MILLS & MILLS LLP

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**professional corporation*

DAVID P. LEES
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December 5, 2011

File No.: 12638-002
By email and courier

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Attention: Board Secretary

AND TO: Service List Attached

Dear Ms. Walli:

Re: Langley Utilities Contracting Ltd. ("Langley") v. Enersource Hydro Mississauga Services Inc. ("Enersource")
Notice of Applications, Notice of Combined Hearing and Procedural Order No. 1
EB-2011-0361/EB-20-11-0376

We enclose herewith our Submission to the Ontario Energy Board for the Hearing returnable December 19, 2011.

Yours truly,
MILLS & MILLS LLP

David P. Lees
DPL:ls
Enc.

SERVICE LIST

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Andrew Bloomfield Director of Operations, Street Lighting 3240 Mavis Road Mississauga, ON L5C 3K1	Intervenor - Enersource Hydro Mississauga Services Inc.
James Hunt Counsel James T. Hunt Law Office 279 Spring Street Coburg, ON K9A 3K3	Intervenor – Powerline Plus Ltd.
Susan Doyle Brampton City Hall 2 Wellington Street Brampton, ON L6Y 4R2	Intervenor – the Corporation of the City of Brampton

Filed: 2011-12-05
EB-2011-0361
EB-2011-0376
Submissions of Langley Utilities Contracting Ltd.

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

SUBMISSIONS OF LANGLEY UTILITIES CONTRACTING LTD. RE: NOTICE OF APPLICATIONS, NOTICE OF COMBINED HEARING AND PROCEDURAL ORDER NO. 1

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INDEX

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

INDEX

TAB 1

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

SUBMISSIONS OF LANGLEY UTILITIES CONTRACTING LTD. RE: NOTICE OF APPLICATIONS, NOTICE OF COMBINED HEARING AND PROCEDURAL ORDER NO. 1

INTRODUCTION

1. On August 2, 2011, Langley Utilities Contracting Ltd ("**Langley Utilities**") submitted an application under file number EB-2011-0376 ("**Langley Utilities Application**") for an Ontario Energy Board (the "**Board**") hearing to determine whether the street lighting services contemplated under The Corporation of the City of Brampton Contract No. 2008-087 are permitted business activities which an affiliate of a municipally-owned electricity distributor can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998*; SO 1998, c 15 Schedule B (the "**Act**").

2. Before deciding whether to hear the Langley Utilities Application, the Board has called this hearing on threshold questions, including the following:

B1 Is there a statutory basis for the Langley Utilities Application under the Act?

B2 If the Act does not provide a statutory basis on which Langley Utilities may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4)?

3. Langley Utilities submits that there is a statutory basis for the Board to hear the Langley Utilities Application under section 19(1) of the *Act.* Alternatively, it is submitted that it is appropriate for the Board to hear the Application on its own motion pursuant to section 19(4) of the Act.

BACKGROUND

4. On or about November 8, 2008, Langley Utilities submitted a bid for the performance of routine and emergency maintenance for street lighting and related devices within the City of Brampton ("**City**"), contract No. 2008-079 to the Corporation of the City of Brampton ("**Contract**"). There were a number of bids on the Contract received by the City on the opening day of November 8, 2008.

5. Langley Utilities' bid was the second lowest bid. The bid by Enersource Hydro Mississauga Services was the lowest bid for the Contract.

6. On or about December 5, 2008, a letter was sent to the City from Langley Utilities advising the City that the awarding of the Contract to Enersource Hydro

Mississauga Services Inc. by the City would be unfair and in contravention of the *Act*.

7. The *Act* states, *inter alia*, that a municipally owned distributor's affiliate shall not carry on any business activity other than those listed in Section 73 (1) of the *Act*.

8. Langley Utilities therefore asserts that Enersource's affiliate is not lawfully permitted, by virtue of section 73 of the *Act*, to perform the services contemplated under the Contract for two principal reasons:

    i. Enersource's affiliate is not lawfully permitted to conduct street lighting activities; and

    ii. Enersource's affiliate is carrying on activities in an area outside of the Enersource's licensed area.

9. Langley Utilities issued a Statement of Claim on September 17, 2010 at the Superior Court of Justice at Brampton under Court File Number CV-10-3476-00 (the "**Action**").

10. Langley Utilities and Enersource Hydro Mississauga Services Inc. have agreed to an Order staying the Action pending a decision by the Ontario Energy Board ("**OEB**"), including any appeal(s) therefrom, on whether the services contemplated under Contract are permitted business activities which an affiliate of a municipally-owned electricity distributor can lawfully carry on under section 73 of *Act*.

BOARD STAFF "COMPLIANCE BULLETINS" ON THE ISSUE IN DISPUTE IN THE LANGLEY UTILITIES APPLICATION

11. On both November 5, 2010 and April 12, 2011, the Board's staff released posted Compliance Bulletins, which do not have the force of law, opining on section 73(1) of the Act with respect to the provision of street lighting services, the very subject matter of the Langley Utilities Application.

12. Both these Compliance Bulletins are posted on the Board's website under a section titled "Rules & Requirements."

13. The November bulletin states that the "Board staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services." The Board staff further stated that "street lighting services can be permitted under item 6 [as listed under section 73(1)]" and that "the provision of street lighting services by an affiliate can also be permitted under item 9 [under section 73(1)]."

14. The April bulletin states that Board staff is of the view that "an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services outside of its affiliated distributor's licensed service area." The bulletin also confirmed the staff's view from the November bulletin that "the provision of street lighting services by an affiliate can be permitted under items 6 and 9 of section 73(1) of the OEB Act."

THE STATUTORY BASIS FOR THE JURISDICTION OF THE LANGLEY APPLICATION

LEGISLATION IS TO BE GIVEN A LIBERAL INTERPRETATION

15. Determining the scope of the Board's jurisdictional authority requires a view towards principles of administrative law and statutory interpretation. The Supreme Court of Canada recently investigated the jurisdictional boundaries of an energy regulator in *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board),* 2006 SCC 4. *ATCO* reiterated the two sources of an administrative decision maker's jurisdiction: (1) express grants of jurisdiction under statute, i.e. explicit powers; and (2) the common law, under the doctrine of jurisdiction by necessary implication, i.e. implicit powers.[1]

16. It is therefore necessary to interpret the *Ontario Energy Board Act* to determine the express and implicit powers that the Board possesses. This must done while following the "rule of liberal interpretation" contained in section 64(1) of the *Legislation Act,* 2006, SO 2006, c 21, Schedule F, which reads as follows:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

17. Therefore, the powers of the Board under the Act must be interpreted broadly and with regard to the objectives of the Act.

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[1] *ATCO* at para 38.

THE EXPLICIT POWER FOR THE ONTARIO ENERGY BOARD TO HEAR THE LANGLEY UTILITIES APPLICATION

18. The statutory basis for Langley Utilities Application is derived from section 19(1) of the Act. Section 19(1) reads as follows:

> The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

19. Section 19(1) of the Act was recently interpreted by the Ontario Court of Appeal in *Snopko v Union Gas Ltd*[2]. In *Snopko,* referring to section 19(1) of the *Ontario Energy Board Act*, Sharpe J.A. wrote:

> The generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. **This includes, inter alia, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.**[3] (emphasis added).

20. In this case, it is submitted that the issues in the Langley Utilities Application relate to the validity of a contract that is directly relevant to the Act. The Langley Utilities Application seeks to determine whether the street lighting services the Contract are permissible in light of section 73 of the Act.

21. Legislative debates from the time of the enactment of the most recent formulation of the Act in 1998 make it clear that it was the intent of the government for the Board to rule and regulate on the types of issues raised in the Langley Utilities

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[2] 2010 ONCA 248. ("*Snopko*").
[3] *Snopko* at para 27.

Application. When speaking to the mandate of the Ontario Energy Board in a legislative debate, Member of Provincial Parliament, Mrs. Helen Johns stated that "the Ontario Energy Board will be able to ensure that marketers are financially sound, they're responsible to the consumers, and they understand that they have a responsibility to care for the consumer. The Ontario Energy Board will be in charge of that."[4] Furthermore, MPP, Mr. Joseph Tascona identified the Board's role as "the independent regulator for the electricity sector" and suggested that the new formulation of the Act "would strengthen the OEB's role in order to better protect electricity and gas consumers and to ensure that efficiencies achieved in the monopoly parts of the industry benefit all customers."[5]

22. The unique position and expertise, as well as the broad authority of the Board has been recognized by the Ontario Court of Appeal in *Natural Resource Gas Ltd v Ontario Energy Board*, where Juriansz J.A. wrote:

> **It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario**. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals.[6] (emphasis added).

23. In another recent case, the Ontario Court of Appeal has identified the competing goals in the regulation of the electricity industry as "the interests of ratepayers in

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[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parl, 2nd Sess, (17 June 1998) online (Helen Johns).
[5] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parl, 2nd Sess, (18 June 1998) online (Joseph Tascona).
[6] [2006] OJ No 2961 (ON CA) at para 18.

terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective."[7]

24. The legislative intent of the Act is to give the Board a broad mandate to regulate the electricity and gas markets. Given the Board's broad mandate, the fact that the central issue of the Langley Utilities Application is clearly within the confines of section 73 of the Act and, *inter alia*, relates to the protection of consumers is sufficient to allow the Board the requisite jurisdiction to hear the matter under section 19(1). As such, it is submitted that section 19(1) provides the Board with an explicit statutory basis for hearing the Langley Utilities Application.

25. The implicit powers of the statute, by virtue of the doctrine of jurisdiction by necessary implication also provide the Board with the necessary jurisdiction for section 19(1) of the *Ontario Energy Board Act* to apply to the Langley Utilities Application.

26. The comments written by Sharpe J. in *Snopko v Union Gas,* namely that the section 19(1) jurisdiction includes "the power to rule on the validity of relevant contracts and to deal with other substantive legal issues,"[8] identifies the wide scope of the implicit powers regarding jurisdiction contained within the *Ontario Energy Board Act*.

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[7] *Toronto Hydro-Electric System Ltd v Ontario (Energy Board)* (2010), 99 OR (3d) 481 at para 14.
[8] *Snopko* at para 27.

THE IMPLICIT POWER FOR THE ONTARIO ENERGY BOARD TO HEAR THE LANGLEY UTILITIES APPLICATION

27. In the alternative, *ATCO* states that the exercise of determining the implicit powers given by a provision in a statute requires an analysis of the larger statutory scheme as a whole. Bastarache J stated that "[t]he 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."[9]

28. *ATCO* identified several situations where the doctrine of jurisdiction by necessary implication may be applied. The Supreme Court cited the following list of such situations from a Board decision in *Re Consumers Gas Co*[10]:

- [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.

[9] *ATCO* at para 49.
[10] *ATCO* at para 74.

29. In this case, the first situation is most applicable, as the jurisdiction to rule on the validity of an electricity services contract is necessary to accomplish the objectives set out in the Act.

30. The implicit powers are granted in order to ensure that the administrative decision-maker can adequately accomplish its mandate. As stated in *Re Dow Chemical Canada Inc and Union Gas Ltd*, "[w]hen 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."[11]

RULING ON THE VALIDITY OF THE CONTRACT IN DISPUTE IS RATIONALLY RELATED TO THE OBJECTIVES OF THE ACT

31. *ATCO* further states that certain considerations apply when considering broadly drawn powers, such as in this case. Bastarache J. states that "[b]roadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework."[12] In this case, the purpose of the regulatory framework of the Board can be found in section 1 of the Act. Section 1 of the Act sets out the Board's objectives with respect to electricity regulation. These objectives are as follows:

> 1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

[11] (1982), 141 DLR (3d) 641 (Ont HC) at pp 658-659.
[12] *ATCO* at para 74.

