not invalidate an existing Board rate order containing such classification.

The final issue relates to the treatment of GLP's forgone revenues resulting from the reclassification.

GLP requested that a deferral account be established to track underpayments or under recoveries of revenues as a result of this decision. The Board finds that a deferral account should be established by GLP to record the difference in revenue resulting from classifying Boniferro as a General Service > 50 kW customer effective April 1, 2005. These amounts should be considered in a future rates proceeding. The methodology used to dispose of these amounts will be determined at that time.

With respect to GLP's shortfall in revenue in the period July 2004 to March 2005, during which Boniferro was not paying GLP the invoiced amounts, it is the view of the Board that this a private collection matter between GLP and Boniferro. The Board found that the rate order was valid in this period and neither the utility nor its ratepayers should be burdened with retroactive ratemaking. However, the Board expects that GLP will exercise prudence in this regard so that it and its customers will continue to benefit from a future revenue stream and from continuing to utilize its distribution assets (no stranded assets) by having Boniferro as a customer.

We note Boniferro's position that if it were to be classified as a General Service > 50 kW customer, it would accept the 6.9% loss factor applied by GLP to that rate class. We find that that there should be no change to the previously approved 6.9% loss factor.

Therefore, the Board orders that:

1. GLP classify Boniferro as a customer in the General Service > 50 kW rate class, effective April 1, 2005.

2. GLP establish a deferral account to capture any revenue deficiency from Boniferro being classified as a General Service > 50 kW rate class customer from April 1, 2005.

DATED at Toronto, February 24, 2006

Original signed by

Pamela Nowina
Vice Chair and Member

Original signed by

Paul Vlahos
Member

MINORITY REASONS

These are the minority reasons of Vice Chair Kaiser.

This proceeding relates to a billing dispute between Great Lakes Power Ltd. ("GLP" or the "utility") and its customer, Boniferro Millworks Inc. ("Boniferro"). GLP has classified Boniferro in the Large Customer A category. Boniferro argues that it should be more properly classified as a General Service > 50 kW customer. This would result in a 25% reduction of the cost of electricity to Boniferro.

The evidence indicates that Boniferro at all times rejected this classification but for a period of time (November 2003 to June 2004) did pay the larger rate. However, since July 1, 2004 Boniferro has been paying at the lower rate under the General Service > 50 kW class. GLP argues that the customer has been underpaying and substantial monies are owed. Boniferro on the other hand, argues that if anything it has been overpaying.

This dispute came before the Board through an intervention by Boniferro in the general rate application filed by GLP on January 18, 2005. Further to the filing of the intervention by Boniferro on February 16th the Board issued various Procedural Orders which provided for interrogatories and the filing of evidence. The Board held an oral hearing in this matter on November 7th and 8th, 2005.

The rate order at issue in this case is somewhat unique. GLP's 2002 rate application was approved by the Ontario Energy Board on an interim basis on May 13, 2002, with rates made effective May 1, 2002. In December of 2002, this interim rate order was made final as a result of Ontario Government legislation, Bill 210. This final rate order set out a Large Customer A rate. While this is referred to as a rate class it in fact included only one customer and was designed specifically for that customer. The rate was set for Domtar Wood Products and was based on the analysis performed by Navagant Consulting in a detailed cost allocation study.

In March 2003, Boniferro purchased part of the Domtar property and changed its operations. Boniferro did not assume or enter into any supply agreement with GLP and did not assume any agreements between GLP and Domtar. In November 2003, Domtar ceased all operations on the property and Boniferro was required to make its own arrangements with GLP.

When Boniferro acquired certain assets from Domtar, GLP assigned Boniferro to the Large Customer A class and began to charge distribution rates applicable to that class. Boniferro objected on the grounds that its usage was not the same as Domtar and that no cost allocation study had been done with respect to its usage.

GLP argued that the rate was "site specific" and that Boniferro was required to pay the rate.

The concept of a "site specific" rate is an unusual one. Rates are generally determined between customer classes on the basis of usage. Here there was no analysis of the usage, rather just a declaration that the rate was site specific. Moreover, this is really not a rate class; it was a one customer rate that was designed specifically for another customer.

It is clear that there were fundamental changes in the operation of Boniferro compared to the previous owner of the land, Domtar Wood Products. First, only part of the property was purchased from Domtar and second, detailed evidence was presented by the president of Boniferro as to the changed functionality. Counsel for GLP admitted in argument that in 2004 the average monthly peak demand for Boniferro was approximately 1,400 kW which was around 24% less than the 1,831 kW that was used for the purpose of creating a Large Customer A class in the first place.

Aside from the reduced electricity use by Boniferro, evidence was presented by Boniferro that indicated that GLP was requiring Boniferro to bear an excessive cost burden. Boniferro pointed to the fact that the dedicated facilities used to serve their plant consisted of 3.65 km of line which at its brand new installed cost, as opposed to the current depreciated cost, was only $250,000. Notwithstanding that, Boniferro was allocated close to $1 million in system costs which they say did not relate to the cost of serving Boniferro.

Boniferro wants to pay the General Service > 50 kW rate from the date service commenced in November 2003. They would accordingly recover the amounts which they overpaid for a period of eight months. The majority hearing this case concluded that the lower rate can go into effect only on April 1, 2005 because to do otherwise would constitute retroactive rate-making. I disagree. This is not a case of retroactive rate-making. This is an error in customer classification.

Retroactivity

There are a number of reasons why the retroactivity issue does not arise in this case. First, there is good reason to believe that the Domtar rate disappeared. While the Domtar rate is called the Large Customer A class, it's a class in name only. It was designed for a specific customer and was based on a cost allocation study that related solely to that customer. It is argued by Boniferro that when Domtar ceased operations that rate order disappeared. If the rate order disappeared, there are no retroactive rates applying to that rate order.

Second, even if the rate did not disappear, it was not meant to apply to Boniferro and should not have been applied to Boniferro. Boniferro should not have been put in that rate class; rather, it should have been put in the General Service > 50 kW rate class. It is true that the utility classified Boniferro in this rate class during a period where the utility's rates were deemed to be a final order by legislation. But this does not mean that this classification was correct or that Boniferro should bear the costs of this classification. Does the rule against retroactive rate making mean that Boniferro should bear these costs? It is not Boniferro's fault that this matter has taken this long to resolve. Boniferro has been complaining about misclassification since the very beginning. Put differently, there is an unjust enrichment when a customer has paid a rate which does not apply to that customer, and the Board may remedy that by ordering a refund. The test for unjust enrichment was recently addressed by the Supreme Court of Canada[5]. Iacobucci J. stated the test for unjust enrichment for the Court, as follows:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reasons for the enrichment. (Paragraph 30)

The *Garland* case is particularly relevant because it addressed the payment of utility rates. In that case, the Court applied an earlier finding that the interest rate on outstanding utility bills was unlawful in the context of the test for unjust enrichment. In applying that test, the Court had no trouble finding that the utility was enriched and the rate payer was deprived. The real issue there, as well as here, was whether there was a juristic reason for the enrichment. There, as here, the utility argued that the enrichment had a juristic justification because it was authorized by a Board Order. The Court, who found that the order was unlawful and therefore inoperative, held that the order could not be relied upon as a juristic reason for the enrichment. According to the Court:

> As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. (Paragraph 51)

---

5 *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629.

Thus, because the provision was inoperative, the Court ordered that the payment be refunded. I believe that this is the appropriate context to consider the relevance of retroactive rate making.

No one disputes that retroactive rate-making is improper. This is most recently recognized by the Supreme Court of Canada in the ATCO decision and numerous decisions before[6]. In *Northwestern Utilities Ltd. v. City of Edmonton*, Estey J. stated on page 691:

> It's clear from the many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered from rates established for past periods.

The general principle is that when a Board establishes a Final Order with respect to rates, that rate is in effect until replaced, i.e. the final rate either is replaced by an Interim Rate or is replaced by a new Final Rate Order in a subsequent proceeding. The reason is that the regulatory compact assumes that between rate hearings, there will always be over earnings or under earnings but the utility must accept the consequences. It is not entitled to be reimbursed if it does not make its full allowed rate of return. On the other hand, the utility does not have to give money back to the ratepayers if it earns in excess of that amount. Rates are to be corrected at the time of the next hearing on a going forward basis. They are not made retroactive. This allows the utility to finance its operations on a predictable basis and provides finality to proceedings.

As a result, if the rate was properly applicable to Boniferro during the entire period, then, under the unjust enrichment doctrine, the rate would be operative.

---

6 *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical* Canada *Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731

As a result, there would be a juristic reason for the utility's enrichment, i.e., the enrichment would not be unjust. Furthermore, given the rule against retroactive rate making, the Board could not now amend that rate to cover a previous period. However, this is not the case here. I am not proposing that the rate be changed; I am finding that it did not apply. The rate was not operative as applied to Boniferro. It therefore does not constitute a juristic reason for the enrichment.

The prohibition against retroactivity assumes that a Final Order has been made by the Board and properly applies to the customer at issue. Here, the Board did not make these rates final as applied to that customer. The customer's inability to challenge the applicability of the rate occurred through a legislative "accident" when the legislature enacted Bill 210. It's hard to argue that the intent of Bill 210 was to create a final order that prohibited a customer from obtaining relief in an ongoing dispute regarding customer classification.

Fundamentally, this case is about customer misclassification. Boniferro applied for service on the basis that it was in the General Service > 50 kW category. That was rejected and the utility placed them in a unique Domtar category called Large Customer A. This dispute has continued on the basis of that alleged misclassification.

The application of the retroactivity doctrine to this case assumes that the Board is adjusting the Domtar or Large Customer A rate retroactively. That with respect is not the issue. Boniferro has never asked for that relief. Rather, Boniferro has asked to be placed in the proper customer classification and to have that take effect from the date service commenced.

In the circumstances, throughout the period starting November 2003, Boniferro should be paying the applicable rates of the General Service > 50 kW class.

It is also important that considerable evidence has been placed before the Board as to the financial difficulties facing Boniferro in its current operations. The over payment at issue is a serious matter for this particular customer. The utility needs to remain prudent that it not arbitrarily determine rates that would lead to the disappearance of the customer and to stranded assets. That will generate a revenue deficiency much greater that that created by reclassification.

How is the deficiency recovered?

Under both the minority and majority decisions there will be a revenue deficiency for the utility. GLP's filing in the 2005 rate case was based on a revenue requirement that assumed that the customer in the Large Customer A class was properly classified and is paying that rate. In both the minority and majority decisions this is not the case. The difference is the length of period that the deficiency relates to.

The minority decision states that the misclassification took place at the beginning of service in November 2003 and the lower rate should prevail from that point. The majority decision states that the lower rate should be effective only from April 1, 2005 because a lower rate prior to that date amounts to retroactive rate-making.

The majority decision analyses the prudence of the utility in the initial classification and finds no fault. It is clear that Boniferro argues that the decision was an error and that they should not have been assigned the Domtar rate and certainly not without a proper cost allocation study. There is some support for that position in the record. There is evidence that the utility declared the rate "site specific" and failed to take into account the differences in functionality of the new operator. The utility admitted in argument that the usage of Boniferro was 24% less than the demand used in striking the Domtar rate.

The Board addressed the prudence test in its Decision in the Enbridge case regarding the prudence of the Alliance contracts[7].

The test is well known but its worth repeating in the context of these proceedings. The first principle is this; when a utility makes decisions in operating its business, the regulator assumes that those decisions, whether they relate to investments or otherwise, are prudent. In other words, there is a burden on those challenging the prudence to demonstrate, on reasonable grounds, that there has been a lack of prudence.

The second principle is that, in analysing whether the utility was prudent or not, the Board must look at the facts and circumstances that were known or ought to be known to the utility at the time the decision was made. In other words, hindsight should not be used to determine prudence.

Put differently, the utility's decision can turn out to be wrong but still have been prudent. Given the limited nature of the record before us and the presumption of prudence on the part of the utility, I find that the decision by the utility to classify Boniferro in the Large Customer A category was a prudent decision. That doesn't mean it was the right decision. In fact, it was the wrong decision.

However, the consequence of this finding is that the shareholder should not bear the deficiency which would result from the reclassification of the customer. The deficiency should be recovered from the other rate classes and the exact disposition of that can be dealt with by the Panel hearing that rate case. The deficiency may be recovered from all customer classes or it may be recovered only from the General Service > 50 kW class. A Procedural Order can be issued to deal with this issue. It's not unusual in rate cases that cost allocation issues between customers will arise and be dealt with by Panels hearing those cases.

---

7 Re: Enbridge, RP-2001-0032, Para. 3.12.2

Boniferro's remedy

Given the concern with retroactivity, I would order that Boniferro be classified in the General Service > 50 kW class from the date service commenced. The utility will be directed to provide a credit towards amounts to be paid by Boniferro in the future in an amount equal to the overpayment. The overpayment can be readily calculated and submissions can be made if necessary with respect to the accounting.

There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive rate-making.[8] This is particularly the case where it reflects a one time fixed amount adjustment to an overpayment that the tribunal finds unjust.

I would also order that the utility be directed to pay Boniferro's costs in this proceeding in an amount to be taxed in the usual fashion.