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

32. It is submitted that allowing the Board to rule on the validity of a contract for electricity-related services is necessary to protect the interests of consumers and helps to promote the economic efficiency and cost effectiveness of the electricity industry. If the Board does not have the ability to rule on contracts which have the potential to compromise the reliability, quality and price of electricity services, the Board's mandate under section 1 of the Act is undermined. Given the effect that the power of the Board to rule on the validity of contracts can have on both consumers and other providers in the industry, it is clear that the implicit powers and the objectives of the statute are rationally related.

33. Consideration of Section 73 of the Act as advanced in the Langley Utilities Application raises issues and considerations which are within the objectives, set out in section 1 of the Act, which guide the Board, including: municipally-owned

distributors entering into higher-risk businesses and potential consequences to the rates paid by ratepayers, unfair competition between private distributors and municipally-owned distributors, cross-subsidization by municipally-owned distributors of their activities and costs between their regulated and unregulated activities, economic efficiency and cost effectiveness in the electricity industry as a whole.

THE BOARD HAS SPECIALIZED EXPERTISE

34. Furthermore, the Board has specialized expertise on the electricity industry which makes it the most appropriate body to determine such matters. In both *Graywood Investments Ltd v Ontario Energy Board,* [2005] OJ No 345 and *Consumers' Gas Co v Ontario (Energy Board),* [2001] OJ No 5024, the Ontario Superior Court of Justice has recognized the "high level of expertise the Board brings to its mandate."[13] Given the detrimental market effects that may arise from the decision that the Board makes, it is of particular importance that this matter is heard in front of the most appropriate body that is able to best appreciate the evidence and the contextual factors and circumstances involved to make an informed decision.

35. The deference that is therefore necessarily afforded to the Board as a result of its unique expertise is emphasized by the courts in *Enbridge Gas Distribution Inc v Ontario Energy Board*:

> In this case, the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise.

[13] *Consumers' Gas* at para 2; *Graywood Investments* at para 32.

> It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy. That is why courts have accorded considerable deference to the Board... [14]

THE BOARD HAS REPRESENTED ITS JURISDICTION OVER THIS ISSUE

36. It is submitted that the Board has represented that matters relating to the permitted activities of a municipally-owned distributor's affiliates under section 73 of the Act are properly within the jurisdiction of the Board.

37. This representation is evidenced by the fact that the Board has posted staff bulletins on its website regarding this issue. On November 5, 2010, the Board issued a compliance bulletin to all licensed electricity distributors and other interested parties regarding the "Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services". On April 12, 2011, the Board issued a subsequent compliance bulletin regarding the same topic.

38. These compliance bulletins can be accessed on the Ontario Energy Board's website under a section marked with the heading "Rules and Requirements." This heading illustrates the importance of the issues dealt with in the compliance bulletins.

[14] (2005), 75 OR (3d) 72 at para 24.

39. Because the Board staff has seen fit to proffer compliance bulletins on the topic on both November 5, 2010 and April 12, 2011, it is submitted that the Board has jurisdiction to hear the Langley Utilities Application.

REQUEST SOUGHT

40. Langley Utilities requests that the Board hear the application made on August 2, 2011 under the powers of the Board pursuant to section 19(1) of the *Ontario Energy Board Act.* Alternatively, it requests that the board hear the application made on August 2, 2011 on the Board's own motion pursuant to section 19(4) of the *Ontario Energy Board Act*.

41. Langley Utilities submits that there be no award of costs payable by it with respect to this hearing.

42. All of which is respectfully submitted this 5th day of December, 2011 at Toronto, Ontario.

MILLS & MILLS LLP
Barristers and Solicitors
2 St. Clair Avenue W., Suite 700
Toronto, ON M4V 1L5

David P. Lees
LSUC #45453B

Telephone: 416-863-0125
Facsimile: 416-863-3997
Lawyers for Langley Utilities Contracting Ltd.

TAB 2

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

AFFIDAVIT of ABRAR HUQ

Sworn the 5th day of December, 2011

I, Abrar Huq, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am a student-at-law for the solicitors of the Applicant, Langley Utilities Contracting Ltd., in this proceeding and as such have knowledge of the matters hereinafter deposed.

2. On July 21, 2011, The Honourable Mr. Justice Ricchetti of the Ontario Superior Court of Justice made an Order on the Consent of the parties ("**Exhibit A**") that the action brought by Langley Utilities Contracting Ltd. against Enersource Hydro Mississauga Services Inc. be stayed pending a decision by the Ontario Energy Board (the "OEB"), including any appeal(s) therefrom, on whether the services contemplated under The Corporation of the City of Brampton contract no. 2008-087 are permitted business activities which an affiliate of a municipally-owned electricity distributor can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998;* S.O. 1998, c. 15 Schedule B.

3. On November 5, 2010, the Ontario Energy Board published on its website, a Compliance Bulletin ("**Exhibit B**") providing guidance in relation to the

application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors.

4. On April 12, 2011, the Ontario Energy Board published on its website, a Compliance Bulletin ("**Exhibit C**") providing guidance in relation to the application of the section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors, specifically in relation to the provision of those services outside of the affiliated distributor's licensed service area.

5. I make this affidavit in support of the submissions of Langley Utilities Contracting Ltd. in the Combined Hearing in front of the Ontario Energy Board under Procedural Order No. 1 of EB-2011-0376 and for no other purpose.

SWORN BEFORE ME)
at the City of Toronto,)
Province of Ontario)
This 9th day of December, 2011)
)
)

A COMMISSIONER for taking affidavits, etc.

Abrar Huq

Stephanie Mary Dewey, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires August 26, 2014.

TAB A

This is Exhibit "A" referred to
in the Affidavit of Abrar Huq
sworn before me, this
9th day of December, 2011.

A Commissioner for taking affidavits

Stephanie Mary Dewey, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires August 26, 2014.

Court File No. CV-10-3476-00

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	) THURSDAY	, THE 21ST
	)	
MR. ~~MADAM~~ JUSTICE RICCHETTI	) DAY OF JULY, 2011	

BETWEEN:

LANGLEY UTILITIES CONTRACTING LTD.

Plaintiff

- and -

ENERSOURCE HYDRO MISSISSAUGA SERVICES INC.

Defendant

ORDER

THIS MOTION, made by the Defendant, for an Order staying the action, was read this day, at Brampton.

ON READING the Notice of Motion, affidavit of Catherine Ma dated July 19, 2011 and the Consent of the parties, filed,

1. **THIS COURT ORDERS** that this action be stayed pending a decision by the Ontario Energy Board (the "OEB"), including any appeal(s) therefrom, on whether the services contemplated under The Corporation of the City of Brampton contract no. 2008-087 are permitted business activities which an affiliate of a municipally-owned electricity distributor can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998;* S.O. 1998, c. 15 Schedule B.

2. **THIS COURT ORDERS** that the Plaintiff, Langley Utilities Contracting Ltd., shall file an application with the OEB by August 1, 2011.

ENTERED
AT BRAMPTON
JUL 28 2011
BOOK No. 73-63
INITIALS

Susan E Elliott

DOCSTOR: 2206468\1

Court File No. CV-10-3476-00

ONTARIO
SUPERIOR COURT OF JUSTICE

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INITIALS

Susan E Edwards

DOCSTOR: 2206468\1

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ONTARIO
SUPERIOR COURT OF JUSTICE

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Anne E Elliott

DOCSTOR: 2206468\1

Court File No. CV-10-3476-00

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	) THURSDAY	, THE 21ST
	)	
MR. ~~MADAM~~ JUSTICE RICCHETTI	) DAY OF JULY, 2011	

BETWEEN:

LANGLEY UTILITIES CONTRACTING LTD.

Plaintiff

- and -

ENERSOURCE HYDRO MISSISSAUGA SERVICES INC.

Defendant

ORDER

THIS MOTION, made by the Defendant, for an Order staying the action, was read this day, at Brampton.

ON READING the Notice of Motion, affidavit of Catherine Ma dated July 19, 2011 and the Consent of the parties, filed,

1. **THIS COURT ORDERS** that this action be stayed pending a decision by the Ontario Energy Board (the "OEB"), including any appeal(s) therefrom, on whether the services contemplated under The Corporation of the City of Brampton contract no. 2008-087 are permitted business activities which an affiliate of a municipally-owned electricity distributor can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998;* S.O. 1998, c. 15 Schedule B.

2. **THIS COURT ORDERS** that the Plaintiff, Langley Utilities Contracting Ltd., shall file an application with the OEB by August 1, 2011.

ENTERED
AT BRAMPTON
JUL 28 2011
BOOK No. 73-63
INITIALS

Susan E Edwards

DOCSTOR: 2206468\1

Court File No. CV-10-3476-00

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TAB B

This is Exhibit "B" referred to
in the Affidavit of Abrar Huq
sworn before me, this
5th day of December, 2011.

A Commissioner for taking affidavits

Stephanie Mary Dewey, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires August 26, 2014.

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Ontario

COMPLIANCE BULLETIN

DATE ISSUED: November 5, 2010

TO: All Licensed Electricity Distributors
All Other Interested Parties

RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

---

This Bulletin provides guidance in relation to the application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors.

1. Background

Section 73(1) of the *Ontario Energy Board Act, 1998* (the "OEB Act") restricts the activities that may be undertaken by an affiliate of a municipally-owned distributor. More specifically, the section establishes an exhaustive list of activities that such affiliates may undertake, including distributing and retailing electricity, distributing or retailing gas and renting or selling hot water heaters, as well as business activities the principal purpose of which is to use more effectively the assets of the distributor or of an affiliate of the distributor. For convenience of reference, section 73 of the OEB Act is

reproduced in its entirety in Appendix A.

A number of distributors have affiliates that are engaged in the provision of street lighting services, such as street light installation and maintenance. A question has been raised as to whether this is permissible under section 73 of the OEB Act. This Bulletin sets out Board staff's views pertaining to the application of section 73 of the OEB Act to the provision of street lighting services by affiliates of distributors.

Section 73(3) of the OEB Act states that section 73(1) does not restrict the activities of a municipal corporation. As such, this Bulletin only addresses the issue of the provision of street lighting services by distributor affiliates that are not municipalities.

2. Application of Section 73 of the OEB Act

Board staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services. In arriving at this view, Board staff has noted the following Board proceedings:

i. As part of the revisions to the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "ARC") (EB-2007-0662) that were adopted by the Board in 2008 (EB-2007-0662), the Board amended the definition of "energy service provider" to include a person that is involved in, among other things, street lighting services and sentinel lighting services. It follows that the Board was satisfied that energy service provider affiliates of a distributor can provide those services.

ii. In a proceeding regarding applications by Toronto Hydro-Electric System Limited ("Toronto Hydro") and its affiliates relating to the sale of street lighting assets (EB-2009-0180/0181/0182/0183), it was clear that an affiliate of the distributor owned street lighting assets and provided programs in relation to

street lighting. The Board determined in that case that some of the street lighting assets were distribution assets and could be transferred to the distributor. Although not discussed by the Board, the street lighting assets that could not be transferred to the distributor presumably would or could remain with the affiliate.

iii. In a proceeding regarding an application by Lakeland Power Distribution Ltd. for an exemption from the ARC (EB-2006-0029), the issue was whether the distributor should be permitted to share employees with its affiliate for the purposes of the provision by the latter of street lighting services. The application was denied, but not on the basis of there being an issue in relation to the provision of street lighting services by Lakeland Power's affiliate.

Board staff is aware that the list of permissible activities in section 73(1) does not refer specifically to street lighting, and that none of the proceedings referred to above specifically identified the particular item in section 73(1) of the OEB Act that would authorize the provision of street lighting services by an affiliate. In Board staff's view, street lighting services can be permitted under item 6 [as listed under section 73(1)]; namely, business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor. In this regard, Board staff notes the following:

i. In many, if not most, instances, the municipality owns the street lights. Street lights are thus assets of an affiliate of a distributor. In this context, the maintenance of street lighting assets by an affiliate makes more effective use of the street lighting assets.

ii. Distributors own the poles on which street lights are installed. The installation and maintenance of street lighting assets by an affiliate allows for the more effective use of the distribution poles.

iii. In some instances, the affiliate uses specialized equipment owned by the distributor for the purposes of providing street lighting services. A good example is bucket trucks. Use of such specialized assets, which have only a limited number of practical applications, by an affiliate for the provision of street lighting services makes more effective use of those assets. Similarly, where an affiliate acquires a specialized asset such as a bucket truck for use in a permitted activity under section 73(1), the subsequent use of that asset for the purposes of providing street lighting services makes more effective use of the asset.

In Board staff's view, the provision of street lighting services by an affiliate can also be permitted under item 9 [under section 73(1)]; namely, the provision of services related to the promotion of energy conservation, energy efficiency or load management. This would be the case to the extent that the street lighting services involve, for example, the installation and maintenance of more energy efficient lights. This would, among other things, also assist a distributor in meeting the conservation and demand management targets set out in its licence.

The views expressed in this Bulletin are those of Board staff and are not binding on the Board.

Any enquiries regarding this Bulletin should be directed to the Board's Market Operations hotline, at 416-440-7604 or market.operations@oeb.gov.on.ca.

Yours Truly,

Original Signed By

Aleck Dadson
Chief Operating Officer
Ontario Energy Board

APPENDIX A

Section 73 of the *Ontario Energy Board Act, 1998*

Municipally-owned distributors

73 (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.
2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.
3. Retailing electricity.
4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in section 1 of the *Public Utilities Act* or sewage services.
8. Renting or selling hot water heaters.
9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services.

(3) Subsection (1) does not restrict the activities of a municipal corporation.

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Ontario

COMPLIANCE BULLETIN

DATE ISSUED: November 5, 2010

TO: All Licensed Electricity Distributors
All Other Interested Parties

RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

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This Bulletin provides guidance in relation to the application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors.

1. Background

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2. Application of Section 73 of the OEB Act

Board staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services. In arriving at this view, Board staff has noted the following Board proceedings:

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Yours Truly,

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Aleck Dadson
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Ontario Energy Board

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(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services.

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RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

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73 (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.
2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.
3. Retailing electricity.
4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in section 1 of the *Public Utilities Act* or sewage services.
8. Renting or selling hot water heaters.
9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services.

(3) Subsection (1) does not restrict the activities of a municipal corporation.

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Ontario

COMPLIANCE BULLETIN

DATE ISSUED: November 5, 2010

TO: All Licensed Electricity Distributors
All Other Interested Parties

RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

---

This Bulletin provides guidance in relation to the application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors.

1. Background

Section 73(1) of the *Ontario Energy Board Act, 1998* (the "OEB Act") restricts the activities that may be undertaken by an affiliate of a municipally-owned distributor. More specifically, the section establishes an exhaustive list of activities that such affiliates may undertake, including distributing and retailing electricity, distributing or retailing gas and renting or selling hot water heaters, as well as business activities the principal purpose of which is to use more effectively the assets of the distributor or of an affiliate of the distributor. For convenience of reference, section 73 of the OEB Act is

reproduced in its entirety in Appendix A.

A number of distributors have affiliates that are engaged in the provision of street lighting services, such as street light installation and maintenance. A question has been raised as to whether this is permissible under section 73 of the OEB Act. This Bulletin sets out Board staff's views pertaining to the application of section 73 of the OEB Act to the provision of street lighting services by affiliates of distributors.

Section 73(3) of the OEB Act states that section 73(1) does not restrict the activities of a municipal corporation. As such, this Bulletin only addresses the issue of the provision of street lighting services by distributor affiliates that are not municipalities.

2. Application of Section 73 of the OEB Act

Board staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services. In arriving at this view, Board staff has noted the following Board proceedings:

i. As part of the revisions to the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "ARC") (EB-2007-0662) that were adopted by the Board in 2008 (EB-2007-0662), the Board amended the definition of "energy service provider" to include a person that is involved in, among other things, street lighting services and sentinel lighting services. It follows that the Board was satisfied that energy service provider affiliates of a distributor can provide those services.

ii. In a proceeding regarding applications by Toronto Hydro-Electric System Limited ("Toronto Hydro") and its affiliates relating to the sale of street lighting assets (EB-2009-0180/0181/0182/0183), it was clear that an affiliate of the distributor owned street lighting assets and provided programs in relation to

street lighting. The Board determined in that case that some of the street lighting assets were distribution assets and could be transferred to the distributor. Although not discussed by the Board, the street lighting assets that could not be transferred to the distributor presumably would or could remain with the affiliate.

iii. In a proceeding regarding an application by Lakeland Power Distribution Ltd. for an exemption from the ARC (EB-2006-0029), the issue was whether the distributor should be permitted to share employees with its affiliate for the purposes of the provision by the latter of street lighting services. The application was denied, but not on the basis of there being an issue in relation to the provision of street lighting services by Lakeland Power's affiliate.

Board staff is aware that the list of permissible activities in section 73(1) does not refer specifically to street lighting, and that none of the proceedings referred to above specifically identified the particular item in section 73(1) of the OEB Act that would authorize the provision of street lighting services by an affiliate. In Board staff's view, street lighting services can be permitted under item 6 [as listed under section 73(1)]; namely, business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor. In this regard, Board staff notes the following:

i. In many, if not most, instances, the municipality owns the street lights. Street lights are thus assets of an affiliate of a distributor. In this context, the maintenance of street lighting assets by an affiliate makes more effective use of the street lighting assets.

ii. Distributors own the poles on which street lights are installed. The installation and maintenance of street lighting assets by an affiliate allows for the more effective use of the distribution poles.

iii. In some instances, the affiliate uses specialized equipment owned by the distributor for the purposes of providing street lighting services. A good example is bucket trucks. Use of such specialized assets, which have only a limited number of practical applications, by an affiliate for the provision of street lighting services makes more effective use of those assets. Similarly, where an affiliate acquires a specialized asset such as a bucket truck for use in a permitted activity under section 73(1), the subsequent use of that asset for the purposes of providing street lighting services makes more effective use of the asset.

In Board staff's view, the provision of street lighting services by an affiliate can also be permitted under item 9 [under section 73(1)]; namely, the provision of services related to the promotion of energy conservation, energy efficiency or load management. This would be the case to the extent that the street lighting services involve, for example, the installation and maintenance of more energy efficient lights. This would, among other things, also assist a distributor in meeting the conservation and demand management targets set out in its licence.

The views expressed in this Bulletin are those of Board staff and are not binding on the Board.

Any enquiries regarding this Bulletin should be directed to the Board's Market Operations hotline, at 416-440-7604 or market.operations@oeb.gov.on.ca.

Yours Truly,

Original Signed By

Aleck Dadson
Chief Operating Officer
Ontario Energy Board

APPENDIX A

Section 73 of the *Ontario Energy Board Act, 1998*

Municipally-owned distributors

73 (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.
2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.
3. Retailing electricity.
4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
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(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services.

(3) Subsection (1) does not restrict the activities of a municipal corporation.

TAB C

This is Exhibit "C" referred to
in the Affidavit of Abrar Huq
sworn before me, this
5th day of December, 2011.

A Commissioner for taking affidavits

Stephanie Mary Dewey, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires August 26, 2014.

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COMPLIANCE BULLETIN

DATE ISSUED: April 12, 2011

TO: All Licensed Electricity Distributors
All Other Interested Parties

RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

---

This Bulletin provides further guidance in relation to the application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors, specifically in relation to the provision of those services outside of the affiliated distributor's licensed service area.

1. Background

Section 73(1) of the *Ontario Energy Board Act, 1998* (the "OEB Act") restricts the activities that may be undertaken by an affiliate of a municipally-owned distributor. On November 5, 2010, Board staff issued a Compliance Bulletin (the "November Bulletin") regarding the application of section 73(1) of the OEB Act in respect of street lighting services. The view expressed by staff in the November Bulletin is that an affiliate of a

distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services.

A question has been raised as to whether that view extends to the circumstance where an affiliate of a distributor is providing street lighting services outside of the affiliated distributor's licensed service area.

By its terms, the November Bulletin is not limited in its application to the provision of street lighting services within the affiliated distributor's licensed service area. However, Board staff considers it appropriate to address this particular issue, and, accordingly, this Bulletin sets out Board staff's views in that regard.

2. Application of Section 73 of the OEB Act

Board staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services outside of its affiliated distributor's licensed service area.

As noted in the November Bulletin, section 73(1) of the OEB Act establishes an exhaustive list of activities that affiliates of municipally-owned distributors may undertake. Board staff notes that section 73(1) of the OEB Act is silent as to the geographic area in which these permitted activities may be undertaken. Board staff also notes that, unlike licensed electricity distributors, their affiliates do not have licensed service areas that constrain the geographic scope of their activities.

As such, it is Board staff's view that, if and to the extent that an activity is permitted under section 73(1), an affiliate is permitted to undertake that activity both inside and outside of its affiliated distributor's licensed service area.

As stated in the November Bulletin, the provision of street lighting services by an

affiliate can be permitted under items 6 and 9 of section 73(1) of the OEB Act. For convenience of reference, relevant portions of the November Bulletin are reproduced here:

> ...In Board staff's view, street lighting services can be permitted under item 6; namely, business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor. In this regard, Board staff notes the following: ...
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Board staff's views as set out in this Bulletin are based solely on a consideration of the provisions of the OEB Act. Board staff expresses no view as to the implications, if any, of municipal or other law on the scope of an affiliate's activities.

The views expressed in this Bulletin are those of Board staff and are not binding on the Board.

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> iii. In some instances, the affiliate uses specialized equipment owned by the distributor for the purposes of providing street lighting services. A good example is bucket trucks. Use of such specialized assets, which have only a limited number of practical applications, by an affiliate for the provision of street lighting services makes more effective use of those assets. Similarly, where an affiliate acquires a specialized asset such as a bucket truck for use in a permitted activity under section 73(1), the subsequent use of that asset for the purposes of providing street lighting services makes more effective use of the asset.
>
> In Board staff's view, the provision of street lighting services by an affiliate can also be permitted under item 9; namely, the provision of services related to the promotion of energy conservation, energy efficiency or load management. This would be the case to the extent that the street lighting services involve, for example, the installation and maintenance of more energy efficient lights. This would, among other things, also assist a distributor in meeting the conservation and demand management targets set out in its licence.

Board staff's views as set out in this Bulletin are based solely on a consideration of the provisions of the OEB Act. Board staff expresses no view as to the implications, if any, of municipal or other law on the scope of an affiliate's activities.