In summary, I agree with the majority that GLP should charge Boniferro the General Service > 50 kW rates and that the utility establish a deferral account to track any revenue deficiency that results. I disagree with the majority regarding the effective date of the reclassification. GLP should reclassify Boniferro to the General Service > 50 kW class as of the date which service commenced, November 2003. I also disagree with the majority regarding the effective date of the deferral account. The deferral account should track any revenue deficiency as of November 2003 and the disposition of these amounts should be considered by the Panel hearing the 2006 rate case. The allocation as between different customer classes can be determined at that time.

---

[8] New *York Water Service Corp. v. Public Service Commission*, 208 N.Y. S. 2d 587 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p.864). The regulator's order was upheld by the New York State Supreme Court (Appellate Division). See also *ATCO Gas and Pipelines Ltd v. Alberta Energy and Utilities Board* [2006] S.C.J. 4 at Para. 137.

DATED at Toronto, February 24, 2006

Original signed by

Gordon Kaiser
Vice Chair and Presiding Member

TAB 4

Gustavson Drilling (1964) Limited
Appellant;

and

The Minister of National Revenue
Respondent.

1974: November 1, 5; 1975: December 4.

Present: Martland, Judson, Pigeon, Dickson and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation—Income tax—Oil companies—Deductions—Drilling and exploration expenses—Transferability of right to deduct to successor corporation—Income Tax Act, R.S.C. 1952, c. 148, as amended, s. 83A(8a), now 1970-71-72, (Can.) c. 63, s. 66(6).

Since 1949 the exploration for petroleum and natural gas has been encouraged by the provision in the *Income Tax Act*, R.S.C. 1952, c. 148 as amended 1970-71-72, c. 63, that oil companies could deduct drilling and exploration expenses from income earned in subsequent years. In 1956 the right was extended to successor corporations by legislation which provided that an oil company which acquired all or substantially all of the property of another oil company could deduct drilling and exploration expenses incurred by the predecessor corporation. The acquisition had however to be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor on the winding up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed. The appellant oil company incurred drilling and exploration expenses in excess of its income prior to 1960 when its parent company acquired substantially all of its property in consideration of the cancellation of a debt due. Entitlement to claim the undeducted drilling and exploration expenses did not accrue to the parent company as the transaction was not carried out as required by the 1956 Act. The appellant remained inactive until 1964 when its shares were acquired by another corporation following the liquidation of its previous parent company. After a change of name it recommenced business with newly acquired assets, none of which had been used or owned by it prior to June 1964. It sought to deduct the accumulated drilling and exploration expenses for the ensuing taxation years. The Minister re-assessed and disallowed the deductions. The appellant successfully appealed to the

Gustavson Drilling (1964) Limited
Appelante;

et

Le ministre du Revenu national *Intimé.*

1974: le 1er et 5 novembre; 1975: le 4 décembre.

Présents: Les juges Martland, Judson, Pigeon, Dickson et de Grandpré.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Revenu—Impôt sur le revenu—Compagnies pétrolières—Déductions—Dépenses d'exploration et de forage—Transmissibilité du droit de déduire ces dépenses à la compagnie remplaçante—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, avec modifications, art. 83A(8a), maintenant 1970-71-72 (Can.), c. 63, art. 66(6).

Depuis 1949, la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifié par 1970-71-72, c. 63, encourage la recherche du pétrole et du gaz naturel en autorisant les compagnies pétrolières à déduire les dépenses de forage et d'exploration du revenu des années subséquentes. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi prévoyant qu'une compagnie pétrolière qui acquérait tous ou presque tous les biens d'une autre compagnie pétrolière pouvait déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Cependant, il fallait que l'acquisition résulte a) d'un échange d'actions du capital social de la remplaçante, ou b) de la distribution des biens à la compagnie remplaçante lors de la liquidation de la compagnie remplacée, postérieurement à l'achat des actions de la compagnie remplacée, par la compagnie remplaçante, moyennant les actions de cette dernière. En 1962, on a retiré ces conditions. La compagnie pétrolière appelante a engagé des dépenses de forage et d'exploration d'un montant supérieur à son revenu avant 1960, année durant laquelle la compagnie-mère a acquis presque tous ses biens en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. La compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que l'opération ne s'est pas faite selon les conditions énoncées dans la Loi de 1956. L'appelante est restée inactive jusqu'en 1964, date à laquelle une autre compagnie a acheté, à la suite de la liquidation de la compagnie-mère, l'ensemble de ses actions. Après un changement de nom, l'appelante a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été pos-

Tax Appeal Board but on a Special Case stated by consent, the Minister was successful in the Federal Court before Cattanach J. and on appeal.

Held (Pigeon and de Grandpré JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. On a literal construction of the legislation the appellant was in the category of a predecessor company and had thereby lost the right to deduct. As the language of the statute was unambiguous and clear, there was no need to have recourse to rules of construction to establish legislative intent. It could not be said that the 1962 legislation was retrospective or that any vested right acquired by the appellant by the repealed paragraphs was affected by their repeal.

Per Pigeon and de Grandpré JJ. *dissenting*: The legislative change effected in 1962 was not an alteration in the scheme of deductions for drilling and exploration expenses. It was a modification in the transferability of the entitlement to those deductions. While the rule against retrospective operation of statutes is no more than a rule of construction which operates more or less strongly according to the nature of the enactment, it operates nowhere more strongly than when any other construction would result in altering the effect of contracts previously entered into. The effect of the 1962 change was to facilitate the transfer of the right to deductions not to alter the result of past contracts so as to effect a forfeiture of the rights of oil companies that had previously transferred their properties under conditions that did not involve the transfer of the valuable right of entitlement to deduct to the transferee.

[*Assessment Commissioner of The Corporation of the Village of Stouffville v. Mennonite Home Association*, [1973] S.C.R. 189; *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] S.C.R. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of*

sédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu des années subséquentes, l'appelante a cherché à déduire les dépenses accumulées de forage et d'exploration. Le Ministre a établi une nouvelle cotisation et rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante mais, par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé en appel.

Arrêt (les juges Pigeon et de Grandpré étant dissidents): Le pourvoi doit être rejeté.

Les juges Martland, Judson et Dickson: Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Interprétée littéralement, la Loi attribue nettement à l'appelante la qualité de compagnie remplacée; cette dernière perd donc le droit aux déductions. En présence d'un texte de loi clair et précis il n'est pas nécessaire de recourir aux règles d'interprétation pour déterminer quelle était l'intention du législateur. On ne peut soutenir que la Loi de 1962 avait un effet rétroactif ou que l'abrogation des paragraphes en question a eu un effet sur quelque droit acquis par l'appelante sous leur régime.

Les juges Pigeon et de Grandpré, *dissidents*: La modification législative de 1962 n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration. Elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation et sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. L'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire.

[Arrêts mentionnés: *Assessment Commissioner of The Corporation of the Village of Stouffville c. Mennonite Home Association*, [1973] R.C.S. 189; *Acme Village School District c. Steele-Smith*, [1933] R.C.S. 47; *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] R.C.S. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] *Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (P.C.); *Hargal Oils Ltd. v. Minister of National Revenue*, [1965] S.C.R. 291 referred to].

APPEAL from a judgment of the Federal Court of Appeal[1] affirming the judgment of Cattanach J. allowing an appeal by way of special case stated from a decision of the Tax Appeal Board allowing an appeal by the appellant from an income tax assessment. Appeal dismissed, Pigeon and de Grandpré JJ. dissenting.

John McDonald, Q.C., F. R. Matthews, Q.C., and *D. C. Nathanson*, for the appellant.

G. W. Ainslie, Q.C., and *L. P. Chambers*, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—This is an income tax case concerning the right of the appellant Gustavson Drilling (1964) Limited to deduct in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years drilling and exploration expenses incurred by it from 1949 to 1960.

Parliament since 1949 has encouraged the exploration for petroleum and natural gas by permitting corporations "whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas" (hereafter referred to as "oil companies") to deduct their drilling and exploration expenses in computing income for the purpose of the *Income Tax Act*. In 1956 the right was extended to successor corporations by legislation which provided that a corporation whose principal business was exploring and drilling for petroleum or natural gas and which acquired all or substantially all of the property of another corporation in the same type of business could deduct drilling and exploration expenses incurred by the predecessor corporation. In the absence of this legislation neither the successor corporation nor the predecessor corporation could have availed itself of such drilling and exploration

[1] [1972] F.C. 1193.

C.T.C. 490 (Ech.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (C.P.); *Hargal Oils Ltd. c. Le ministre du Revenu national*, [1965] R.C.S. 291].

POURVOI interjeté d'un arrêt de la Cour d'appel fédérale[1] confirmant le jugement du juge Cattanach accueillant un appel exposé dans un mémoire spécial à l'encontre d'une décision de la Commission d'appel de l'impôt qui avait accueilli un appel interjeté par l'appelante d'une cotisation à l'impôt sur le revenu. Pourvoi rejeté, le juge Pigeon et de Grandpré étant dissidents.

John McDonald, c.r., F. R. Matthews, c.r., et *D. C. Nathanson*, pour l'appelante.

G. W. Ainslie, c.r., et *L. P. Chambers*, pour l'intimé.

Le jugement des juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Il s'agit d'une question d'impôt sur le revenu portant sur le droit de l'appelante Gustavson Drilling (1964) Limited de déduire dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, les dépenses de forage et d'exploration qu'elle a faites de 1949 à 1960.

Depuis 1949, le Parlement encourage la recherche du pétrole et de gaz naturel en autorisant les compagnies dont «l'entreprise principale est la production, le raffinage ou la mise en vente du pétrole, des produits du pétrole ou du gaz naturel, ou l'exploration ou le forage en vue de découvrir du pétrole ou du gaz naturel» (ci-après appelées «compagnies pétrolières») à déduire leurs dépenses de forage et d'exploration, dans le calcul de leur revenu aux fins de la *Loi de l'impôt sur le revenu*. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi qui prévoyait qu'une corporation dont l'entreprise principale est l'exploration et le forage en vue de découvrir du pétrole ou du gaz naturel et qui acquiert tous les biens ou sensiblement tous les biens d'une autre corporation dont l'entreprise principale est la même, peut déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. En l'absence de cette loi, ni la

[1] [1972] C.F. 1193.

expenses for tax purposes. The 1956 legislation contained qualifications, however. In order to entitle the successor corporation to the deduction it was imperative that the acquisition of the property of the predecessor by the successor be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor upon the winding-up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed; thereafter the legislation simply provided that every oil company which at any time after 1954 acquired all or substantially all of the property of another oil company could claim a deduction in respect of drilling and exploration expenses incurred by the predecessor company and the predecessor company was denied the right to make any such claim. Within this context the present case arises.

The appellant was incorporated in 1949 under the name of Sharples Oil (Canada) Ltd., as a wholly owned subsidiary of Sharples Oil Corporation, an American corporation, and until 1960 it carried on the business of an oil company in Canada, incurring during that period drilling and exploration expenses of $1,987,547.19 in excess of its income from the production of petroleum and natural gas. On November 30, 1960, the parent company, Sharples Oil Corporation, acquired substantially all of the property of the appellant in consideration for the cancellation of a debt owing to it by the appellant. The parties agree that at this time entitlement to claim the theretofore undeducted drilling and exploration expenses did not accrue to the parent company because the transaction was not carried out in either manner prescribed by the Act.

After disposal of its property the appellant discontinued business and remained inactive until 1964. In June 1964, however, Mikas Oil Co. Ltd. purchased all of the issued and outstanding shares in the capital stock of the appellant from the shareholders of Sharples Oil Corporation following the liquidation of that corporation. The appellant's

corporation remplaçante ni la corporation remplacée n'aurait pu se prévaloir pour des fins fiscales des dépenses de forage et d'exploration. Toutefois, cette loi de 1956 comporte certaines réserves. La corporation remplaçante n'a droit à cette déduction que si elle acquiert les biens de la corporation remplacée (a) en échange d'actions de son propre capital social, ou (b) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat des actions de la corporation remplacée, par la corporation remplaçante, moyennant des actions de cette dernière. En 1962, on a retiré ces conditions; dans la suite, la loi prévoyait simplement que toute compagnie pétrolière qui, en tout temps après 1954, avait acquis tous les biens ou sensiblement tous les biens d'une autre compagnie pétrolière, pouvait réclamer une déduction à titre de dépenses de forage et d'exploration faites par la corporation remplacée alors que cette dernière ne pouvait, elle, se prévaloir de ce droit. Le présent litige tire son origine de ce contexte.

En 1949, l'appelante a été constituée en corporation sous le nom de Sharples Oil (Canada) Ltd., en tant que filiale exclusive de la corporation américaine Sharples Oil Corporation, et jusqu'en 1960, elle était une compagnie pétrolière au Canada qui a engagé, durant cette période, des dépenses de forage et d'exploration d'un montant de $1,987,-547.19 supérieur au revenu que lui a procuré la production de pétrole et de gaz naturel. Le 30 novembre 1960, la compagnie-mère Sharples Oil Corporation, a acquis presque tous les biens de l'appelante en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. Les parties conviennent qu'à cette époque-là la compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que la transaction ne s'est pas opérée aux termes de l'une ou l'autre des conditions énoncées dans la Loi.