The views expressed in this Bulletin are those of Board staff and are not binding on the Board.

Any enquiries regarding this Bulletin should be directed to the Board's Market Operations hotline, at 416-440-7604 or market.operations@ontarioenergyboard.ca.

Aleck Dadson
Chief Operating Officer
Ontario Energy Board

TAB 3

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

BOOK OF AUTHORITIES FOR LANGLEY UTILITIES CONTRACTING LTD.
RE: NOTICE OF APPLICATIONS, NOTICE OF COMBINED HEARING AND PROCEDURAL ORDER NO. 1

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Solicitors for Langley Utilities Contracting Ltd.

TAB A

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TAB 1

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Board's powers, general
Power to determine law and fact

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

...

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Municipally-owned distributors

73. (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.
2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.
3. Retailing electricity.
4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in section 1 of the *Public Utilities Act* or sewage services.
8. Renting or selling hot water heaters.
9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. 1998, c. 15, Sched. B, s. 73 (1); 2002, c. 23, s. 4 (9).

Limitation

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services. 1998, c. 15, Sched. B, s. 73 (2).

Municipal corporation

(3) Subsection (1) does not restrict the activities of a municipal corporation. 1998, c. 15, Sched. B, s. 73 (3).

TAB 2

Legislation Act, 2006

S.O. 2006, CHAPTER 21
SCHEDULE F

GENERAL RULES OF CONSTRUCTION

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

TAB 3

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)

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

Supreme Court of Canada

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

Heard: May 11, 2005
Judgment: February 9, 2006[FN*]
Docket: 30247

Proceedings: reversing in part *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205, [2004] 4 W.W.R. 239, 312 W.A.C. 250, 339 A.R. 250, 2004 CarswellAlta 55, 2004 ABCA 3 (Alta. C.A.)

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J. Richard McKee, Renée Marx, for Intervener, Alberta Energy and Utilities Board

George Vegh, Michael W. Lyle (written submissions), for intervener, Ontario Energy Board

Michael D. Schafler, J.L. McDougall, Q.C. (written submissions), for Intervener, Enbridge Gas Distribution Inc.

Michael A. Penny, Susan Kushneryk (written submissions), for Intervener, Union Gas Limited

Subject: Public

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

Public law --- Public utilities — Regulatory boards — Miscellaneous

AS Ltd., division of A Ltd., gas and pipeline company, filed letter application with Alberta Energy and Utilities Board for approval of sale of AS Ltd. properties — Board found that "no-harm" test was satisfied — Board then determined allocation of net sale proceeds — Board determined that from gross proceeds of $6,550,000, A Ltd. should receive $465,000 to cover cost of disposition and provision for environmental remediation, shareholders should receive $2,014,690, and customers should receive $4,070,310 — A Ltd. appealed board decision on basis that board did not have jurisdiction to allocate proceeds to customers — Appeal was allowed and matter was referred back to board — Court of Appeal found that board did not have jurisdiction to allocate proceeds of sale to ratepayers — City, representing rights of customers, appealed, contending that board had jurisdiction to allocate portion of net gain on sale of utility asset to rate-paying customers — A Ltd. cross-appealed, questioning board's jurisdiction to allocate any of A Ltd.'s proceeds from sale to customers — Appeal dismissed; cross-appeal allowed — Appropriate remedy was to set aside board's decision and refer matter back to board to approve sale of property belonging to A Ltd., recognizing that proceeds of sale belonged to A Ltd. — Issue of jurisdiction of board attracted standard of correctness — Court of Appeal made no error of fact or law when it concluded that board acted beyond its jurisdiction by misapprehending its statutory and common law authority — Court of Appeal erred when it did not go on to conclude that board had no jurisdiction to allocate any portion of proceeds of sale of property to ratepayers — Legislation was silent as to board's power to deal with sale proceeds — Board's discretion was to be exercised within confines of statutory regime and principles generally applicable to regulatory matters — Customers did not have property interest in utility — Board misdirected itself by confusing interest of customers in obtaining safe and efficient utility service with interest in underlying assets owned by utility — None of three statutes, Gas Utilities Act, Alberta Energy and Utilities Board Act, and Public Utilities Board Act, provided board with power to allocate proceeds of sale and therefore affect property interests of public utility.

Droit public --- Utilités publiques — Organismes de réglementation — Divers

AS ltée, une filiale de A ltée, une compagnie de gazoducs, a fait une demande par lettre au Alberta Energy and Utilities Board (la Commission) afin d'être autorisée à vendre des biens qu'elle détenait — Commission a conclu à « l'absence de préjudice » — Commission a ensuite déterminé à qui serait attribué le produit net de la vente — Commission a réparti le produit brut de la vente de 6 550 000 $ comme suit: 465 000 $ à A ltée pour les frais d'aliénation et de dépollution, 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients — A ltée est allée en appel de la décision de la Commission, invoquant que celle-ci n'avait pas compétence pour attribuer une partie du produit aux clients — Pourvoi a été accueilli et l'affaire a été renvoyée devant la Commission — Cour d'appel a conclu que la Commission n'avait pas compétence pour attribuer le produit de la vente aux clients — Représentant les droits des clients, la Ville a interjeté appel, alléguant que la Commission avait compétence pour attribuer aux clients payeurs une partie du produit net de la vente des biens d'une entreprise de services publics — A ltée a formé un pourvoi incident, mettant en doute la compétence de la Commission pour attribuer quelque partie du produit de la vente aux clients — Pourvoi rejeté; pourvoi incident accueilli — Réparation appropriée était d'annuler la décision de la Commission et de renvoyer l'affaire devant celle-ci afin qu'elle approuve la vente des biens appartenant à A ltée et qu'elle reconnaisse que le produit de la vente appartient à A ltée — Norme de la décision correcte était la norme applicable pour la question de la compétence — Cour d'appel n'a pas commis une erreur de fait ou de droit en concluant que la Commission avait excédé sa compétence en interprétant mal ses pouvoirs conférés par la loi et la common law — Cour d'appel a commis une erreur en omettant de conclure que la Commission n'avait pas compétence pour attribuer quelque partie du produit de la vente des biens aux clients — Loi était silencieuse en ce qui concernait le pouvoir de la Commission d'aborder la question du produit de la vente — Commission devait exercer son pouvoir discrétionnaire à l'intérieur des limites du régime législatif et des principes généralement applicables en matière réglementaire — Clients ne détenaient aucun droit sur les biens du service public — Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise de services publics est le propriétaire — Aucune des trois lois, soit la Gas Utilities Act, la Alberta Energy and Utilities Board Act et la Public Utilities Board Act ne conférait à

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

la Commission le pouvoir d'attribuer le produit de la vente et, donc, d'affecter les droits dans des biens détenus par le service public.

AS Ltd., a division of A Ltd., a gas and pipeline company, filed a letter application with the Alberta Energy and Utilities Board for approval of the sale of its properties located in Calgary. A Ltd. requested that the board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover disposition costs, and to recognize the balance of the profits resulting from the sale should be paid to shareholders. Considering the application to approve the sale, the board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the transaction, and found that the test was satisfied. The board then determined the allocation of net sale proceeds. The board found that it should apply the formula whereby the windfall realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. The board found that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings. The board determined that from the gross proceeds of $6,550,000, A Ltd. should receive $465,000 to cover the cost of disposition and the provision for environmental remediation, the shareholders should receive $2,014,690, and the customers should receive $4,070,310.

A Ltd. appealed, arguing that the board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. The appeal was allowed, the decision of the board was set aside and the matter was referred back to the board. The board was directed to allocate the entire amount of allocation of proceeds categorized as "Remainder to be Shared" to A Ltd.. The Court of Appeal found that the board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers. The city, representing the customers' interests, appealed, contending that the board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the board approved the sale. A Ltd. cross-appealed, contending that the board had no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years, and questioning the board's jurisdiction to allocate any of A Ltd.'s proceeds from the sale to customers.

Held: The appeal was dismissed and the cross-appeal was allowed.

Per Bastarache J. (LeBel, Deschamps and Charron JJ. concurring): The board's decision should be set aside and the matter referred back to the board to approve the sale of the property belonging to A Ltd., recognizing that the proceeds of the sale belong to A Ltd..

The issue of jurisdiction of the board attracted a standard of correctness. No deference was to be shown for the board's decision with regard to its jurisdiction on the allocation of the net gain on sale of assets.

The Court of Appeal made no error of fact or law when it concluded that the board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the board had no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers.

Considering the grammatical and ordinary sense of the relevant provisions of the Gas Utilities Act ("GUA"), the Alberta Energy and Utilities Board Act ("AEUBA") and the Public Utilities Board Act ("PUBA"), the legislation was silent as to the board's power to deal with sale proceeds. The broader context had to be considered. A grant of authority to exercise a discretion as found in s. 15(3) of AEUBA and s. 37 of PUBA did not confer unlimited discretion in the board. The board's discretion was to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters.

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The customers did not have a property interest in the utility. Customers have made no investment. Shareholders have made an investment and assume all the risks as the residual claimants to the utility's profit. The board misdirected itself by confusing the interest of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned by the utility. The board was not in a position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. There was no such power granted by the various statutes, and it could not even be said that there was over-compensation. The power to allocate the proceeds from the sale of the utility's assets was not necessarily incidental to the express powers conferred on the board by the AEUBA, the GUA and the PUBA. Section 15(3) of the AEUBA had to be construed in accordance with the purpose of s. 26(2) of the GUA. Allowing the board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the public interest would be a serious misconception of the powers of the board to approve a sale. To do so would completely disregard the economic rationale of rate setting. None of the three statutes provided the board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

Had it not been concluded that the board lacked jurisdiction, the disposition would have been the same. The board did not meet a reasonable standard when it exercised its power. The board wrongly assumed that the ratepayers had acquired a proprietary interest in the utility's assets because the assets were a factor in the rate-setting process. The board explicitly concluded that no harm would ensue to customers from the sale of the asset. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds.

Per Binnie J. (dissenting) (McLachlin C.J.C. and Fish J. concurring): The appeal should be allowed, the board's decision restored, and the cross-appeal dismissed. The board has authority under s. 15(3) of the AEUBA to impose on the sale any additional conditions the board considers necessary in the public interest. Whether or not the conditions of approval imposed by the board were necessary in the public interest was for the board to decide. The board was in a better position to assess the necessity in this field for the protection of their public interest than either the Court of Appeal or the Supreme Court of Canada.

The standard of review on matters of jurisdiction was correctness. The board's exercise of its discretion called for greater judicial deference. The identification of a subjective discretion in the decision-maker ("the board considers necessary"), the expertise of that decision-maker and the nature of the decision to be made ("in the public interest") called for the patent unreasonableness standard. Regardless of whether the proper standard was patent unreasonableness or reasonableness, the board's response was well within the range of established regulatory opinions.

Neither the legislation nor the regulatory practice in the province and elsewhere dictated the answer to the problems confronting the board. It would have been open to the board to allow A Ltd.'s application for the entire profit. However, the solution adopted by the board was within its statutory authority and did not call for judicial intervention. It was for the board to decide what conditions in the circumstances of this case were necessary in the public interest, and the board's solution was well within the range of reasonable options. A Ltd.'s argument that the board's distribution was confiscatory overlooked the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. The board was addressing a prospective receipt and allocated two thirds of it to a prospective, and not retroactive, rate-making exercise. This was consistent with regulatory practice.

In exercise of its authority under s. 15(3) of the AEUBA, and having regard to its general supervision over all gas utilities and owners of them pursuant to s. 22(1) of the GUA, the board made an allocation of net gain for the public policy reasons it articulated in its decision. The allocation of the gain on an asset A Ltd. sought to withdraw from the rate base was a decision the board was mandated to make.

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AS ltée, une filiale de A ltée, une compagnie de gazoducs, a fait, par lettre, une demande à la Alberta Energy and Utilities Board (la Commission) afin d'être autorisée à vendre des biens situés à Calgary. A ltée a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. Dans le cadre de son examen de la demande d'autorisation de la vente, la Commission a utilisé le critère de « l'absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération; elle a conclu a « l'absence de préjudice ». La Commission a ensuite décidé de l'attribution du produit net de la vente. Elle a conclu qu'il fallait appliquer la formule selon laquelle le profit inattendu réalisé lorsque le produit de la vente excède le coût initial pouvait être réparti entre les clients et les actionnaires. Elle a conclu qu'il fallait tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments. Elle a réparti le produit brut de la vente de 6 550 000 $ comme suit: 465 000 $ à A ltée pour les frais d'aliénation et de dépollution, 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients.

A ltée est allée en appel, soutenant que la Commission n'avait pas compétence pour décider de l'attribution du produit de la vente et que celui-ci aurait dû être attribué en totalité aux actionnaires. Le pourvoi a été accueilli, la décision de la Commission a été annulée et l'affaire a été renvoyée devant la Commission. Il a été ordonné à la Commission d'attribuer à A ltée la totalité du produit qualifié de « [Traduction] résidu à partager ». La Cour d'appel a conclu que la Commission n'avait pas compétence pour attribuer le produit de la vente aux clients. Représentant les intérêts des clients, la Ville a interjeté appel, alléguant que la Commission avait compétence pour attribuer aux clients une partie du produit net de la vente d'un bien appartenant à un service public, et ce, même si la Commission a conclu à l'absence de préjudice pour le public au moment où elle a autorisé la vente. A ltée a formé un pourvoi incident, soutenant que la Commission n'avait pas compétence pour attribuer une partie du produit aux clients équivalente à la dépréciation accumulée calculée pour les années antérieures, et mettant en doute la compétence de la Commission d'attribuer une quelconque partie du produit de la vente aux clients.

Arrêt: Le pourvoi a été rejeté et le pourvoi incident a été accueilli.

Bastarache, J. (LeBel, Deschamps et Charron, JJ., souscrivant à son opinion): La décision de la Commission devait être annulée et l'affaire devait être renvoyée à celle-ci afin qu'elle autorise la vente des biens appartenant à A ltée et qu'elle reconnaisse que le produit de la vente appartient à A ltée.

La norme de la décision correcte était la norme applicable à la question de la compétence de la Commission. Il n'y avait pas lieu de faire preuve de retenue à l'égard de la décision de la Commission quant à la compétence de celle-ci pour attribuer le produit net de la vente des biens.

La Cour d'appel n'a pas commis d'erreur de fait ou de droit en concluant que la Commission a excédé sa compétence en interprétant mal ses pouvoirs conférés par la loi et la common law. Elle a cependant commis une erreur en omettant de conclure que la Commission n'avait pas compétence pour attribuer aux clients quelque partie que ce soit du produit de la vente des biens.

Il ressortait de l'examen du sens grammatical et ordinaire des dispositions pertinentes de la Gas Utilities Act (GUA), de la Alberta Energy and Utilities Board Act (AEUBA) et de la Public Utilities Board Act (PUBA) que ces lois étaient silencieuses quant aux pouvoirs de la Commission d'aborder la question du produit de la vente de biens. Il fallait examiner le contexte plus général. Le pouvoir discrétionnaire octroyé par les art. 15(3) AEUBA et 37 PUBA n'était pas illimité. La Commission devait exercer son pouvoir discrétionnaire à l'intérieur des limites du régime législatif et des principes généralement applicables aux affaires réglementaires.

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Les clients n'avaient aucun droit de propriété sur le service public. Ils n'avaient fait aucun investissement. Ce sont les actionnaires qui investissent des fonds et ce sont eux qui assument les risques, car ils ont droit au reliquat du profit du service public. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise de services publics est le propriétaire. Elle ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. Les différentes lois ne conféraient pas un tel pouvoir, et on ne pouvait même pas dire qu'il y avait eu paiement excessif. Le pouvoir d'attribuer le produit de la vente des biens du service public n'était pas nécessairement accessoire aux pouvoirs expressément conférés à la Commission par la AEUBA, la GUA et la PUBA. Il fallait interpréter l'art. 15(3) AEUBA en conformité avec l'objet de l'art. 26(2). Permettre à la Commission de confisquer le gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'intérêt public serait se méprendre grandement sur le pouvoir de celle-ci d'autoriser ou non une vente. Cela ferait totalement abstraction des fondements économiques de la tarification. Aucune des trois lois n'accordait à la Commission le pouvoir d'attribuer le produit de la vente et, donc, d'empiéter sur le droit de propriété de l'entreprise de services publics.

Même s'il avait été conclu que la Commission n'avait pas compétence, le résultat aurait été le même. La Commission n'a pas exercé son pouvoir de façon raisonnable. Elle a présumé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise de services publics parce que les biens constituaient l'un des facteurs pris en compte dans le cadre du processus de tarification. Elle a explicitement conclu que la vente des biens ne causerait aucun préjudice aux clients. Les clients n'avaient aucun intérêt légitime qui devrait être protégé ou avait besoin de l'être en refusant d'autoriser la vente ou en accordant une autorisation conditionnelle à une attribution particulière du produit.

Binnie, J. (dissident) (McLachlin, J.C.C., et Fish, J., souscrivant à son opinion): Le pourvoi devrait être accueilli, la décision de la Commission rétablie et le pourvoi incident rejeté. La Commission avait le pouvoir, en vertu de l'art. 15(3) AEUBA, d'assortir la vente de toutes les conditions qu'elle peut juger nécessaires dans l'intérêt du public. C'était à la Commission qu'il revenait de décider si les conditions d'autorisation qu'elle avait imposées étaient nécessaires dans l'intérêt du public. La Commission était mieux placée dans ce domaine que ne l'était la Cour d'appel ou la Cour suprême du Canada pour apprécier la nécessité de protéger l'intérêt du public.

La norme de contrôle applicable pour les questions de compétence était celle de la décision correcte. L'exercice de son pouvoir discrétionnaire par la Commission commandait de faire preuve d'une plus grande retenue. L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent l'application de la norme de la décision manifestement déraisonnable. Peu importe que la norme de contrôle soit celle de la décision manifestement déraisonnable ou celle de la décision raisonnable, il demeurait que la décision de la Commission se situait dans les limites des opinions exprimées par les organismes de réglementation.

Ni les lois ni les pratiques réglementaires en cours dans la province ou ailleurs ne donnaient de réponse aux problèmes devant la Commission. Il aurait été loisible à celle-ci d'accorder la demande de A ltée à l'égard du produit en entier. Cependant, la solution adoptée par la Commission se situait à l'intérieur de ses pouvoirs conférés par la loi et ne nécessitait aucune intervention des tribunaux. C'était à la Commission qu'il revenait de décider, en fonction des circonstances de l'espèce, quelles conditions devaient être imposées dans l'intérêt du public; la solution trouvée par la Commission se situait à l'intérieur des choix raisonnables. L'argument de A ltée selon lequel l'attribution déterminée par la Commission avait un effet confiscatoire ne tenait pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. La Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure, et non antérieure, ce qui était conforme à la pratique réglementaire.

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Dans l'exercice de ce pouvoir conféré par l'art. 15(3) AEUBA et vu la surveillance générale des services de gaz et de leurs propriétaires qui lui incombait conformément à l'art. 22(1) GUA, la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. La Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'A ltée souhaitait soustraire à la base tarifaire.

Cases considered by *Bastarache J.*:

ATCO Electric Ltd., Re (December 4, 2003), Doc. 2002-098 (Alta. E.U.B.) — referred to

Atco Ltd. v. Calgary Power Ltd. (1982), [1982] 2 S.C.R. 557, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 20 B.L.R. 227, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 41 A.R. 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 140 D.L.R. (3d) 193, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* [1983] 1 W.W.R. 385, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 23 Alta. L.R. (2d) 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 45 N.R. 1, 1982 CarswellAlta 205, 1982 CarswellAlta 557 (S.C.C.) — considered

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

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

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Bristol-Myers Squibb Co. v. Canada (Attorney General) (2005), 253 D.L.R. (4th) 1, 2005 SCC 26, 2005 CarswellNat 1261, 2005 CarswellNat 1262, 39 C.P.R. (4th) 449, 334 N.R. 55, [2005] 1 S.C.R. 533 (S.C.C.) — considered

Canadian Broadcasting League v. Canada (Canadian Radio-Television & Telecommunications Commission) (1982), 138 D.L.R. (3d) 512, 43 N.R. 77, [1983] 1 F.C. 182, 67 C.P.R. (2d) 49, 1982 CarswellNat 71F, 1982 CarswellNat 71 (Fed. C.A.) — referred to

Canadian Broadcasting League v. Canada (Canadian Radio-Television & Telecommunications Commission) (1985), [1985] 1 S.C.R. 174, 57 N.R. 76, 1985 CarswellNat 671, 1985 CarswellNat 671F (S.C.C.) — referred to

Canadian Pacific Air Lines Ltd. v. C.A.L.P.A. (1993), 93 C.L.L.C. 14,062, 17 Admin. L.R. (2d) 141, 160 N.R. 321, [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1, 1993 CarswellNat 816, 1993 CarswellNat 1385 (S.C.C.) — considered

Chieu v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 3, 2002 CarswellNat 5, 2002 CarswellNat 6, 18 Imm. L.R. (3d) 93, 208 D.L.R. (4th) 107, 280 N.R. 268, 37 Admin. L.R. (3d) 252, [2002] 1 S.C.R. 84 (S.C.C.) — referred to

Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy & Utilities Board) (1996), 41 Alta. L.R. (3d) 374, [1996] 9 W.W.R. 637, 187 A.R. 205, 127 W.A.C. 205, 1996 CarswellAlta 689 (Alta. C.A.)