A la suite du transfert de ses biens, l'appelante a interrompu ses opérations et est restée inactive jusqu'en 1964. Cependant, en juin 1964, Mikas Oil Co. Ltd. a acheté des actionnaires de Sharples Oil Corporation, à la suite de la liquidation de cette dernière, l'ensemble des actions émises du capital social de l'appelante. En octobre 1964, l'appelante name was changed to Gustavson Drilling (1964) Limited, in October 1964; thereafter the appellant recommenced business as an oil company with newly acquired assets, none of which had been used or owned by the appellant prior to June 1964. In computing its income for the 1965, 1966, 1967 and 1968 taxation years the appellant claimed deductions of $119,290.49; $447,369.99; $888,-084.10; and $31,179.00 respectively as part of the accumulated drilling and exploration expenses of $1,987,547.19. The Minister re-assessed and disallowed the claimed deductions. The appellant successfully appealed to the Tax Appeal Board but a Special Case was stated by consent, pursuant to Rule 475 of the Federal Court, and the appeal of the Minister was successful before Cattanach J. whose judgment in the Federal Court was upheld by the Federal Court of Appeal. The question on which the opinion of the Court was sought in the Special Case reads:

> The question for the opinion of the Court is whether subsection (8a) of section 83A of the *Income Tax Act* as amended by the repeal of paragraphs (c) and (d) thereof by Statutes of Canada, 1962-63, c. 8, section 19, subsections (11) and (15), precludes the Respondent from deducting in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years amounts on account of the drilling and exploration expenses mentioned in paragraph 4 hereof, which but for the repeal would have been deductible by the Respondent under subsections (1) and (3) of section 83A of the Act.

Subsections (1) and (3) of s. 83A of the *Income Tax Act*, under which the appellant claims the right to deductions, read as follows as applied to the 1965 to 1968 taxation years:

> **83A.** (1) A corporation ... may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*a*) the aggregate of such of the drilling and exploration expenses ... as were incurred during the calendar years 1949 to 1952, to the extent that they were not deductible in computing income for a previous taxation year, or
>
> (*b*) of that aggregate, an amount equal to its income for the taxation year

a adopté le nom de Gustavson Drilling (1964) Limited; par la suite, elle a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été possédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, l'appelante a déduit des sommes de $119,290.49, $447,369.99, $888,084.10 et $31,179.00 respectivement, qu'elle a réclamées comme partie des dépenses accumulées de forage et d'exploration chiffrées à $1,987,547.19. Le Ministre lui a imposé une nouvelle cotisation et a rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante; par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial, conformément à la règle 475 de la Cour fédérale, et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé par la Cour d'appel fédérale. Voici le libellé de la question litigieuse exposée dans le mémoire spécial:

> [TRADUCTION] La question soumise à la Cour est celle de savoir si le paragraphe (8a) de l'article 83A de la *Loi de l'impôt sur le revenu* tel que modifié par l'abrogation des alinéas *c*) et *d*) dudit article par les statuts du Canada, 1962-63, c. 8, article 19, paragraphes (11) et (15), interdit à l'intimée de déduire, dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968 les sommes représentant les dépenses de forage et d'exploration mentionnées au paragraphe 4 des présentes que, n'eût été l'abrogation, l'intimée aurait pu déduire en vertu des paragraphes (1) et (3) de l'article 83A de la Loi.

Les paragraphes (1) et (3) de l'art. 83A de la *Loi de l'impôt sur le revenu*, en vertu desquels l'appelante prétend avoir droit aux déductions, se lisent comme suit, tels qu'ils s'appliquaient aux années d'imposition 1965 à 1968:

> **83A.** (1) Une corporation ... peut déduire, dans le calcul de son revenu, aux fins de la présente Partie, pour une année d'imposition, le moindre de
>
> *a*) l'ensemble des dépenses de forage et d'exploration ... qui ont été faites au cours des années civiles 1949 à 1952, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou
>
> *b*) de cet ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

minus the deductions allowed for the year by subsections (8a) and (8d) of this section . . .

. . .

(3) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

(i) the drilling and exploration expenses . . .

. . .

as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

. . .

minus the deductions allowed for the year by subsections (1), (2), (8a) and (8d) of this section . . .

There can be no doubt that in the absence of subs. (8a) of s. 83A the drilling and exploration expenses claimed by the appellant would have been deductible by it. One must, then, turn to subs. (8a) upon the construction of which this case falls to be decided. In 1960, when the property of the appellant was acquired by Sharples Oil Corporation, the pertinent parts of subs. (8a) read:

83A. (8a) Notwithstanding subsection (8), where a corporation (hereinafter in this subsection referred to as the "successor corporation") . . .

. . .

has, at any time after 1954, acquired from a corporation (hereinafter in this subsection referred to as the "predecessor corporation") . . . all or substantially all of the property of the predecessor corporation used by it in carrying on that business in Canada,

(*c*) pursuant to the purchase of such property by the successor corporation in consideration of shares of the capital stock of the successor corporation, or

(*d*) as a result of the distribution of such property to the successor corporation upon the winding-up of the predecessor corporation subsequently to the purchase of all or substantially all of the shares of the capital stock of the predecessor corporation by the successor corporation in consideration of shares of the capital stock of the successor corporation,

. . .

moins les déductions allouées pour l'année par les paragraphes (8a) et (8d) du présent article . . .

. . .

(3) Une corporation . . . peut déduire, dans le calcul de son revenu aux fins de la présente Partie, pour une année d'imposition, le moindre de

c) l'ensemble

(i) des dépenses de forage et d'exploration . . .

. . .

qui ont été faites après l'année civile 1952 et avant le 11 avril 1962, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou

d) dudit ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

moins les déductions allouées pour l'année par les paragraphes (1), (2), (8a) et (8d) du présent article . . .

Il n'y a aucun doute qu'en l'absence du par. (8a) de l'art. 83A, l'appelante aurait pu déduire les dépenses de forage et d'exploration qu'elle réclame. Il faut donc examiner ce par. (8a) dont l'interprétation sera déterminante du sort de cette affaire. En 1960, lorsque Sharples Oil Corporation a acquis les biens de l'appelante, les dispositions pertinentes du par. (8a) se lisaient comme suit:

83A. (8a) Nonobstant le paragraphe (8), lorsqu'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplaçante»). . .

. . .

a, en tout temps après 1954, acquis d'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplacée»). . .tous les biens ou sensiblement tous les biens de la corporation remplacée, utilisés par elle dans l'exercice de ladite entreprise au Canada,

c) en vertu de l'achat desdits biens par la corporation remplaçante moyennant des actions du capital social de la corporation remplaçante, ou

d) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat de toutes les actions ou sensiblement toutes les actions du capital social de la corporation remplacée, par la corporation remplaçante, moyennant des actions du capital social de la corporation remplaçante, there may be deducted by the successor corporation, in computing its income under this Part for a taxation year, the lesser of

(*e*) the aggregate of

(i) the drilling and exploration expenses ... incurred by the predecessor corporation ...

. . .

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

cette dernière peut déduire, dans le calcul de son revenu selon la présente Partie pour une année d'imposition, le moindre

e) de l'ensemble

(i) des dépenses de forage et d'exploitation. . .faites par la corporation remplacée. . .

. . .

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Paragraphs (*c*) and (*d*) of subs. (8a) were repealed by c. 8, 1962-63 (Can.), s. 19, subs. (11), and the repeal was made applicable to the 1962 and subsequent taxation years.

Le paragraphe (11) de l'art. 19 du c. 8 des Statuts du Canada 1962-63 a abrogé les al. *c*) et *d*) du par. (8a), et cette abrogation est entrée en vigueur à compter de l'année d'imposition 1962 et suivantes.

In summary, therefore: Company A incurred drilling and exploration expenses; Company B acquired the property of Company A in 1960 but because of the manner in which the transaction was carried out Company B did not at that time qualify as a successor company and did not become entitled to deduct from its income the undeducted drilling and exploration expenses of Company A; in 1962 and thereafter, if the contentions of the Minister prevail, Company B qualified as a successor company and as such became entitled to claim such expenses as a deduction; Company A was denied such right by the concluding words of subs. (8a).

En résumé: la compagnie A a fait des dépenses de forage et d'exploration; la compagnie B a acquis les biens de la compagnie A en 1960, mais à cause de la façon dont s'est opérée la transaction, la compagnie B ne pouvait pas être considérée à cette époque-là comme une compagnie remplaçante de sorte qu'elle n'a pu acquérir le droit de déduire de son revenu les dépenses non déduites de forage et d'exploration engagées par la compagnie A; en 1962 et par la suite, si l'on s'en tient aux prétentions du Ministre, la compagnie B a acquis la qualité de compagnie remplaçante et à ce titre, elle était dorénavant autorisé à déduire les dépenses en question; la fin du par. (8a) empêchait la compagnie A de se prévaloir de ce droit.

Before examining the rival contentions, several observations might be made. The first is with regard to the onus on a taxpayer who claims the benefit of an exemption. He must bring himself clearly within the language in which the exemption is expressed: *The Assessment Commissioner of the Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*[2], at p. 194.

Avant d'examiner les prétentions rivales, il convient de formuler quelques remarques. La première porte sur le fardeau incombant au contribuable qui se prévaut d'une exemption. Il doit établir clairement que son cas s'insère dans l'exemption réclamée: *The Assessment Commissioner of the Corporation of the Village of Stouffville c. The Mennonite Home Association of York County et The Corporation of the Village of Stouffville*[2], à la p. 194.

[2] [1973] S.C.R. 189.

[2] [1973] R.C.S. 189.

Secondly, the concept of a deduction being made by a taxpayer other than the one who incurred the expenditure is not unknown to the *Income Tax Act*. Section 85I(3) of the Act permits a new corporation formed on the amalgamation of two or more corporations after 1957 to deduct drilling and exploration expenses incurred by the predecessor corporation. Section 83A(3c) permits a joint exploration corporation to elect to renounce in favour of another corporation an agreed portion of the aggregate of the drilling and exploration expenses incurred by the joint exploration corporation.

Thirdly, by deleting paras. (*c*) and (*d*) of subs. (8a), Parliament liberalized the provision by making available to an expanded number of successor corporations a right to deduct. I do not think Parliament ever contemplated that a company which had sold or otherwise disposed of its assets could later have recourse to s. 83A. Parliament chose to grant a successor company the right to deduct drilling and exploration expenses incurred by a predecessor and the only problem in implementing its policy was with respect to the company which would have the right to deduct in the year of acquisition. The successor was accorded that right by the statute. The result of the amendment to the legislation in 1962 was to confer a right to claim deductions upon certain successor companies. This was a new right, coming from Parliament, not one acquired from a company's predecessor. At no time during the currency of the legislation has a predecessor company been able to transfer to a successor company entitlement to claim deductions in respect of drilling and exploration expenses.

It will be convenient now to consider in more detail the submissions of the appellant and of the Minister. Those of the Minister may be shortly put, resting on the language of the Act which, the Minister submits, is precise and unambiguous when read in the context of the whole statute and the general intendment of the Act. It is argued that there is no need to have recourse to presumptions of legislative intent, for such rules of construction are only useful in ascertaining the true

Deuxièmement, le principe selon lequel une déduction peut être effectuée par un contribuable autre que celui qui a encouru la dépense n'est pas étranger à la *Loi de l'impôt sur le revenu*. Le paragraphe (3) de l'art. 85I de la Loi autorise la nouvelle corporation, issue de la fusion de deux ou plusieurs corporations après 1957, à déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Le paragraphe (3c) de l'art. 83A permet à une corporation d'exploration en commun de renoncer en faveur d'une autre corporation à une partie convenue de ses dépenses de forage et d'exploration.

Troisièmement, en abrogeant les al. *c*) et *d*) du par. (8a), le Parlement a élargi les cadres de la disposition en permettant à un plus grand nombre de corporations remplaçantes de s'en prévaloir. Je crois que le Parlement n'a jamais envisagé la possibilité qu'une compagnie qui a vendu ses biens ou en a autrement disposé puisse plus tard se prévaloir de l'art. 83A. Le Parlement a choisi d'accorder à la compagnie remplaçante le droit de déduire les dépenses de forage et d'exploration engagées par la compagnie remplacée et, la seule difficulté dans la mise en œuvre de cette politique consistait à déterminer quelle compagnie serait autorisée à se prévaloir de la déduction pour l'année de l'acquisition. La loi a accordé ce droit au remplaçant. Les dispositions modificatrices de 1962 ont conféré à certaines compagnies remplaçantes le droit de se prévaloir des déductions en question. C'était donc un droit nouveau accordé par le Parlement et non par la compagnie remplacée. Jamais la loi n'a permis à une compagnie remplacée de céder à une compagnie remplaçante le droit de se prévaloir des déductions relatives aux dépenses de forage et d'exploration.

Il convient maintenant d'examiner de plus près les allégations de l'appelante et du Ministre. Les allégations de ce dernier se résument en quelques mots et reposent sur le texte de la Loi qui, selon lui, est clair et précis lorsque son lecteur tient compte de l'ensemble et de l'esprit général de la Loi. On allègue qu'il n'est pas nécessaire d'avoir recours aux présomptions portant sur l'intention du législateur puisque ces règles d'interprétation ne sont utiles dans la détermination du sens véritameaning where the language of the statute is not clear and plain: per Lamont J. in *Acme Village School District v. Steele-Smith*[3], at p. 51. There is much to this submission. I do not think that the appellant can sustain its position on a literal reading of subs. (8a), the language of which places appellant fairly and squarely in the category of a predecessor company. The appellant, however, seeks to avoid a literal construction of the subsection with a three-pronged argument, which must fairly be considered, based upon (a) the presumption against retrospective operation of statutes; (b) the presumption against interference with vested rights; (c) the meaning to be given to the word "aggregate" in subs. (8a). With regard to points (a) and (b) it would not be sufficient for the appellant to establish that the legislation had retrospective effect; it must also show it had an accrued right which was adversely affected by the legislation.