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— referred to

Consumers' Gas Co. v. Ontario (Energy Board) (2001), 2001 CarswellOnt 4503 (Ont. Div. Ct.) — referred to

Contino v. Leonelli-Contino (2005), 2005 CarswellOnt 6281, 2005 CarswellOnt 6282, 2005 SCC 63, 19 R.F.L. (6th) 272 (S.C.C.) — referred to

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

Coseka Resources Ltd. v. Saratoga Processing Co. (1981), [1981] 2 S.C.R. vii, 40 N.R. 172, 34 A.R. 360 (note) (S.C.C.) — referred to

Dome Petroleum Ltd. v. Alberta (Public Utilities Board) (1976), 2 A.R. 453, 13 N.R. 301 (Alta. C.A.) — considered

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Dow Chemical Canada Inc. v. Union Gas Ltd. (1982), 141 D.L.R. (3d) 641, 1982 CarswellOnt 753 (Ont. Div. Ct.) — considered

Dow Chemical Canada Inc. v. Union Gas Ltd. (1983), 42 O.R. (2d) 731, 3 Admin. L.R. 314, 150 D.L.R. (3d) 267, 1983 CarswellOnt 785 (Ont. C.A.) — referred to

Duquesne Light Co. v. Barasch (1989), 488 U.S. 299, 98 P.U.R. 4th 253, 109 S.Ct. 609, 102 L.Ed.2d 646, 57 U.S.L.W. 4083 (U.S. S.C.) — referred to

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

Hongkong Bank of Canada v. Wheeler Holdings Ltd. (1993), 6 Alta. L.R. (3d) 337, 135 A.R. 83, 33 W.A.C. 83, 100 D.L.R. (4th) 40, 29 R.P.R. (2d) 1, [1993] 1 S.C.R. 167, 148 N.R. 1, 1993 CarswellAlta 250, 1993 CarswellAlta 559 (S.C.C.) — referred to

Interprovincial Pipe Line Ltd. v. Canada (National Energy Board) (1977), [1978] 1 F.C. 601, 78 D.L.R. (3d) 401, 17 N.R. 56, 1977 CarswellNat 125, 1977 CarswellNat 125F (Fed. C.A.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

Leiriao c. Val-Bélair (Ville) (1991), 7 M.P.L.R. (2d) 1, (sub nom. *Leiriao v. Val-Bélair (Town)*) [1991] 3 S.C.R. 349, (sub nom. *Leiriao v. Val-Bélair (Town)*) 46 L.C.R. 161, 1991 CarswellQue 48, 129 N.R. 188, 1991 CarswellQue 107 (S.C.C.) — referred to

Marche v. Halifax Insurance Co. (2005), 1 S.C.R. 47, [2005] R.R.A. 1, 2005 SCC 6, 2005 CarswellNS 77, 2005 CarswellNS 78, 18 C.C.L.I. (4th) 1, 248 D.L.R. (4th) 577, [2005] I.L.R. 4383, 330 N.R. 115, 230 N.S.R.

(2d) 333, 729 A.P.R. 333 (S.C.C.) — considered

Market St. Ry. Co. v. Railroad Commission California (1945), 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 (U.S. S.C.) — referred to

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

Pacific National Investments Ltd. v. Victoria (City) (2000), 2000 SCC 64, 2000 CarswellBC 2439, 2000 CarswellBC 2441, 193 D.L.R. (4th) 385, 83 B.C.L.R. (3d) 207, [2001] 3 W.W.R. 1, 263 N.R. 1, 15 M.P.L.R. (3d) 1, [2000] 2 S.C.R. 919, 144 B.C.A.C. 203, 236 W.A.C. 203 (S.C.C.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — followed

R. v. McIntosh (1995), 36 C.R. (4th) 171, 95 C.C.C. (3d) 481, 21 O.R. (3d) 797 (note), 178 N.R. 161, 79 O.A.C. 81, [1995] 1 S.C.R. 686, 1995 CarswellOnt 4, 1995 CarswellOnt 518 (S.C.C.) — referred to

Reference re National Energy Board Act (1986), 19 Admin. L.R. 301, (sub nom. *National Energy Board Act (Canada), Re)* [1986] 3 F.C. 275, 29 D.L.R. (4th) 35, 69 N.R. 174, 1986 CarswellNat 225, 1986 CarswellNat 690 (Fed. C.A.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

TransAlta Utilities Corp., Re (March 28, 2002), Doc. 2002-038 (Alta. E.U.B.) — referred to

Transalta Utilities Corp. v. Alberta (Public Utilities Board) (1986), 43 Alta. L.R. (2d) 171, 21 Admin. L.R. 1, 68 A.R. 171, 1986 CarswellAlta 24 (Alta. C.A.) — considered

Union Gas Ltd. v. Ontario (Energy Board) (1983), 43 O.R. (2d) 489, 1 D.L.R. (4th) 698, 1983 CarswellOnt 919 (Ont. Div. Ct.) — referred to

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (2004), [2004] 7 W.W.R. 603, 346 A.R. 4, 320 W.A.C. 4, 26 Alta. L.R. (4th) 1, 12 Admin. L.R. (4th) 1, [2004] 1 S.C.R. 485, 46 M.P.L.R. (3d) 1, 236 D.L.R. (4th) 385, 318 N.R. 170, 18 R.P.R. (4th) 1, 50 M.V.R. (4th) 1, 2004 SCC 19, 2004 CarswellAlta 355, 2004 CarswellAlta 356 (S.C.C.) — considered

Cases considered by *Binnie J.*:

Arizona Public Service Co., Re (1988), 91 P.U.R. 4th 337 (U.S. Ariz. C.C.) — considered

Atco Ltd. v. Calgary Power Ltd. (1982), [1982] 2 S.C.R. 557, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 20

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B.L.R. 227, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 41 A.R. 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 140 D.L.R. (3d) 193, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* [1983] 1 W.W.R. 385, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 23 Alta. L.R. (2d) 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.)* 45 N.R. 1, 1982 CarswellAlta 205, 1982 CarswellAlta 557 (S.C.C.) — considered

Board of Public Utility Commissioners v. New York Telephone Co. (1926), 271 U.S. 23, 46 S.Ct. 363, 70 L.Ed. 808 (U.S.S.C.) — considered

Boston Gas Co., Re (1982), 49 P.U.R. 4th 1 (U.S. Mass. D.P.U.) — considered

C.J.A., Local 579 v. Bradco Construction Ltd. (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — considered

C.U.P.E. v. Ontario (Minister of Labour) (2003), [2003] 1 S.C.R. 539, 2003 SCC 29, 2003 CarswellOnt 1770, 2003 CarswellOnt 1803, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour))* 66 O.R. (3d) 735 (note), 2003 C.L.L.C. 220-040, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour))* 304 N.R. 76, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour))* 173 O.A.C. 38, 50 Admin. L.R. (3d) 1, 226 D.L.R. (4th) 193 (S.C.C.) — considered

Calgary Power Ltd. v. Copithorne (1958), 16 D.L.R. (2d) 241, 78 C.R.T.C. 31, [1959] S.C.R. 24, 1958 CarswellAlta 74 (S.C.C.) — considered

California Water Service Co., Re (1996), 66 CPUC (2d) 100 (U.S. Cal. P.U.C.) — considered

Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd. (1987), 10 O.S.C.B. 1771, 35 B.L.R. 117, 23 Admin. L.R. 285, (sub nom. *C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission))* 59 O.R. (2d) 79, 37 D.L.R. (4th) 94, 21 O.A.C. 216, 1987 CarswellOnt 1733 (Ont. Div. Ct.) — considered

Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission) (2001), 2001 SCC 37, 2001 CarswellOnt 1959, 2001 CarswellOnt 1960, 24 O.S.C.B. 3641, 29 Admin. L.R. (3d) 1, 199 D.L.R. (4th) 577, (sub nom. *Asbestos Corp., Société nationale de l'Amiante & Quebec (Province), Re)* 269 N.R. 311, 14 B.L.R. (3d) 1, 146 O.A.C. 201, [2001] 2 S.C.R. 132 (S.C.C.) — referred to

Compliance with the Energy Policy Act of 1992, Re (1995), 62 CPUC (2d) 517 (U.S. Cal. P.U.C.) — considered

Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission (1973), 485 F.2d 786, 158 U.S.App.D.C. 7 (U.S. C.A. D.C.) — considered

Memorial Gardens Assn. (Canada) Ltd. v. Colwood Cemetery Co. (1958), [1958] S.C.R. 353, 13 D.L.R. (2d) 97, 76 C.R.T.C. 319, 1958 CarswellBC 165 (S.C.C.) — considered

New York Water Service Co. v. Public Service Commission (1962), 37 P.U.R. 3d 442, 12 A.D.2d 122, 208 N.Y.S.2d 857 (U.S. S.C. Ct. App.) — considered

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

Pezim v. British Columbia (Superintendent of Brokers) (1994), 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 46 B.C.A.C. 1, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 75 W.A.C. 1, 1994 CarswellBC 232, 1994 CarswellBC 1242 (S.C.C.) — referred to

Q. v. College of Physicians & Surgeons (British Columbia) (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — considered

Southern California Gas Co., Re (1990), 118 P.U.R. 4th 81, 38 CPUC (2d) 166 (U.S. Cal. P.U.C.) — considered

Southern California Water Co., Re (1992), 43 CPUC (2d) 596 (U.S. Cal. P.U.C.) — considered

Transalta Utilities Corp. v. Alberta (Public Utilities Board) (1986), 43 Alta. L.R. (2d) 171, 21 Admin. L.R. 1, 68 A.R. 171, 1986 CarswellAlta 24 (Alta. C.A.) — considered

Union Gas Co. of Canada v. Sydenham Gas & Petroleum Co. (1957), [1957] S.C.R. 185, 75 C.R.T.C. 1, 7 D.L.R. (2d) 65, 1957 CarswellOnt 54 (S.C.C.) — considered

Yukon Energy Corp. v. Yukon (Utilities Board) (1996), 74 B.C.A.C. 58, 121 W.A.C. 58, 1996 CarswellYukon 3 (Y.T. C.A.) — considered

Statutes considered by *Bastarache J.*:

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

Generally — considered

s. 13 — referred to

s. 15 — considered

s. 15(1) — considered

s. 15(3) — considered

s. 15(3)(d) — considered

s. 26(1) — considered

s. 26(2) — considered

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s. 27 — referred to

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

s. 25.1(2) [en. 1984, c. 66, s. 1(3)] — referred to

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

Generally — considered

s. 16 — referred to

s. 17 — referred to

s. 22 — referred to

s. 22(1) — referred to

s. 24 — referred to

s. 24(1) — referred to

s. 26 — referred to

s. 26(1) — referred to

s. 26(2) — considered

s. 26(2)(a) — referred to

s. 26(2)(d) — considered

s. 26(2)(d)(i) — considered

s. 26(2)(d)(ii) — referred to

s. 27(1) — referred to

s. 36 — referred to

s. 36(a) — considered

ss. 36-45 — referred to

s. 37 — referred to

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s. 37(1) — considered

s. 37(2) — considered

s. 37(3) — referred to

s. 40 — referred to

s. 59 — referred to

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

s. 10 — referred to

Public Utilities Act, S.A. 1915, c. 6

Generally — considered

s. 21 — referred to

s. 23 — referred to

s. 24 — referred to

s. 29(g) — referred to

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

Generally — considered

s. 36 — referred to

s. 37 — considered

s. 80 — referred to

s. 80(b) — referred to

s. 85(1) — referred to

s. 87 — referred to

s. 89 — referred to

s. 89(a) — considered

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ss. 89-95 — referred to

s. 90 — referred to

s. 91 — referred to

s. 101 — referred to

s. 101(2)(a) — referred to

s. 101(2)(d)(i) — referred to

s. 101(2)(d)(ii) — referred to

s. 102(1) — referred to

Statutes considered by *Binnie J.*:

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

s. 15(3) — considered

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

s. 22(1) — considered

s. 26 — considered

s. 26(2)(d)(i) — considered

Hydro and Electric Energy Act, R.S.A. 1980, c. H-13

Generally — referred to

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

s. 101(2)(d)(i) — referred to

APPEAL by city from judgment reported at *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205, [2004] 4 W.W.R. 239, 312 W.A.C. 250, 339 A.R. 250, 2004 CarswellAlta 55, 2004 ABCA 3 (Alta. C.A.), allowing appeal by gas company from decision of utilities board allocating proceeds of sale of company's former assets to customers; CROSS-APPEAL by company with respect to jurisdiction of board.