First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of

[3] [1933] S.C.R. 47.

ble que lorsque le texte est obscur et ambigu: voir les propos du juge Lamont dans *Acme Village School District c. Steele-Smith*[3], à la p. 51. Cette allégation est fort pertinente. Je ne crois pas que l'appelante puisse obtenir gain de cause en s'en tenant au sens littéral du par. (8a) puisque sa rédaction attribue nettement à l'appelante la qualité de compagnie remplacée. Toutefois, elle cherche à éviter une interprétation littérale de ce paragraphe et soumet à cet effet une triple argumentation qu'il convient d'examiner équitablement et qui se fonde sur a) la présomption à l'encontre de la rétroactivité des lois; b) la présomption voulant qu'on ne puisse porter atteinte aux droits acquis; c) la signification à donner au mot «ensemble» du par. (8a). Concernant les points a) et b), l'appelante doit faire plus que démontrer la portée rétroactive de la loi; elle doit également établir qu'elle possédait un droit acquis auquel la loi a porté atteinte.

Premièrement, la rétroactivité. Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif. A première vue, la présente affaire peut s'apparenter au deuxième cas, mais je suis d'avis que l'analyse de la disposition abrogative démontre qu'elle n'a aucune portée rétroactive dans le sens qu'elle modifie des droits acquis, bien qu'elle porte incontestablement atteinte aux transactions passées. L'article, tel que modifié par la disposition abrogative, ne vise pas les années d'imposition antérieures à la date de la modification; il ne cherche pas à s'immiscer dans le passé et ne prétend pas signifier qu'à une date antérieure, il faille considérer que le droit ou les droits des parties étaient ce qu'ils n'étaient pas alors. Pour autant que l'appelante soit concernée, cet article ne vise qu'à retirer pour l'avenir le droit de faire certaines déductions dont il était aupara-

[3] [1933] R.C.S. 47.

the amending statute.

The appellant maintains that in 1960, at the time of the relevant transaction, it had the status of a non-predecessor company under s. 83A(8a), as it then read, and the right to carry over deductions to subsequent tax years; that the 1962 amendment could not operate retrospectively to change its status from non-predecessor company under s. 83A(8a) with the consequence that the drilling and exploration expenses became thereafter deductible only by Sharples Oil Corporation, the successor company. The appellant concludes that the right to deduct the said expenses remains with it in perpetuity. I cannot agree. It is immaterial that the appellant company had a particular status as the result of previous legislation. Parliament, acting within its competence, has said that as of 1962 and for the purposes of calculating taxable income in future years, the appellant has a different status.

The contention of appellant that the repeal has application only in respect of acquisitions carried out subsequent to the passage of the repealing enactment would introduce a limitation upon the amplitude of subs. (8a), as amended, which is not supported by the language of the subsection. It would also deny successor corporations rights which s. 83A would seem to accord them. The interpretation pressed by appellant tends also to ignore the words "at any time after 1954". Appellant submits that these words may, and should, have application to the extent of preserving the rights of a successor corporation which, prior to the repealing enactment, carried out an acquisition in one or other of the manners set out in subs. (*c*) and (*d*) and therefore prior to repeal enjoyed the benefit of subs. (8a) but they should not have further force or effect. The difficulty with this submission is that one can find nothing in the legislation as it read in respect of the 1965 and subsequent taxation years which would support a distinction between those corporations which

vant possible de tirer avantage; l'article n'a aucune incidence sur ce droit dans la mesure où il a été exercé à une date antérieure à l'adoption de la loi modificatrice.

L'appelante prétend qu'elle avait en 1960, à l'époque de la transaction en question, la qualité d'une compagnie non remplacée aux termes du par. (8a) de l'art. 83A, tel qu'alors libellé, ainsi que le droit de reporter des déductions au cours des années d'imposition subséquentes; elle soutient également que la modification de 1962 ne peut avoir d'effet rétroactif de façon à lui conférer maintenant la qualité de compagnie remplacée aux termes du par. (8a) de l'art. 83A, de sorte que les dépenses de forage et d'exploration pouvaient être déduites, par la suite, uniquement par Sharples Oil Corporation, la compagnie remplaçante. Finalement, l'appelante conclut qu'elle conserve à perpétuité le droit de déduire les dépenses en question. Je ne peux partager cette prétention. Il importe peu que la compagnie appelante ait eu une qualité particulière sous l'ancienne loi. Sans outrepasser sa compétence, le Parlement a statué qu'à compter des années d'imposition 1962 et suivantes, pour les fins du calcul du revenu imposable, l'appelante aurait une qualité différente.

La prétention de l'appelante selon laquelle l'abrogation agit seulement sur les acquisitions faites ultérieurement à l'adoption de la loi abrogative, a pour effet de restreindre la portée du par. (8a) dans sa forme modifiée, ce que le texte du paragraphe en question ne démontre aucunement. Cette prétention a également pour effet d'empêcher les corporations remplaçantes de se prévaloir des droits que leur accorde semble-t-il, l'art. 83A. L'interprétation mise de l'avant par l'appelante tend également à ignorer les mots «en tout temps après 1954». Cette dernière prétend que ces mots peuvent et doivent agir uniquement dans la mesure où ils permettent de garantir les droits d'une corporation remplaçante qui, antérieurement à la loi abrogative, a fait une acquisition suivant l'une ou l'autre des méthodes décrites aux al. *c*) et *d*) et qui, par conséquent, tirait avantage du par. (8a) avant l'abrogation. Ce qui fait obstacle à cette prétention est l'impossibilité de trouver dans cette partie de la loi portant sur les années d'imposition 1965 et suivantes, un indice qui étayerait une acquired the property of other corporations prior to the 1962 amendment, in accordance with subs. (*c*) and (*d*), and those which acquired the property of other corporations following the amendment.

The *Income Tax Act* contains a series of very complicated rules which change frequently, for the annual computation of world income. The statute in force in the particular taxation year must be applied to determine the taxpayer's taxable income for that year. The effect of the repealing enactment of 1962 was merely to provide that in future years certain new rules should apply affecting deductions from income of exploration and development expenses. Although the effect of the repealing enactment may appear to have been to divest the appellant of a right to deduct which it had earlier enjoyed and in some manner have caused a transmutation of an antecedent transaction, I do not think that, when the matter is closely examined, such is the true effect. In each of the years 1949 to 1960 the appellant had a right to deduct. The Act in each of those years conferred the right. In 1960 the appellant transferred its assets. The contract of sale, if any, forms no part of the record. So far as the record discloses, no mention was made of drilling and exploration espenses at the time. After disposing of its property, it was no longer a corporation whose principal business was that of exploring or drilling for petroleum or natural gas nor did it have income. It, therefore, no longer had a right to deduct. No claim was made by it in the 1961, 1962, 1963 or 1964 taxation years. By the time the appellant resumed business it had no right under the then legislative scheme to claim for drilling and exploration expenses incurred in earlier years. Any claim which it might make for exploration and drilling expenses could only be in respect of expenses incurred following resumption of business. It may seem unfortunate that an amendment which was intended to liberalize the legislation by removing a barrier to the inheritance of drilling and exploration expenses should have the effect of denying a predecessor company such as the appellant from enjoying a right which it would have enjoyed in the absence of the repeal but the legis-

distinction entre les corporations qui ont fait l'acquisition des biens d'autres corporations avant la modification de 1962, en conformité avec les al. *c*) et *d*), et celles qui ont fait l'acquisition des biens d'autres corporations postérieurement à la modification.

La *Loi de l'impôt sur le revenu* contient une série de règles très complexes modifiées fréquemment qui servent au calcul annuel du revenu global. Pour déterminer le revenu imposable d'un contribuable pour une année particulière, il faut appliquer la loi qui était alors en vigueur. La disposition abrogative de 1962 a simplement pour effet d'introduire pour les années subséquentes de nouvelles règles touchant la déductibilité des dépenses d'exploration et de mise en valeur. Bien que la disposition abrogative puisse paraître avoir pour effet de dépouiller l'appelante du droit dont elle jouissait auparavant de faire certaines déductions et d'une certaine façon causé la transmutation d'une transaction antérieure, je suis d'avis qu'un examen attentif de la question démontre qu'il n'en est pas ainsi. De 1949 à 1960, la Loi en vigueur au cours de chacune de ces années autorisait l'appelante à se prévaloir de la déduction. En 1960, l'appelante a transféré son actif. Le contrat de vente, s'il en existe un, n'apparaît pas au dossier et dans la mesure des révélations qui y sont contenues, il n'a pas été question à l'époque des dépenses de forage et d'exploration. Après avoir disposé de ses biens, l'appelante n'était plus une corporation s'occupant principalement de faire de l'exploration ou forage pour la découverte de pétrole ou de gaz naturel, et elle n'avait plus de revenu. Elle ne pouvait donc plus se prévaloir de la déduction en question. Au cours des années d'imposition 1961, 1962, 1963 et 1964, elle n'a fait aucune réclamation. A l'époque où l'appelante a repris ses activités, elle n'avait plus le droit, en vertu de la loi alors en vigueur, de réclamer les dépenses de forage et d'exploration engagées antérieurement. Il lui était possible de réclamer uniquement les dépenses de forage et d'exploration engagées après qu'elle eut repris ses activités. Il est peut-être malheureux qu'une modification dont le but est de libéraliser la loi en facilitant la transmission des dépenses de forage et d'exploration, ait pour effet de priver une compagnie remplacée comme l'appelation as amended is unambiguous and clear. After the repeal of paras. (*c*) and (*d*) of subs. (8a) in 1962 and for the purpose of paying income tax in the years following 1962, the appellant company is a predecessor company within the meaning of subs. (8a) and precluded from deducting the drilling and exploration expenses incurred by it prior to November 10, 1960.

Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*[4], at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the *Income Tax Act* of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmen-

[4] [1933] S.C.R. 629.

lante d'un droit dont elle aurait pu se prévaloir en l'absence de l'abrogation, mais il n'en demeure pas moins que la loi dans sa forme modifiée est claire et précise. Après l'abrogation des al. *c*) et *d*) du par. (8a) en 1962 et aux fins du calcul de l'impôt à payer pour les années postérieures à 1962, la compagnie appelante est une compagnie remplacée au sens du par. (8a) et de ce fait, il lui est impossible de déduire les dépenses de forage et d'exploration engagées par elle avant le 10 novembre 1960.

Deuxièmement, l'interférence avec des droits acquis. Selon la règle, une loi ne doit pas être interprétée de façon à porter atteinte aux droits existants relatifs aux personnes ou aux biens, sauf si le texte de cette loi exige une telle interprétation: *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*[4], à la p. 638. La présomption selon laquelle une loi ne porte pas atteinte aux droits acquis à moins que la législature ait clairement manifesté l'intention contraire, s'applique sans discrimination, que la loi ait une portée rétroactive ou qu'elle produise son effet dans l'avenir. Ce dernier type de loi peut être mauvais s'il porte atteinte à des droits acquis sans l'exprimer clairement. Toutefois, cette présomption s'applique seulement lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations. Il est évident que la plupart des lois modifient des droits existants ou y portent atteinte d'une façon ou d'une autre, et les lois fiscales ne font pas exception. Les seuls droits dont un contribuable peut se prévaloir au cours d'une année d'imposition au regard de réclamations d'exemptions sont ceux que lui accordent la *Loi de l'impôt sur le revenu* alors en vigueur. L'appelante fonde son argumentation sur le fait qu'elle possède un droit acquis et continu de déduire dans le calcul de son revenu les dépenses de forage et d'exploration engagées par elle, alors qu'il est clair que la *Loi de l'impôt sur le revenu* de 1960 et des années antérieures n'accorde aucun droit à l'égard des années d'imposition 1965 et suivantes. C'est une erreur que de considérer les dépenses de forage et d'exploration comme un compte en banque duquel il est possible d'effectuer des retraits indéfiniment ou, du moins,

[4] [1933] R.C.S. 629.

tal policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands*[5], at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6]; *Director of Public Works v. Ho Po Sang*[7].

Section 35 of the *Interpretation Act*, R.S.C. 1970, c. I-23 is cited in support of the appellant. It reads:

> **35.** Where an enactment is repealed in whole or in part, the repeal does not
>
> . . .
>
> (*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

I agree with Mr. Justice Thurlow of the Federal Court of Appeal that it cannot be said that the repeal of paras. (*c*) and (*d*) affected their previous operation or anything done or suffered by appellant thereunder since paras. (*c*) and (*d*) never had any operation upon or application to anything done or suffered by appellant. I am also in agreement with Mr. Justice Thurlow that it cannot be said that any right acquired by appellant under paras. (*c*) or (*d*) was affected by their repeal, since no right was ever acquired by appellant under either of them. This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the sec-

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All E.R. 721 (P.C.).

jusqu'à l'épuisement du solde. Personne n'a le droit acquis de se prévaloir de la loi telle qu'elle existait par le passé; en droit fiscal, il est impérieux que la législation reflète l'évolution des besoins sociaux et de l'attitude du gouvernement. Un contribuable est libre de planifier sa vie financière en se fondant sur l'espoir que le droit fiscal demeure statique; il prend alors le risque d'une modification à la législation.

Le simple droit de se prévaloir d'un texte législatif abrogé, dont jouissent les membres de la communauté ou une catégorie d'entre eux à la date de l'abrogation d'une loi, ne peut être considéré comme un droit acquis: *Abbott v. Minister of Lands*[5], à la p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6], *Director of Public Works v. Ho Po Sang*[7].

L'article 35 de la *Loi d'interprétation*, S.R.C. 1970, c. I-23 est cité en appui de la thèse de l'appelante. En voici le texte:

> **35.** Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation
>
> . . .
>
> *b*) n'atteint ni l'application antérieure du texte législatif ainsi abrogé ni une chose dûment faite ou subie sous son régime;
>
> *c*) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé.

Je partage l'avis du juge Thurlow de la Cour d'appel fédérale selon lequel il ne peut être dit que l'abrogation des al. *c*) et *d*) atteint leur application antérieure ni une chose dûment faite ou subie sous leur régime par l'appelante, puisque les al. *c*) et *d*) ne se sont jamais appliqués à l'appelante ni à une chose dûment faite ou subie par elle. Je souscris encore une fois à l'avis du juge Thurlow lorsqu'il affirme que l'on ne peut pas dire que l'abrogation des al. *c*) et *d*) a eu un effet sur quelque droit acquis par l'appelante sous leur régime, puisque cette dernière n'a jamais acquis de droits sous le régime de l'un quelconque d'entre eux. Cet article représente simplement la consécration législative de la présomption de droit commun relative aux

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All. E.R. 721 (P.C.).

tion does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

Third, "aggregate". The somewhat tortuous argument on this point is largely a mere embellishment of the retrospectivity argument. It runs as follows. Even if the appellant is regarded as a predecessor corporation, the accumulated drilling and exploration expenses may nevertheless be deducted by the appellant because (1) the prohibition expressed in the concluding paragraph of subs. (8a) extends only to "the aggregate determined under paragraph (*e*)"; (2) such aggregate in each of the years 1965 to 1968 is *nil* by reason of the necessity under subparas. (iii) and (iv) thereof of determining such aggregate in the first instance "for the taxation year in which the property so acquired was acquired by the successor corporation", *i.e.*, 1960; (3) subparas. (iii) and (iv) of subs. (8a)(*e*) have been construed by this Court in *Hargal Oils Ltd. v. Minister of National Revenue*[8], at pp. 295-6, where it was held that the "aggregate" is to:

> ... consist of expenses not deductible by the predecessor corporation in the taxation year in which the property was acquired by the successor corporation, but which would have been deductible by the predecessor corporation in that taxation year, "but for the provisions of ... this subsection."

(4) this passage presupposes the existence of the qualified predecessor and a qualified successor corporation in the taxation year in which the transfer of property took place and the amount to be included in the aggregate can only be determined in the taxation year in which the transaction occurred; (5) in the 1960 taxation year subs. (8a) was not applicable to appellant and there cannot be in that taxation year either a successor corporation or a predecessor corporation nor any "aggregate" to which the concluding paragraph of

[8] [1965] S.C.R. 291.

droits acquis telle qu'elle existe à l'égard de l'abrogation des dispositions législatives et, selon moi, cet article n'ajoute rien à l'argumentation de l'appelante. Cette dernière doit toujours démontrer qu'elle possède un droit ou un privilège né ou acquis sous le régime du texte législatif avant son abrogation, ce qu'elle ne peut faire.

Troisièmement, le mot «ensemble». Cet argument quelque peu tortueux reprend en grande partie, sous un jour plus favorable, l'argument de la rétroactivité. En voici l'essentiel: même si l'appelante est considérée comme une corporation remplacée, elle peut néanmoins déduire les dépenses accumulées de forage et d'exploration parce que (1) l'interdiction spécifiée dans le dernier alinéa du par. (8a) porte uniquement sur «l'ensemble déterminé selon l'al. *e*)»; (2) cet ensemble pour chacune des années d'imposition 1965 à 1968 est nul, vu la nécessité, aux termes des sous-al. (iii) et (iv) de l'al. *e*), de déterminer d'abord cet ensemble «pour l'année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante», c.-à-d. 1960; (3) les sous-al. (iii) et (iv) de l'al. *e*) du par. (8a) ont été interprétés par cette Cour dans *Hargal Oils Ltd. c. Le ministre du Revenu national*[8], aux pp. 295 et 296, où cette dernière a statué que le mot «ensemble»:

> [TRADUCTION] ... comprend les dépenses qui n'étaient pas déductibles par la compagnie remplacée dans le calcul de son revenu pour l'année d'imposition où ses biens ont été acquis par la compagnie remplaçante, mais qui auraient été déductibles par la compagnie remplacée dans le calcul de son revenu pour cette année d'imposition-là «en l'absence des dispositions ... du présent paragraphe».

(4) cet extrait présuppose l'existence de corporations remplacées et remplaçantes autorisées à l'époque du transfert des biens, et il est possible de déterminer le montant à inclure dans l'ensemble uniquement au cours de l'année d'imposition où s'est effectuée la transaction; (5) au cours de l'année d'imposition 1960, le par. (8a) n'était pas applicable à l'appelante, et il ne pouvait y avoir à cette époque soit une corporation remplacée ou une corporation remplaçante, ni aucun «ensemble» auquel pourrait se rattacher dans les années d'im-

[8] [1965] R.C.S. 291.

subs. (8a) can be related in subsequent taxation years; (6) the repealing enactment is made applicable to the 1962 and subsequent taxation years and cannot be given earlier effect in determining what is to be included in the "aggregate".

I do not think that the language of subs. (8a) or the gloss which it is suggested was put upon that language in the quoted passage from *Hargal's* case leads to the conclusion for which appellant contends. The quoted passage from *Hargal's* case merely compresses the words of subs. (8a). As applied to the facts of the case now before us, subs. (8a) provides that there may be deducted by the successor corporation the "aggregate" of the drilling and exploration expenses incurred by the appellant (*i.e.* approximately $2,000,000) to the extent that such expenses (a) were not deductible by the appellant in 1960 or earlier; and (b) would but for subs. (8a) have been deductible by the appellant in 1960. The subsection does not postulate the existence of a successor corporation and a predecessor corporation in the year of acquisition. The amount of the aggregate must be determined each year in which the deduction is sought, not for the taxation year of acquisition. The starting point in computing the aggregate is to total the expenditures on drilling and exploration; this amount must then be reduced to the extent that the expenses were deductible by the predecessor corporation in the year of acquisition or in earlier years; the amount which the successor corporation may deduct must not exceed the amount which would have been deductible by the predecessor in the year of acquisition in the absence of subs. (8a). It will be observed that the appellant is claiming to be entitled to a deduction under s. 83A(1) and (3), both of which subsections speak of the "aggregate" of drilling and exploration expenses to the extent that they were not deductible in computing income for a previous taxation year. It would be strange if the "aggregate" computed in accordance with the wording of s. 83A(1) and (3) would amount to $2,000,000 but computed in accordance with the analogous wording of s. 83A(8a) would be nil. In my opinion the "aggregate" is the same whether computed under s. 83A(1) and (3) or under s. 83A(8a). There is no difficulty in applying the words of s. 83A(8a) in this case. The

position subséquentes, le dernier alinéa du par. (8a); (6) le texte législatif abrogatif est applicable aux années d'imposition 1962 et suivantes et ne peut rétroagir de façon à déterminer ce qu'il faut inclure dans l'«ensemble».

Je ne suis pas d'avis que le texte du par. (8a) et l'interprétation spécieuse qui, prétend-on, en a été donnée dans l'extrait cité de l'arrêt *Hargal* mènent à la conclusion recherchée par l'appelante. L'extrait cité de l'arrêt *Hargal* ne fait que condenser le texte du par. (8a). Tel qu'appliqué aux faits de la présente affaire, le par. (8a) dispose que la corporation remplaçante peut déduire l'«ensemble» des dépenses de forage et d'exploration engagées par l'appelante (c.-à-d. approximativement $2,000,000) dans la mesure où lesdites dépenses a) n'étaient pas déductibles par l'appelante en 1960 ou avant cette date; et b) auraient été déductibles par l'appelante en 1960 en l'absence des dispositions du par. (8a). Ce paragraphe ne présuppose pas l'existence, au cours de l'année d'acquisition, de corporations remplaçantes et remplacées. Le montant de l'ensemble doit être déterminé chaque année où l'on se prévaut de la déduction, et non pour l'année d'imposition où s'est fait l'acquisition. Pour déterminer le montant de l'ensemble, il faut d'abord établir le total des dépenses de forage et d'exploration; ce montant doit ensuite être réduit dans la mesure où les dépenses étaient déductibles par la corporation remplacée dans le calcul de son revenu pour l'année d'acquisition ou pour toute l'année antérieure; le montant déductible par la corporation remplaçante ne doit pas dépasser celui que la compagnie remplacée aurait pu déduire du calcul de son revenu pour l'année de l'acquisition en absence du par. (8a). Il convient de souligner que l'appelante prétend avoir droit à une déduction en vertu des par. (1) et (3) de l'art. 83A, qui traitent de l'«ensemble» des dépenses de forage et d'exploration, dans le mesure où elles n'étaient pas déductibles du revenu d'une année d'imposition antérieure. Il serait plutôt étrange que l'«ensemble» calculé en conformité du texte des par. (1) et (3) de l'art. 83A totalise un montant de $2,000,000, tandis qu'il serait nul lorsque calculé en conformité du texte analogue du par. (8a) de l'art. 83A. A mon avis, l'«ensemble» est le même, qu'il soit calculé selon les par. (1) et (3) de l'art. 83A ou selon aggregate of the drilling and exploration expenses deductible by the appellant prior to the repealing enactment and since that time deductible by the successor corporation is readily identifiable and has been quantified.

le par (8a) de l'art. 83A. L'application des termes du par. (8a) de l'art. 83A ne soulève aucune difficulté en l'espèce. L'ensemble des dépenses de forage et d'exploration déductibles par l'appelante avant le texte législatif abrogatif, et depuis lors déductible par la corporation remplaçante, est facilement identifiable et a été déterminé.

I would dismiss the appeal with costs.

Je suis d'avis de rejeter le pourvoi avec dépens.

The judgment of Pigeon and de Grandpré JJ. was delivered by

Le jugement des juges Pigeon et de Grandpré a été rendu par

PIGEON J. (*dissenting*)—The appellant is an oil producing company. It was incorporated under the laws of Canada on May 26, 1949, under the name of Sharples Oil (Canada) Ltd. It was a wholly owned subsidiary of Sharples Oil Corporation, a U.S. company. It did incur drilling and exploration expenses for which it would, in later years, be entitled to claim a deduction from income for taxation purposes. As of November 30, 1960, the amount of such expenditures that could be carried forward was nearly $2,000,000 (the exact amount was agreed to be $1,987,547.19). Preliminary to the winding-up of the parent company, the appellant transferred to it on that date substantially all its assets. Under subs. (8a) of s. 83A of the *Income Tax Act* as it then read (that is as enacted by 1956 c. 39, s. 23 with some immaterial amendments), this conveyance did not transfer to the parent company appellant's entitlement to future deductions because it did not meet the requirements of subparas. (*c*) and (*d*). Therefore, the conveyance did not have the effect of depriving the appellant from its entitlement to deductions in the future on that account by virtue of the concluding paragraph of subs. (8a):

LE JUGE PIGEON (*dissident*)—L'appelante est une compagnie pétrolière. Elle a été constituée par charte fédérale le 26 mai 1949 sous le nom de Sharples Oil (Canada) Ltd. Elle était une filiale exclusive de Sharples Oil Corporation, une compagnie américaine. Elle a engagé des dépenses de forage et d'exploration pour lesquelles il lui était possible, dans les années à venir, de réclamer une déduction dans le calcul de son revenu imposable. Le 30 novembre 1960, le montant de ces dépenses susceptibles d'être reportées totalisait presque $2,000,000 (les parties ayant convenu d'un montant exact de $1,987,547.19). Antérieurement à la liquidation de la compagnie-mère, l'appelante lui a transféré, à cette date-là, presque tout son actif. En vertu du par. (8a) de l'art. 83A de la *Loi de l'impôt sur le revenu*, tel qu'alors libellé (c'est-à-dire, tel que mis en vigueur par 1956 c. 39, art. 23 avec quelques modifications non pertinentes), ce transfert de l'actif n'a pas entraîné le transfert à la compagnie-mère du droit de l'appelante à des déductions futures parce que l'actif n'a pas été acquis conformément aux dispositions des al. *c*) et *d*). Par conséquent, en vertu du dernier alinéa du par. (8a) que voici, ce transfert n'a pas eu pour effet de retirer à l'appelante le droit de réclamer, pour les années d'imposition à venir, des déductions relatives aux dépenses engagées:

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

In the winding-up of the parent company, the appellant's shares were distributed to the parent's

Au cours des procédures de liquidation de la compagnie-mère, ses actionnaires ont acquis les shareholders who, as of June 18, 1964, sold all those shares to Mikas Oil Co. Ltd. for $280,000. The appellant's name was then changed to Gustavson Drilling (1964) Limited and it resumed operations as an oil producing company. Having made profits, it claimed deductions from income on account of the previously incurred drilling and exploration expenses above mentioned. These deductions totalling over $1,500,000 for 1965-68 were disallowed by reassessments. They were restored by the Tax Appeal Board but, on appeal, they were denied by the Federal Court at trial and on appeal.