POURVOI de la Ville à l'encontre de l'arrêt publié *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2004), 24 Alta. L.R. (4th) 205, [2004] 4 W.W.R. 239, 312 W.A.C. 250, 339 A.R. 250, 2004 CarswellAlta 55, 2004 ABCA 3 (Alta. C.A.), qui a accueilli le pourvoi de la compagnie de gazoducs à l'encontre de la décision de la commission réglementant les services publics qui avait attribué aux clients une partie du produit de la vente de

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

biens appartenant à la compagnie; POURVOI INCIDENT de la compagnie relativement à la compétence de la commission.

***Bastarache J.*:**

1. Introduction

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

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

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

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

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its

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

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

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

1.1 Overview of the Facts

8 ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 Judicial History

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 Decision 2001-78 (Atco Gas and Pipelines Ltd.)

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,

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the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 Decision 2002-037, (Alta. E.U.B.)

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

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *Transalta Utilities Corp. v. Alberta (Public Utilities Board)* (1986), 68 A.R. 171 (Alta. C.A.), referring to various decisions it had rendered in the past. Quoting from Alta. E.U.B. Decision 2000-41 (*TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*" (para. 27):

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

The Board also referred to Decision 2001-65, where it had clarified the following (para. 28):

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

12 On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated, at paras. 47-49:

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate 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

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rate base and the Board applies the TransAlta Formula.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset.

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

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

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company (paras. 112-13):

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.

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

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

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

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the

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

2. Analysis

2.1 Issues

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

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

2.2 Standard of Review

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

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

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

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

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

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

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

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (Ont. Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy & Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (Alta. C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated 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 (S.C.C.), at p. 576; *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)* (1976), 2 A.R. 453 (Alta. C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822 (S.C.C.). The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

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

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) GUA and s. 15(3)(d) AEUBA) is not a polycentric question, contrary to the

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conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28 (S.C.C.), at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

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

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

33 The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

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

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

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35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada*, (3rd ed. 2001), at pp. 183-184).

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

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

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

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Utilities Corp., Re (Alta. E.U.B.); *ATCO Electric Ltd., Re* (Alta. E.U.B.)).

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and (3)(d) of the AEUBA and s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. ...

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

. . . . .

(d) without the approval of the Board,

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

. . . . .

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

AEUBA

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

. . . . .

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

. . . . .

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

. . . . .

PUBA

37 In matters within its jurisdiction the Board may order and require any person or local authority to do

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

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

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

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

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

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

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada*

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(Minister of Citizenship & Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3 (S.C.C.) at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

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

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

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

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

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

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

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

Dow Chemical Canada Inc. v. Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. Div. Ct.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (Ont. C.A.) (see also *Interprovincial Pipe Line Ltd. v. Canada (National Energy Board)*

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(1977), [1978] 1 F.C. 601 (Fed. C.A.); *Canadian Broadcasting League v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1982), [1983] 1 F.C. 182 (Fed. C.A.), aff'd. [1985] 1 S.C.R. 174 (S.C.C.)).

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

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

2.3.3.1 Historical Background and Broader Context

54 The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 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

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

58 It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

59 Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Alberta Government Telephones* (1984), Alta. P.U.B. Decision No. E84081; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

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

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

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

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price - nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco*, at p. 576; *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at pp. 192-93 (hereinafter "*Northwestern 1929*")).

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

65 The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable ... rates" (PUBA, s. 89(a), GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.), at p. 691 (hereinafter "*Northwestern 1979*"), adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Gas Utilities Act and Public Utilities Board Act* (1984), Alta. P.U.B. Decision No. E84113, at p. 23; *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-702.)

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

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

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(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, p. 245).

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

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory...

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

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

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

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unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (U.S. S.C. 1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission California*, 324 U.S. 548 (U.S. S.C. 1945).

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

71 From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii (S.C.C.); *Dow Chemical Canada Inc.*, at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 The Power to Attach Conditions

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

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

> 1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
>
> 2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
>
> 3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
>
> 4. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
>
> 5. when the legislature did not address its mind to the issue and decide against conferring the power to the

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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 *Reference re National Energy Board Act*, [1986] 3 F.C. 275 (Fed. C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be

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highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

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

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

2.4 Other Considerations

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

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

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

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

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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 (Decision 2002-037; para. 54):

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

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

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

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

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

***Binnie J.*:**

88 The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta

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Energy and Utilities Board (the "Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

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

I. Analysis

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

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

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

A. The Board's Statutory Authority

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them...". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have

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denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions) (Decision 2002-037, (Alta. E.U.B.), para. 47).

> In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

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

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

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

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

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

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

B. The Board's Decision

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

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

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

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

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

97 The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted (Decision 2002-037):

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

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

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

> (a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;
>
> (b) decisions made about the utility should be driven by both parties' interests;
>
> (c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and
>
> (d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

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

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

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

C. Standard of Review

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

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

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

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne* (1958), [1959] S.C.R. 24 (S.C.C.), at p. 34:

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

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.*

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

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

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

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

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

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

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

108 Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R.F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)) who wrote in *Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.* (1987), 59 O.R. (2d) 79 (Ont. Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

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

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

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109 "Patent unreasonableness" is a highly deferential standard:

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

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

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

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

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

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

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

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

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favouritism toward investors to the detriment of ratepayers affected by the transaction.

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("The Efficient Allocation of Proceeds from a Utility's Sale of Assets", by P. W. MacAvoy and J. G. Sidak (2001) 22 *Energy L.J.* 233, at p. 234)

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

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

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

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

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

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

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

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

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

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conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

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

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Yukon (Utilities Board)* (1996), 74 B.C.A.C. 58, 121 W.A.C. 58 (Y.T. C.A.), at para. 85.

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

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

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Arizona Public Service Co., Re*, 91 P.U.R. 4th 337, 1988 WL 391394 (U.S. Ariz. C.C. 1988):

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

121 Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Southern California Water Co., Re*, 43 CPUC (2d) 596, 1992 WL 584058 (U.S. Cal. P.U.C. 1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders. The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D. 89-07-016, 32 Cal. P.U.C. 2d 233 (Redding). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset

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> and replaces it with another asset or obligation while at the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation.

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

F. ATCO's Arguments

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

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

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

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

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

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

1. The Confiscation Issue

129 In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the market place. In *Southern California Gas Co., Re*, 38 CPUC (2d) 166, 118 P.U.R. 4th 81, 1990 WL 488654 (U.S. Cal. P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

> In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment.

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> Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property.

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

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (U.S. C.A. D.C. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

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

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (U.S.S.C. 1926), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said (at p. 31):

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

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

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

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

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

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

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

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

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

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

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

134 My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the

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utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals as follows (at p. 806):

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

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.), Estey J. stated, at p. 691:

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

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Co. v. Public Service Commission*, 208 N.Y.S.2d 857 (U.S. S.C. Ct. App. 1962). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p. 864):

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

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

138 More recently, in *Compliance with the Energy Policy Act of 1992, Re*, 62 CPUC (2d) 517, WL 768628 (U.S. Cal. P.U.C. 1995), the regulator commented:

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

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

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

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

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

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

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

143 In *California Water Service Co., Re*, 66 CPUC (2d) 100, 1996 WL 293205 (U.S. Cal. P.U.C. 1996), the regulator commented that:

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

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

4. Lack of Reciprocity

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

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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

(See *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116, at p. 17; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84115, at p. 12; *Re Gas Utilities Act and Public Utilities Board Act*, (1984), Alta. P.U.B. Decision No. E84113, at p. 23.)

146 In *Alberta Government Telephones*, the Board reviewed a number of regulatory approaches (including *Boston Gas Co., Re*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

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

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market, the utility continues to be entitled to a rate of return on its original investment even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

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

II. Conclusion

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

III. Disposition

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

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident rejeté.

Appendix — APPENDIX

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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

[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]

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

(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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

(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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

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]

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

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

2006 CarswellAlta 139, 2006 SCC 4, J.E. 2006-358, 344 N.R. 293, [2006] A.W.L.D. 775, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140

(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.

FN* A corrigendum issued by the court on April 24, 2006 has been incorporated herein.

END OF DOCUMENT

TAB 4

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

Snopko v. Union Gas Ltd.

Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight (Plaintiffs / Appellants) and Union Gas Ltd. and Ram Petroleums Ltd. (Defendants / Respondents)

Ontario Court of Appeal

David Watt J.A., J. MacFarland J.A., and Robert J. Sharpe J.A.

Heard: January 22, 2010
Judgment: April 7, 2010
Docket: CA C49977

Proceedings: affirmed *Snopko v. Union Gas Ltd.* ((January 6, 2009)), Doc. 5021/08 ((Ont. S.C.J.))

Counsel: Donald R. Good for Appellants

Crawford Smith for Respondents

Subject: Natural Resources; Civil Practice and Procedure; Contracts; Torts

Natural resources --- Oil and gas — Statutory regulation — Provincial boards

Plaintiffs' lands formed part of one of natural gas storage pools U Ltd. operated — Plaintiffs' gas storage leases with R Ltd. had been assigned to U Ltd. — Ontario Energy Board issued designation order which, inter alia, authorized U Ltd. to inject, store, and remove gas from storage pool — Association, of which plaintiffs were members, brought application before board seeking "fair and equitable compensation" from U Ltd. under s. 38(3) of Ontario Energy Board Act, 1998 — Settlement reached on issue of just and equitable compensation for claims arising during certain years — Plaintiffs brought action against R Ltd. and U Ltd., alleging, inter alia, breach of contract — U Ltd.'s motion for summary judgment dismissing action against it was granted on jurisdictional grounds — Plaintiffs appealed — Appeal dismissed — Board had broad jurisdiction under Act to, inter alia, authorize injection of gas into designated gas storage area, and order person so authorized to pay just and equitable compensation to owners of property overlaying area — Under s. 38(3) of Act, no civil proceeding could be commenced to determine that compensation — In substance, plaintiffs' claims fell within s. 38(2) of Act as claims for just and equitable compensation "in respect of the gas or oil rights or the right to store gas" or "for any damage necessarily resulting

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

from the exercise of the authority given by" designation order — Under s. 19 of Act, board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact" — Board had power to decide all questions of fact and law arising in connection with matters properly before it, including power to rule on validity of relevant contracts and deal with other substantive legal issues.

Civil practice and procedure --- Summary judgment — Miscellaneous.

Cases considered by *Robert J. Sharpe J.A.*:

Wellington v. Imperial Oil Ltd. (1969), [1970] 1 O.R. 177, 8 D.L.R. (3d) 29, 1969 CarswellOnt 247 (Ont. H.C.) — considered

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

s. 19 — considered

s. 19(1) — referred to

s. 36.1 [en. 2001, c. 9, Sched. F, s. 2(2)] — considered

s. 37 — considered

s. 38 — considered

s. 38(2) — considered

s. 38(3) — considered

APPEAL by plaintiffs from judgment granting defendant's motion for summary judgment dismissing action against it.

***Robert J. Sharpe J.A.*:**

1 This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

2 The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd.

("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

3 In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

4 In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

5 In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement, Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

6 On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

7 Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

8 The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

9 Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

10 Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

11 Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

Compensation Order. Each of the appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

12 On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

13 The appellants advance the following claims against Union:

- *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);

- *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));

- *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);

- *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and

- *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

14 The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

15 In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

16 Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

17 The Act provides as follows with respect to the regulation of gas storage areas:

Gas storage areas

36.1(1) The Board may by order,

(a) designate an area as a gas storage area for the purposes of this Act; or

(b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2 (2).

Transition

(2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1) (a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2 .

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2 (3).

Authority to store

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1) ,

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 .