The reason for which the deductions were denied was that in 1962, some two years after the transfer of appellant's assets to its parent, subparas. (*c*) and (*d*) of ss. (8a) had been repealed by statute applicable to 1962 and following taxation years. It was said in effect that by virtue of this amendment, the entitlement to the future deductions had gone with the assets to the parent company as a "successor corporation". Of course, as the latter had been wound-up, it could not take advantage of the provision but it was said that this had destroyed, as of 1962, any right which the appellant had to claim deductions on account of drilling and exploration expenditures incurred before November 30, 1960, by virtue of the concluding paragraph of ss. (8a) amended by the 1962 statute to read:

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for a taxation year subsequent to its taxation year in which the property so acquired was acquired by the successor corporation.

In my view, the legislative change effected in 1962 by the repeal of paras. (*c*) and (*d*) of subs. (8a) was not an alteration in the scheme of deductions for drilling and exploration expenses, but a modification in the transferability of the entitlement to those deductions. In essence, the Minister's contention which prevailed in the court below against the Tax Appeal Board's conclusion was that, although the transfer of appellant's property

actions de l'appelante et, le 18 juin 1964, ils les ont vendues à Mikas Oil Co. Ltd. pour la somme de $280,000. L'appelante a alors adopté le nom de Gustavson Drilling (1964) Limited et elle a repris ses activités comme compagnie pétrolière. Ayant réalisé des profits, l'appelante a réclamé, dans le calcul de son revenu, la déduction de certaines sommes au regard de ses dépenses de forage et d'exploration engagées antérieurement. Ces déductions, qui totalisaient plus de $1,500,000 pour les années 1965 à 1968, ont été refusées à l'occasion de nouvelles cotisations. La Commission d'appel de l'impôt les a rétablies mais elles ont ensuite été refusées par la Cour fédérale en première instance et en appel.

Les déductions ont été refusées en raison de l'abrogation, en 1962, soit deux ans après le transfert de l'actif de l'appelante à la compagnie-mère, des sous-alinéas *c*) et *d*) du par. (8a) par une loi applicable aux années d'imposition 1962 et suivantes. En fait, on a statué qu'en vertu de cette modification, la compagnie-mère en tant que «corporation remplaçante» avait acquis, en même temps que l'actif, le droit aux déductions futures. Naturellement, vu la liquidation de cette dernière, elle n'a pu tirer profit de cette disposition, mais on a statué, en vertu du dernier alinéa du par. (8a), tel que modifié en 1962 et reproduit ci-après, que cela avait retiré à l'appelante, à compter de 1962, le droit de se prévaloir d'une déduction à titre de dépenses de forage et d'exploration engagées avant le 30 novembre 1960:

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

A mon avis, la modification législative apportée en 1962 par l'abrogation des al. *c*) et *d*) du par. (8a) n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration; elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Selon le Ministre, bien que le transfert des biens de l'appelante à Sharples Oil Corporation effectué le 13 novembre 1960 ne s'étendait pas au droit à ces to Sharples Oil Corporation made on November 13, 1960, did not include the entitlement to the deductions in question, this right became included in this transfer when, in 1962, an amendment to the *Income Tax Act* repealed the provisions that had prevented it from going to the transferee with the property transferred.

The rule against retrospective operation of statutes is, of course, no more than a rule of construction. It operates more or less strongly according to the nature of the enactment. However, nowhere does it operate more strongly than when any other construction would result in altering the effect of contracts previously entered into. In *Reid v. Reid*[9], Bowen L.J. said (at pp. 408-9):

Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a large retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

Now as to sect. 5, it applies in express terms to marriages contracted before the commencement of the Act. Then are we to take the view which Mr. *Barber* puts forward, ... this construction may displace or disturb previous dispositions of property, and therefore unless we can read in plain language that the Legislature intended what Mr. *Barber* contends for, the principle of construction with which I set out forbids us to adopt that construction.

Here, the effect of the contract was to leave the entitlement to the deductions intact in the hands of the transferor but, if the legislative change is read as applicable to that contract, the result is an outright forfeiture or confiscation of this valuable

[9] (1886), 31 Ch.D. 402.

déductions, ce droit a été incorporé au transfert en question lorsqu'en 1962 une modification à la *Loi de l'impôt sur le revenu* a abrogé les dispositions qui consacraient l'intransmissibilité de ce droit à la personne à qui les biens avaient été transférés. Cette prétention du Ministre a prévalu devant le tribunal d'instance inférieure à l'encontre de la conclusion de la Commission d'appel de l'impôt.

Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation. Sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. Dans *Reid v. Reid*[9], le lord juge Bowen tient les propos suivants (aux pp. 408 et 409):

[TRADUCTION] Or, la règle particulière d'interprétation dont on a fait mention, mais qui est utile uniquement lorsque le texte d'une loi du Parlement est obscur, se rattache à la célèbre maxime *omnis nova constitutio futuris formam imponere debet non praeteritis*, c'est-à-dire que sauf exception, la nouvelle loi doit être interprétée de façon à minimiser au possible l'interférence avec des droits acquis. Selon moi, même lorsque nous interprétons une loi ou un article qui ont une portée rétroactive, nous devons toujours avoir à l'esprit que cette maxime entre en jeu dès que le texte cesse d'être clair. Il s'agit là d'un corollaire nécessaire et naturel de la règle générale selon laquelle il ne faut pas donner à un article une portée rétroactive plus considérable que celle que la législature a manifestement voulu lui donner, même si cette loi a, dans une certaine mesure, un effet rétroactif.

Or, quant à l'art. 5, il s'applique expressément aux mariages contractés avant l'entrée en vigueur de la Loi. Allons-nous donc adopter l'opinion émise par M. *Barber*, ... cette interprétation peut toucher ou porter atteinte à des actes antérieurs, elle est donc inadmissible selon le principe énoncé au début de mes motifs, à moins qu'il nous apparaisse clairement que la prétention de M. *Barber* est conforme à l'intention du législateur.

En l'espèce, le contrat avait pour effet de laisser intact entre les mains du cédant le droit aux déductions, mais, si la modification législative est jugée applicable, il y a alors déchéance complète de ce droit précieux à cause de la liquidation du

[9] (1886), 31 Ch.D. 402.

right, the transferee having been wound-up. On that construction, if the transferee was a subsisting oil company it would, without any consideration therefor, obtain this valuable right in addition to the properties conveyed. In the instant case, the appellant's shares were sold after the 1962 amendment but, on the Minister's submission, it would make no difference if they had been bought before the amendment, the purchasers would have lost what they paid for. Bearing in mind the presumption against retrospective operation, can the statute be read so as to avoid this unjust result?

The application provision of the 1962 amending act enacts that the relevant subsection is applicable to the 1962 and subsequent taxation years. The Minister says this means that assessments for those years are to be made in accordance with the law as changed by the new statute. I do not deny that such is ordinarily the effect of an enactment in those terms. However, I cannot see why, in view of the nature of the substantive enactment, it would not be read differently with respect to the provisions with which we are concerned, namely, provisions which concern the legal effect of contracts in relation to a scheme of entitlement to deductions intended to be available for many years in the future. Because of the special risk involved in exploring and drilling for oil Parliament has departed from the principle of yearly deductions of expenses, deductions for drilling and exploration expenses are available to oil companies in subsequent years.

While after the sale of its assets the appellant was no longer in a situation in which it could claim deductions for drilling and exploration expenses, it had a perfect right to resume active operations and claim in later years. It had not lost its entitlement to such deductions in appropriate circumstances, such entitlement was a valuable asset of enduring value involving substantial potential benefits just as some other kinds of tax losses. While the realization of actual benefits from such assets is subject to restrictions and conditions, they are commonly bought and sold through the acquisition of the shares of the company holding them. This is some-

cessionnaire. Selon cette interprétation, si le cessionnaire était une compagnie pétrolière existante il obtiendrait, sans contre-partie, ce droit précieux en plus des biens cédés. Dans la présente affaire, on a vendu les actions de l'appelante après l'entrée en vigueur de la modification de 1962 mais, de l'aveu même du Ministre, les acheteurs auraient perdu l'objet de leur achat même s'ils avaient acheté les actions avant l'entrée en vigueur de la modification. En ayant à l'esprit la présomption contre la rétroactivité, peut-on interpréter la loi présentement en cause de façon à éviter ce résultat injuste?

La disposition visant l'application de la loi modificatrice de 1962 prévoit que le paragraphe en question s'appliquera aux années d'imposition 1962 et suivantes. Selon le Ministre, cela signifie que les cotisations pour ces années-là doivent s'effectuer en conformité du droit modifié par la nouvelle loi. Je ne nie pas que ce soit ordinairement l'effet d'un texte législatif ainsi libellé. Toutefois, en raison de la nature du système de déductions dont il s'agit, je ne vois pas pourquoi on ne pourrait pas l'interpréter différemment à l'égard des dispositions en cause, c'est-à-dire celles qui portent sur l'effet juridique des contrats conclus en relation avec ce système de déductions à faire pendant plusieurs années à venir. A cause du risque particulier propre à l'exploration et au forage visant à découvrir du pétrole, le Parlement s'est écarté du principe de la déduction annuelle des dépenses en autorisant les compagnies pétrolières à déduire au cours des années subséquentes leurs dépenses de forage et d'exploration.

Bien qu'après la vente de son actif l'appelante ne fût plus en mesure de se prévaloir du droit de déduire ses dépenses de forage et d'exploration, elle conservait néanmoins le droit légitime de reprendre plus tard ses activités et de réclamer alors les déductions. Elle n'avait pas perdu le droit de faire ces déductions dans des circonstances appropriées, et ce droit était un bien précieux de valeur permanente qui comporte d'importants avantages éventuels à l'instar d'autres types de pertes admissibles pour fins fiscales. Bien que la réalisation profitable de semblables actifs soit soumise à des restrictions et conditions, ils sont réguthing which appears from the facts of the case and of which we should anyway take judicial notice. It is not something of which Parliament may be deemed to have been unaware in passing the legislation. Due to the nature of the entitlement to future deductions for drilling and exploration expenses, it should not be presumed that a company holding such an asset will not seek to realize its value in later years just because, at one point, it has sold or otherwise disposed of its properties. The 1962 amendment should not be looked upon purely as conferring the right to claim deductions upon the purchaser of the properties. There is a correlative withdrawing of this right from the vendor which Parliament's so-called liberality effected at the same time. Thus the true nature of the operation is a transfer of the entitlement to the deductions.

I cannot agree that our present income tax legislation should be construed on the basis of the special rules that were developed in the days when the taxation statutes were yearly drawn up in the Ways and Means Committee. Our *Income Tax Act* is permanent legislation and we are here dealing with incentive provisions, that is a system of deductions designed to encourage investment. It is true that it is within Parliament's power to breach the promises of special treatment on the faith of which investments have been made. There is however a strong presumption against any intention to do this. In the present case, there was clearly no such intention. The scheme of deductions was not repealed. Appellant would admittedly be entitled to the deductions were it not for the fact that, some years previously, it transferred its property to another corporation, as it could lawfully do without prejudicing its entitlement to the deductions. At that time, this transfer did not carry the right to the deductions although it would now do so. Under such circumstances, it does not appear to me that the application provision may properly be read as making the new law applicable to a contract previously executed so as to change its effect especially when such change is nothing but an entirely unjustified forfeiture or confiscation of valuable rights.

lièrement achetés et vendus par l'acquisition des actions de la compagnie qui les possède. Les faits de l'espèce le démontrent et, de toute façon, j'estime que nous devons en prendre connaissance d'office. Il ne s'agit pas d'une situation dont le Parlement pouvait ignorer l'existence lors de l'adoption du texte législatif. Vu le caractère du droit aux déductions futures pour dépenses de forage et d'exploration, on ne doit pas présumer qu'une compagnie qui possède un tel actif ne cherchera pas plus tard à le réaliser, uniquement parce qu'à une certaine époque, elle a vendu ses biens ou en a autrement disposé. On ne doit pas interpréter la modification de 1962 comme ayant pour seul effet de donner à l'acquéreur le droit aux déductions. La prétendue générosité du Parlement comporte également le retrait corrélatif de ce droit au vendeur. La disposition a donc pour but véritable d'effectuer le transfert du droit aux déductions.

Je ne peux partager l'avis selon lequel nos présentes lois fiscales doivent être interprétées suivant les règles spéciales établies à l'époque où le Comité des voies et moyens rédigeait annuellement les lois fiscales. Notre *Loi de l'impôt sur le revenu* est une loi permanente, et nous sommes aux prises ici en présence de dispositions visant à encourager les investissements par l'instauration d'un régime de déductions. Il est vrai que le Parlement a le pouvoir de briser les promesses de traitement privilégié sur la foi desquelles des investissements ont été faits. Toutefois, une forte présomption existe à l'encontre d'une intention semblable. En l'espèce, il n'y a trace d'aucune telle intention. Le régime de déduction n'a pas été abrogé. De toute évidence, l'appelante aurait droit aux déductions si elle n'avait, quelques années auparavant, transféré ses biens à une autre corporation comme elle pouvait légitimement le faire sans porter atteinte à son droit de se prévaloir des déductions. A cette époque-là, ce transfert n'emportait pas celui du droit aux déductions, bien qu'aujourd'hui il en soit autrement. Dans de telles circonstances, j'estime qu'on ne peut, à bon droit, interpréter la disposition visant l'application de la nouvelle loi comme signifiant qu'elle est applicable à un contrat déjà exécuté, de façon à en modifier l'effet, surtout lorsqu'une telle modification ne constitue rien de moins qu'une confiscation entièrement injustifiée de droits précieux.

Concerning the decision of this Court in *Acme Village School District v. Steele-Smith*[10], I would point out that the situation was quite different. The dispute was between a school teacher and a school board which was his employer. The agreement between them provided for termination by either party giving thirty days notice in writing to the other. Subsequent to the making of the agreement, the Legislature amended the section of the *School Act* contemplating the termination of teachers' engagements by such notice. The amendment provided that except in the month of June, no such notice shall be given by a Board without the approval of an inspector previously obtained. This Court held that the teacher was entitled to the benefit of the amendment. Lamont J. said, speaking for the majority (at p. 52):

> Considering the nature and scope of the Act and the control over the agreement between teacher and Board retained by the Minister, and considering also that the mischief for which the legislature was providing a remedy was a presently existing evil which the legislature proposed to cure by making the right of either party to terminate the agreement depend upon the consent of the inspector, I am of opinion that sufficient has been shewn to rebut the presumption that the section was intended only to be prospective in its operation.

With deference for those who hold a different view, it seems to me that if a similar reasoning is applied to the contract and legislation in question herein, the result ought to be that the intention of Parliament in effecting the legislative change in 1962 was to facilitate the transfer of the right to deductions, not to alter the result of past contracts so as to effect a forfeiture of the rights of those oil companies that had previously transferred their properties under conditions that did not involve a transfer of their entitlement to the transferee. In my view, the words used by Parliament do not compel us to reach the result contended for by the Minister. That this is a matter of taxation in which it is said no resort to equity can be had, makes in my view no difference.

I would allow the appeal with costs throughout to the appellant, reverse the judgments of the

[10] [1933] S.C.R. 47.

Quant à l'arrêt rendu par cette Cour dans *Acme Village School District c. Steele-Smith*[10], je tiens à souligner que la situation était très différente. Le litige était entre un enseignant et son employeur, une commission scolaire. La convention qui les liait stipulait que l'une ou l'autre des parties pouvait y mettre fin par préavis de trente jours. Après la conclusion de la convention, la législature a modifié l'article du *School Act* relatif à la cessation d'emploi d'un enseignant suite à un tel préavis. Selon la modification, le préavis ne pouvait plus être donné, sauf au mois de juin, sans l'accord préalable d'un inspecteur. Cette Cour a statué que l'enseignant était autorisé à se prévaloir de la modification. Le juge Lamont, au nom de la majorité, s'est exprimé ainsi (à la p. 52):

> [TRADUCTION] Compte tenu du caractère et de la portée de la Loi et du contrôle que le Ministre a conservé sur la convention liant l'enseignant et la Commission, et compte tenu également du fait que le redressement apporté par la Législature s'adresse à un problème actuel que cette dernière se propose de régler en subordonnant au consentement d'un inspecteur le droit de chacune des parties de mettre fin à la convention, j'estime qu'il y en a assez pour réfuter la présomption que l'article ne doit produire son effet que dans l'avenir.

Avec respect pour l'opinion contraire, je suis d'avis que l'application de ce raisonnement au contrat et à la Loi en question incite plutôt à conclure que l'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire. A mon avis, les mots employés par le Parlement ne nous obligent pas à conclure dans le sens que le voudrait le Ministre. Selon moi, il importe peu qu'il s'agisse en l'espèce d'une question de fiscalité à l'égard de laquelle aucun recours en *equity* ne peut être exercé.

J'accueillerais le pourvoi avec dépens dans toutes les cours en faveur de l'appelante, j'infirme-

[10] [1933] R.C.S. 47.

Federal Court at trial and on appeal, and restore the judgment of the Tax Appeal Board.

Appeal dismissed with costs, PIGEON *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: McDonald & Hayden, Toronto.

Solicitors for the respondent: D. S. Maxwell, Ottawa.

rais les jugements rendus par la Cour fédérale en première instance et en appel, et je rétablirais le jugement de la Commission d'appel de l'impôt.

Pourvoi rejeté avec dépens, les juges PIGEON *et* DE GRANDPRÉ *étant dissidents.*

Procureurs de l'appelante: McDonald & Hayden, Toronto.

Procureur de l'intimé: D. S. Maxwell, Ottawa.

TAB 5

Indexed as:

Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)

Between
Beau Canada Exploration Ltd., appellant, and
Alberta Energy and Utilities Board, Northstar Energy Corporation and Rustum Petroleums (1993) Limited, respondents

[2000] A.J. No. 507

2000 ABCA 132

186 D.L.R. (4th) 690

261 A.R. 131

22 Admin. L.R. (3d) 16

96 A.C.W.S. (3d) 1055

Docket: 99-18491

Alberta Court of Appeal
Calgary, Alberta

Hunt, Fruman and Wittmann JJ.A.

Heard: March 2, 2000.
Judgment: filed April 24, 2000.

(51 paras.)

Appeal from decision 99-21 of the Alberta Energy and Utilities Board. Dated September 28, 1999.

Counsel:

J.W. Rose, Q.C. and B.J. Roth, for the appellant.
F. Foran, Q.C. and S.C. Lee, for the respondents Northstar Energy and Rustum Petroleums.
A.E. Domes, for the respondent Alberta Energy and Utilities Board.

REASONS FOR JUDGMENT RESERVED

The judgment of the Court was delivered by

1 HUNT J.A.:-- In Decision 99-21 issued on September 28, 1999, ("Decision"), the Alberta Energy and Utilities Board ("Board") decided to shut in a gas well. Although the well had always produced less than its allowable amount, the Board recalculated and reduced the allowable production for past years, resulting in a recalculated overproduction. Leave to appeal the Decision was granted on the following questions, pursuant to s. 44 of the Energy Resources Conservation Act, R.S.A. 1980, c. E-11:

1. Whether the Board exceeded its jurisdiction or erred in law in ordering Beau Canada's well located at LSD 12-22-41-28 W4 ("Well") to be shut in on the basis of recalculated 1997 and 1998 allowables as a result of the submission to the EUB of relevant 1996 pressure data previously withheld.
2. Whether the Decision is patently unreasonable to the extent that the EUB concluded the Well should not be subject to an off-target penalty but held that the penalty should be applied until after the overproduction, to the date of the Decision, is retired.

2 I am of the view that the Board did not have the jurisdiction to shut in the Well. The appeal must be allowed, the order vacated and the matter returned to the Board for further consideration. Therefore, it is unnecessary to answer the second question.

FACTS

3 The Appellant Beau Canada Exploration Ltd. ("Beau") purchased APL Oil & Gas Ltd. ("APL") in 1998, thereby acquiring the Well which APL had drilled and begun to produce in 1993. The Well had been drilled outside the prescribed target area. The Board therefore assessed an off-target penalty in relation to the Well in 1994. Off-target penalties reduce the allowable production of a well by a penalty factor. In the industry, it is commonly understood that drilling in target areas promotes conservation by requiring uniform drainage of pools. It also reduces unfair drainage of reserves from adjacent drilling spacing units of other operators and provides for the orderly development of surface facilities. (AB 12)

4 Beginning in 1994, the Board made annual orders specifying allowable production from the Well. Each time a new annual allowable order was made, the previous allowable order was rescinded. APL produced in compliance with these orders.

5 The Board issued Interim Directives ("IDs") concerning off-target penalties in October 1994, which modified the imposition of penalties. APL then applied to have its off-target penalty removed, arguing that the penalty was no longer appropriate. APL's application was opposed by the Respondent Northstar Energy Corporation ("Northstar") which owns two wells that produce from the same pool as the Well. Northstar also owns mineral rights on Section 21 which adjoins the section where the Well is located, but does not have a producing well on Section 21. APL's application was denied. APL did not agree with the decision and applied for a review, but abandoned the review request because the new allowable set by the Board allowed it to produce without significant restrictions.

6 In 1995, asserting that the allowables were too high given the actual pressure decline in the pool from which the Well produces, Northstar asked the Board to change its procedures so that the allowables from the Well would be determined at three-month intervals. While the Board did not agree, its June 8th, 1995 letter to Northstar said it would require annual pressure tests of the Well. APL eventually received a copy of this letter, although not from the Board itself.

7 This appeal arises from Northstar's October 1998 application to the Board to shut in the Well, on the basis that production was inequitable and that Northstar, a common pool owner, had suffered losses (AB 69). In November 1998, Beau applied to have its off-target penalty rescinded, asserting that the Well was not off-target towards a gas well and that, according to the IDs, it should not be subject to a penalty. (AB 85)

8 On January 22, 1999, a staff decision was made ordering the Well shut in (AB 89). It referred to the fact that APL had conducted pressure tests on the Well in 1996 but had not submitted the results to the Board until November 6, 1998 (shortly after the Northstar application). Because annual pressure data had not been submitted, the allowables for 1997 and 1998 did not account for the actual reservoir depletion in the pool. As a result, the Well had been "overproduced" and had to be suspended. Another staff decision to similar effect followed in February 1999 (AB 92). Beau requested a public hearing concerning Northstar's application.

THE BOARD'S DECISION

9 The Board allowed Beau's application and decided that the off-target penalty should be suspended as of the date of the Decision. However, the Board upheld the staff decision to shut in the Well. The Board decided that "overproduction" of the Well should be calculated based on the 1996 pressure data using the pool pressure decline indicated in the 1996 test. The Board recalculated the past allowables resulting in "overproduction", applied a penalty factor and decided the Well should be shut in immediately.

10 At AB 367, the Board referred to its 1995 letter requiring annual pressure tests. It concluded that the letter was unclear as to whether the requirement for annual pressure testing would later be formalized. Accordingly, neither APL nor Beau could be held accountable for not submitting annual pressure tests thereafter.

11 The Board discussed two substantive issues. First, in regard to the allowable calculation (AB 367), it referred to s. 11.120 of the Oil and Gas Conservation Regulations, A. R. 151/71 ("Regulations")(set out below), which requires that reservoir pressure data be submitted to the Board. Failure to submit data is a "serious breach" of the Regulations since "[r]eservoir pressure data are critical to the evaluation and administration of off-target gas wells" and since the Board must ensure that "no operator gains a competitive advantage through failing to comply with its Regulations". If submitted, the 1996 data would have been used to determine the 1997 allowable, which would have been smaller to reflect the actual pressure decline in the pool.

12 The Board added:

> The 1999 allowable should therefore be adjusted to reflect <u>cumulative overproduction</u> resulting from the steeper pressure decline trend confirmed by the June 1996 test. For this purpose the Board believes a pressure decline rate of 25 per cent per year is reasonable and notes that both parties acknowledged that this is representative of the decline rate over this time period. (emphasis added)

13 A table attached to the Decision at AB 371 shows the Board's calculation of the allowable status for the well from 1996 to 30 April 1999. The table quantifies the "overproduction" based on the 1996 pressure data, as well as the portion of the resulting "overproduction" subject to a 50 per cent penalty.

14 Second, in regard to the off-target penalty (AB 368), the Board agreed that the reserves being drilled into by the Well were underneath Section 21, where Northstar held rights. Since Northstar had not drilled a well in that section, however, the Board was "not prepared to accept that inequitable drainage of these reserves is occurring" and so was not prepared to apply the off-target penalty to the Well. The Board did not believe that the Well gained access to the pool as a result of its off-target location, being satisfied that the Well would have also accessed the pool if it had been drilled within its target area. While there might be some advantage to the off-target location, "the Board does not consider the potential difference significant enough to warrant application of the off-target penalty." In the result, the Board decided once the "overproduction" was retired, the off-target penalty factor would not be applied.

LEGISLATION

15 The purposes of the Oil and Gas Conservation Act ("Act"), R.S.A. 1980, c. O-5 are found in s. 4:

> (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
> (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating and abandonment of wells and in operations for the production of oil and gas;
> (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;
> (d) to afford each owner the opportunity of obtaining his share of the production of oil or gas from any pool;
> (e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;
> (f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

16 Section 1(1)(a) defines "allowable" as:

> when that term is used in connection with a well, means the amount of oil or gas a well is permitted to produce, in accordance with an order of the Board for this purpose, after application of any applicable penalty factor;

17 Section 19(a.1) provides:

> The Board may
>
> . . .

> shut in the well for a definite period of time or indefinitely if it is made to appear to the Board that a contravention of this Act, the regulations or an order of the Board has occurred with respect to the well

18 Sections 97 and 99 contemplate penalties for, among other things, a contravention of the Act or the Regulations.

19 Section 4.060 of the Regulations authorizes the imposition of off-target penalties. In Part 10, entitled "Production Rates and Accounting", s. 10.020(1) provides:

> A licensee or operator of a production entity or any person authorized by the licensee or operator may take production from the production entity only at rates in accordance with the subsisting MRL Order of the Board where it applies or in accordance with any applicable order or authorization governing rates of production.

20 Section 10.060 states:

> The Board, upon its own motion or upon application therefor, where it is satisfied that any provision in this Part is not or should not be applicable to the circumstances of a particular case, may vary, alter or exempt from application any provision of this Part and may make such other provision as it considers suitable or necessary to effect the purposes of the Part.

21 Central to this appeal is s. 10.200(1) of the Regulations, which, for the purposes of sections 10.210 to 10.270, defines "overproduction" as "the production of ... gas in excess of the ... gas allowable ... determined in accordance with a <u>subsisting</u> order or directive of the Board" (emphasis added). Sections 10.280(1)(c) and (3) deal with the consequences of cumulative "overproduction":

> Where the cumulative overproduction of an allowable or a control well rate at a production entity
>
> (c) for gas at the end of an allowable period is 20% or more of the gas allowable for the allowable period, the Board, without further notice, may restrict the gas allowable in the next succeeding period to an amount equivalent to the gas allowable that the production entity would otherwise have less an amount equal to 0.50 times the cumulative overproduction in excess of 10% of the gas allowable for the period ending.
>
> . . .
>
> (3) Notwithstanding subsection (1), where a well is overproduced and, after notice, the well continues to be overproduced, the Board may take such measures as may be necessary to remedy the overproductive status, including shutting in the well.

22 It was apparently pursuant to s. 10.280(1)(c) that the Board applied the 50 per cent penalty to the Well and to subsection (3) that it shut in the well. Section 10.300(4) authorizes the Board to "revise or rescind" a maximum daily allowable, either upon application or upon its own motion.

23 Section 11.120(1), the provision referred to by the Board in noting APL's breach of the Regulations, obligates the licensee of a well to provide the Board the data and results of tests without delay.

STANDARD OF REVIEW

24 It is common ground that the Board must be correct on a question pertaining to its jurisdiction. The Board points out that courts should be slow to characterize a matter before an administrative tribunal as "jurisdictional" and thus subject to a standard of correctness. I.L.W.U., Local 514 v. Prince Rupert Grain Ltd. (1996), 135 D.L.R. (4th) 385 (S.C.C.).

THE POSITIONS OF THE PARTIES

25 The Appellant asserts that the Board retroactively recalculated the allowables and was able to find "overproduction" only because the 1997 and 1998 production exceeded the recalculated allowables. It says there was never "overproduction" vis-à-vis the original allowables since APL had always produced in compliance with existing orders. It argues the Board exceeded its jurisdiction in determining that there was "overproduction" as a result of the recalculated allowables, since neither the Act nor the Regulations permit the Board to retroactively or retrospectively adjust an allowable.

26 The Board emphasizes its technical expertise regarding the regulation of the oil and gas industry in suggesting that the Decision was within its jurisdiction. It underscores that the definition of "overproduction" in the Regulations (set out above) applies specifically to sections of the Regulations not in issue. It notes that Northstar nominally applied pursuant to 10.280(3) of the Regulations but asserts that, in reality, Northstar was asking the Board to craft a remedy to deal with APL's failure to promptly submit the 1996 pressure data.

27 Northstar relies in part (as does the Board) on s. 19(a.1) of the Act as providing jurisdiction for the Board's decision to shut in the Well. In its view, rather than retroactivity, the issue is the duration of the shut-in status which is a question of fact or mixed fact and law, not of jurisdiction.

ISSUES

1. DOES THE BOARD HAVE THE JURISDICTION TO RECALCULATE THE ALLOWABLES?

28 A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. Calgary & Home Oil v. Madison Nat. Gas (1959), 19 D.L.R. (2d) 655 at 661 (Alta. S.C. App. Div.). See also Re Northwestern Utilities and City of Edmonton (1978), 89 D.L.R. (3d) 161 at 170 (S.C.C.). This principle is based on notions of fairness and the reliability of expectations. R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at 513. Although it has been suggested that retroactive orders "change past transactions" while retrospective orders "attach new consequences to past transactions", the distinction is of little import here. Nova v. Amoco Canada Petroleum Company Ltd. et al. (1981), 32 A.R. 613 at 620 (S.C.C.).

29 In my view, the legislation does not authorize the Board to recalculate past allowables leading to a finding of overproduction; to impose penalties for the resulting overproduction; and to shut in a well while that overproduction is being retired. Therefore, the Board exceeded its jurisdiction in purporting to make such an order.

30 It was conceded by Northstar that there is no such specific authorization in the Act or the Regulations. By contrast, the legislative authority to make retroactive orders is explicit in other sections of the Act. For example, in the context of common purchasers, carriers and processors, s. 45 of the Act authorizes the Board to make orders effective on a date "previous to the date the declaration or order is made".

31 While the Act is silent about the authority to recalculate allowables, it empowers the Board to make regulations concerning allowables. But s. 10(1)(e.1) and (o), the relevant regulation-making powers, are couched in forward-looking language: "rules by which the base allowable ... may be determined" and "rules for the calculation of allowables".

32 The Regulations themselves shed little light on this issue. Section 10.020(1) states that a licensee may take production "in accordance with any applicable order or authorization governing rates of production." Beau says it did exactly that: it produced at an allowable rate set by the Board.

33 Section 10.060 authorizes the Board to "vary, alter or exempt from application any provision of this Part and may make such other provision as it considers suitable or necessary to effect the purposes of the Part." There is nothing to suggest that this includes the power to recalculate a past allowable. While the language is broad, it is unlikely that this provision in the Regulations could authorize an after-the-fact undoing of long-standing Board orders (some of which had been rescinded and replaced), let alone justify the imposition of penalties for "overproduction" created by the recalculation.

34 Section 10.095 states that the gas base allowable will be a formula (Qmax) as shown in "the subsisting annual gas allowable order". This language also suggests that the Board's power to set allowables is prospective only.

35 The Board emphasizes that the definition of "overproduction" found in s. 10.200(1) (which refers to a "subsisting" Board order) applies only to sections 10.210 to 10.270, whereas reliance here is on s. 10.280. This argument seems to suggest that the term "overproduction" in s. 10.280 means something different than it does in the several sections that precede it. The Board also points to s. 10.280(3) as providing authority for its Decision.

36 There are two problems with these arguments. First, it is difficult to ascribe a meaning to the term "overproduction" in s. 10.280 other than its definition in s. 10.200(1). In any event, the fact that this definition is not specifically stated to be applicable to 10.280 would not, by itself, authorize the past recalculation of an allowable.

37 Second, s. 10.280(3) is not directed at the sort of problem presented here. Section 10.280(1)(c) refers to "cumulative overproduction" in the context of "the end of an allowable period", authorizing the Board to restrict production in "the next succeeding period", including a penalty factor. This language is clearly prospective. The notion of overproduction in subsection (3) must be based on subsection (1), since subsection (3) applies "notwithstanding subsection (1)". Logically, then, "overproduction" in subsection (3) cannot mean "overproduction" resulting from an after-the-fact allowable recalculation. And, in any event, subsection (3) only authorizes the Board to take necessary measures after notice of the "overproduction" contemplated by subsection (1) has been given.

38 The unfairness of any other interpretation is apparent when one considers the significant penalty factor authorized by subsection (1) and applied in this case. Were the Board able to recalculate allowables after the gas had been produced, a producer could be penalized heavily despite having

produced in compliance with an earlier order. Given the changing price of commodities such as natural gas and the various costs associated with production, such a retroactive order could have grave financial consequences for a producer. The statutory language would have to be much clearer to accomplish this result.

39 Nor does the language of s. 10.300(4), enabling the Board to "revise or rescind" an allowable order, seem to contemplate the retroactive exercise of this power.

40 Northstar relies on several cases that interpret other statutes as permitting retroactive regulation. Since these cases involve the interpretation of different statutes in the context of other regulatory problems, they are unhelpful in resolving the present problem. For example, in Nova, supra, the overall regulatory scheme permitted the company to set initial rates and the Board to vary or confirm them upon receipt of a complaint. At 623, Estey J. concluded that this legislative pattern allowed the Board to vary the rates retroactively at least to the date of the complaint, if it considered the rates unjust and unreasonable. Here, in contrast, the Board itself set the initial allowables. See also Re Eurocan Pulp & Paper Co. Ltd. and B.C. Energy Comm. (1978), 87 D.L.R. (3d) 727 (B.C. C.A.). Nfld. Telephone v. Bd. of Comm. (1990), 45 Admin. L.R. 291 (Nfld. C.A.) is also not persuasive since the Court characterized the order not as retrospective but as an affirmation of an earlier order, a power clearly within the Board's jurisdiction.

41 On the other hand, in Calgary & Home Oil, supra, at 661, it was determined that giving "the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board." See also Re Northwestern Utilities, supra. In my view, the latter authorities are applicable.

2. DOES THE BOARD HAVE THE JURISDICTION TO SHUT IN THE WELL FOR BREACH OF A REGULATION?

42 The Board did not have jurisdiction to shut in the Well on the basis of "overproduction" resulting from a recalculation of the allowable production rate. Both the Board and Northstar argue that the Board nevertheless had jurisdiction to make the impugned order, primarily based on s. 19(a.1) of the Act which empowers the Board to shut in a well if the Act, the Regulations or a Board order have been contravened.

43 The objects of the Act, set out above, leave no doubt that the Board's function is highly specialized. "Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes." Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 at 1756. Given the Board's function and the context of this case, do other legislative provisions authorize it to shut in the Well?

44 Section 19(a.1) of the Act clearly permits the Board to shut in a well when a regulation has been breached. Beau acknowledges that APL breached s. 11.120(1) of the Regulations when it failed to remit the 1996 pressure test data. In the circumstances of this case, however, there are at least two reasons why s. 19(a.1) cannot provide the basis for the Decision.

45 First, the foundation of Northstar's October 1998 application was not APL's failure to file timely pressure test data but its alleged overproduction. The application was grounded on an allegation that the production from the Well was "inequitable" and that, as a working interest owner in a common pool, Northstar had suffered resulting losses (AB 69). Northstar's assertion of inequitable drainage was rejected by the Board. Although Northstar relied on APL's failure to comply with the Board's 1995 letter concerning the need for annual pressure data (AB 73), the Board also concluded that neither APL nor Beau could be faulted for not providing annual pressure tests.

46 Northstar's failure to rely on s. 19(a.1) in its application is not dispositive in this case, since presumably it did not find out about APL's 1996 test results until a few weeks after its application was filed. On the other hand, by the time of the hearing it was apparent to everyone that the 1996 test results had been filed late. Northstar nevertheless continued to emphasize s. 10.280(3) of the Regulations before the Board. See e.g. AB 315 and 354. A brief of law submitted by Northstar in response to Beau's brief of law does not mention s. 19(a.1). The opening remarks by the Board's Acting Chairman state that Northstar's application was pursuant to s. 10.280(3) (AB 123). During oral argument before this Court, Northstar conceded it had never relied on s. 19(a.1) before the Board.

47 Second, there is no mention of s. 19(a.1) in the Decision. Rather, the emphasis is on recalculating the allowables dating back to 1997, based on the 1996 pressure test. This is especially apparent from the table attached to the Decision which refers throughout to "adjusted allowables" and to "overproduction". As Beau points out, a hearing which focussed on an appropriate penalty for the breach of a regulation, rather than on "overproduction" resulting from a recalculation, might have given rise to other issues. For example, there was evidence that Northstar had also failed to file test results in a timely way. See especially AB 299. Had the focus in the hearing been on crafting an appropriate remedy for APL's failure to file the 1996 test results, Beau might have emphasized, among other things, the effect of Northstar's own failure to file test results. It may also be that such a focus in the hearing would have led to a different remedy than that granted in the Decision.

48 Northstar argues that, so long as the legislation authorizes what was done, the Board does not have to specify the provision upon which it is relies. This may be true generally but, for the reasons just given, that outcome would be unfair in this case. It would also require the Court to place a characterization on the Decision that it seems unable to bear. Additionally, such a view of the Decision would fly in the face of s. 29 (2) of the Energy Resources Conservation Act, which entitles parties whose rights may be adversely affected by a Board decision to have a reasonable opportunity to learn the facts relevant to the application and to furnish evidence relevant to the application.

49 Apart from s. 19(a.1) of the Act and the provisions discussed earlier, can the Board's authority to shut in the Well be found elsewhere? Reliance is placed on ss. 15 and 42 of the Energy Resources Conservation Act. The latter permits the Board to "review, rescind, change, alter or vary an order or direction made by it ...". The former states that "[t]he Board ... may do all things that are necessary for or incidental to the performance of" its duties or functions. Reference is also made to s. 10(3) of the Alberta Energy and Utilities Board Act, S.A. 1994, c. A-19.5, which empowers the Board to "grant partial, further or other relief in addition to, or in substitution for, that applied for ...".

50 While these are broad powers that must be interpreted in the light of the Board's important and complex responsibilities, it is not necessary for the purposes of this case to describe their outer limits. It is enough to observe that, for the reasons already discussed, these provisions cannot justify this Decision. In a properly convened and directed proceeding, with appropriate notice and adequate evidence, the Board has jurisdiction to shut in a well for a breach. That was not, however, the purpose or focus of this hearing, nor the case Beau was asked to answer.

CONCLUSION

51 Section 44(6) of the Energy Resources Conservation Act authorizes the Court to "confirm, vary or vacate the order appealed from". If the order is vacated, the matter must be referred back to the Board "for further consideration and redetermination." The Board lacked the jurisdiction to shut in the Well on the basis of overproduction created by a recalculation of allowables. Accordingly, that part of the Decision is vacated and the matter returned to the Board for further consideration in light of the above Reasons.

HUNT J.A.
FRUMAN J.A.:-- I concur.
WITTMANN J.A.:-- I concur.