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply.

18 In addition, s. 19 of the Act provides as follows:

Power to determine law and fact

> 19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

19 The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Wellington v. Imperial Oil Ltd.* (1969), [1970] 1 O.R. 177 (Ont. H.C.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> . . . . .
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

20 The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

21 While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

22 Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

23 The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

24 I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas

right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

25 The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

26 In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

27 Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

28 In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Wellington v. Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

29 By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

30 In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

31 As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

32 For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

J. MacFarland J.A.:

I agree.

David Watt J.A.:

I agree.

Appeal dismissed.

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TAB 5

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2006 CarswellOnt 4458, 214 O.A.C. 236, 149 A.C.W.S. (3d) 889

Natural Resource Gas Ltd. v. Ontario (Energy Board)

NATURAL RESOURCE GAS LIMITED (Appellant) and ONTARIO ENERGY BOARD (Respondent)

Ontario Court of Appeal

J. Laskin J.A., R.G. Juriansz J.A., and S. Borins J.A.

Heard: April 28, 2006
Judgment: July 21, 2006
Docket: CA C44333

Proceedings: affirming *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2005), 2005 CarswellOnt 1569, 197 O.A.C. 310 (Ont. Div. Ct.)

Counsel: Alan Mark, Jennifer Teskey for Appellant

Glenn Zacher for Respondent

Subject: Public

Public law --- Public utilities — Regulatory boards — Regulation of rates

Utilities company provided natural gas services to Ontario customers — Due to fluctuations between purchase price of gas and amount charged to customers, company maintained variance account — Company made clerical error in determining variance amount and under collected costs by $531,794 — Ontario Energy Board approved recovery of costs over three-year period, but disallowed company from recovering interest, or regulatory costs involved in board proceedings — Divisional Court judge dismissed company's appeal — Company appealed — Appeal dismissed — Board's decision was reasonable — Board concluded that company's regulatory costs were not prudently incurred — But for company's accounting error and delay in recognizing it, company would not have had to incur costs to seek and obtain board's decision to permit recovery of unrecorded costs — It was open to board to consider underlying as well as direct cause of interest charges — While interest charges directly resulted from board's decision to defer their recovery, board would not have faced situation that prompted that decision had company recorded gas costs variances properly.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Miscellaneous

Standard of review — Utilities company provided natural gas services to Ontario customers — Due to fluctuations between purchase price of gas and amount charged to customers, company maintained variance account — Company made clerical error in determining variance amount and under collected costs by $531,794 — Ontario Energy Board approved recovery of costs over three year period, but disallowed company from recovering interest, or regulatory costs involved in board proceedings — Divisional Court judge dismissed company's appeal — Company appealed — Appeal dismissed — Board's decision was reviewable on standard of reasonableness — At issue was interpretation of words "just and reasonable" in s. 36(3) of Ontario Energy Board Act, 1998, which provides that "in approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate" — Act does not contain privative clause — Section 33 of Act provides right of appeal to Divisional Court from order of board only upon question of law or jurisdiction — While question involved meaning of phrase "just and reasonable", it required application of that phrase to particular and unusual facts of this case — Question was one of mixed fact and law and involved policy considerations as well — Board possessed greater expertise relative to court in determining question.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Utilities company provided natural gas services to Ontario customers — Due to fluctuations between purchase price of gas and amount charged to customers, company maintained variance account — Company made clerical error in determining variance amount and under collected costs by $531,794 — Ontario Energy Board approved recovery of costs over three year period, but disallowed company from recovering interest, or regulatory costs involved in board proceedings — Divisional Court judge dismissed company's appeal — Company appealed — Appeal dismissed — Board's decision was reviewable on standard of reasonableness — At issue was interpretation of words "just and reasonable" in s. 36(3) of Ontario Energy Board Act, 1998, which provides that "in approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate" — Act does not contain privative clause — Section 33 of Act provides right of appeal to Divisional Court from order of board only upon question of law or jurisdiction — While question involved meaning of phrase "just and reasonable", it required application of that phrase to particular and unusual facts of this case — Question was one of mixed fact and law and involved policy considerations as well — Board possessed greater expertise relative to court in determining question.

Cases considered by *R.G. Juriansz J.A.*:

Enbridge Gas Distribution Inc. v. Ontario (Energy Board) (2006), 2006 CarswellOnt 2106 (Ont. C.A.) — considered

Graywood Investments Ltd. v. Ontario (Energy Board) (2006), 2006 CarswellOnt 3100 (Ont. C.A.) — considered

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — referred to

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — considered

TransCanada Pipelines Ltd. v. Canada (National Energy Board) (2004), 2004 CAF 149, 2004 CarswellNat

2545, 319 N.R. 171, 2004 FCA 149, 2004 CarswellNat 987 (F.C.A.) — considered

Statutes considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

s. 2 — considered

s. 33 — considered

s. 36 — considered

s. 36(1) — considered

s. 36(2) — considered

s. 36(3) — considered

s. 44(1) — considered

APPEAL by utilities company from judgment reported at *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2005), 2005 CarswellOnt 1569, 197 O.A.C. 310 (Ont. Div. Ct.) dismissing its appeal from decision of Ontario Energy Board approving recovery of costs over three year period, but disallowing company from recovering interest, or regulatory costs involved in Board proceedings.

R.G. Juriansz J.A.:

I. Introduction

1 Natural Resource Gas Limited ("NRG") appeals from a decision of the Divisional Court dated April 21, 2005, dismissing its appeal of the Review Decision of the Ontario Energy Board (the "OEB") dated April 19, 2004.

2 NRG purchases gas from producers and distributes it to its customers at rates regulated by the OEB. Because of an accounting error, NRG had unrecorded costs of purchasing gas in the amount of $531,794 during the period from October 1, 2002 to December 31, 2003. Had these costs been recognized, they would have been passed on to NRG's customers in the normal course. After an initial unsuccessful application, NRG made a second application to the OEB on January 20, 2004 in which it sought authorization to record the unrecorded costs as a debit as of January 1, 2004 and an order allowing the recovery of the unrecorded costs by increasing its rates over a twelve month period commencing May 1, 2004. The OEB's Review Decision on that application is the subject of this appeal.

3 In that decision, the OEB found the unrecorded costs were material and had been prudently incurred and therefore NRG should be permitted to recover them. The OEB also decided that NRG's recovery of the costs would be deferred over three years to minimize rate volatility to customers. Then, in what gives rise to this appeal, the OEB went on to decide that NRG would not be allowed to recover any of its regulatory costs or the interest charges associated with the deferral of the recovery of the unrecorded costs.

4 NRG contends that the interest and regulatory expenses result not from the accounting error but from the OEB's decision to defer recovery the unrecorded costs. NRG submits that since the OEB decided that the unrecorded costs were prudently incurred, it follows that the expenses that are associated with the OEB's decision to defer recovery are also prudently incurred. NRG asserts that as a matter of law it would not be "just and reasonable" to deny their recovery.

5 I would dismiss the appeal because the OEB's decision satisfies the applicable standard of review: reasonableness.

II Issues on Appeal

1. What is the standard of review that applies to the OEB's decision?

2. Did the OEB commit reversible error by denying NRG recovery of its regulatory costs and interest charges?

III Standard of Review

6 The Divisional Court applied a standard of reasonableness: "[I]n view of the lack of a privative clause, the OEB's disposition attracts at least a standard of reasonableness." NRG submits the Divisional Court erred and that the proper standard of review of the OEB's decision in this case is correctness.

7 In two recent decisions, *Graywood Investments Ltd. v. Ontario (Energy Board)*, [2006] O.J. No. 2030 (Ont. C.A.) and *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (Ont. C.A.), this court has considered the standard of review of decisions of the OEB.

8 In *Enbridge*, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".

9 In *Graywood*, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):

> First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference.

10 In order to take this case outside the application of this general conclusion, NRG must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in *Graywood*.

11 *Graywood* concerned a dispute as to whether the parties had agreed that Toronto Hydro would install an electricity distribution system in a Graywood building project before November 1, 2000. This case concerns whether the OEB's decision to deny recovery of certain regulatory and interest expenses is "just and reasonable". I am satisfied the nature of these questions is sufficiently different that it is necessary to address the standard of review that applies in this case afresh. That *Graywood* was not available to the parties when this case was argued provides additional reason to do so.

12 Determining the applicable standard of review requires a pragmatic and functional consideration of four factors:

i) the existence of a privative clause;

ii) the expertise of the tribunal;

iii) the purpose of the statute as a whole, and the provision in particular; and

iv) the nature of the question in dispute.

Pushpanathan v. Canada (Minister of Employment & Immigration), [1998] 1 S.C.R. 982 (S.C.C.), at paras. 29-38.

13 These factors, in my view, need not be analysed separately or in any particular order. I address all four factors in the following general discussion

14 The OEB derives its authority from the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Sched. B (the "*Act*").

15 The objectives of the OEB with respect to gas regulation are set out in section 2 of the *Act*:

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.

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

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2.

16 The OEB also has a broad rule-making regulatory jurisdiction:

44.(1) The Board may make rules,

(a) governing the conduct of a gas transmitter, gas distributor or storage company as such conduct relates to its affiliates;

(b) governing the conduct of a gas distributor as such conduct relates to any person,

(i) selling or offering to sell gas to a consumer,

(ii) acting as agent or broker for a seller of gas to a consumer, or

(iii) acting or offering to act as the agent or broker of a consumer in the purchase of gas;

(c) governing the conduct of persons holding a licence issued under Part IV;

(d) establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company;

(e) establishing classes of gas transmitters, gas distributors and storage companies;

(f) requiring and providing for the making of returns, statements or reports by any class of gas transmitters, gas distributors or storage companies relating to the transmission, distribution, storage or sale of gas, in such form and containing such matters and verified in such manner as the rule may provide;

(g) requiring and providing for an affiliate of a gas transmitter, gas distributor or storage company to make returns, statements or reports relating to the transmission, distribution, storage or sale of gas by the gas transmitter, gas distributor or storage company of which it is the affiliate, in such form and containing such matters and verified in such manner as the rule may provide;

(h) establishing a uniform system of accounts applicable to any class of gas transmitters, gas distributors or storage companies;

(i) respecting any other matter prescribed by regulation. 1998, c. 15, Sched. B, s. 44 (1).

17 The provision in issue is s. 36 of the *Act*. It prohibits a gas distributor from selling gas or charging for its distribution except in accordance with an order of the OEB and provides that the OEB is not bound by the terms of the contract. It authorizes the OEB to approve or fix "just and reasonable rates" for the sale, transmission, distribution and storage of gas. It allows the OEB, in approving or fixing just and reasonable rates, to adopt any method or technique that it considers appropriate. At the time it provided in part:

36 (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

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

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

. . . . .

18 It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate

the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.

19 The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction".

20 NRG would characterize the question at issue as one of law, namely, the definition of the phrase "just and reasonable" as used in section 36 of the Act. NRG submits that, properly interpreted, the words "just and reasonable" require that a utility be allowed to recover all its legitimate, prudently incurred costs. NRG argues that the OEB, having found that the unrecorded costs were prudently incurred but not initially recognized because of an accounting error, cannot disallow interest costs that result not from the accounting error, but from the OEB's decision to defer recovery over three years.

21 The OEB suggests that the question is one involving the manner in which the OEB exercised its discretion in fixing NRG's rates.

22 The Divisional Court described the nature of the question in this way:

> The question before the Board was therefore not simply whether recovery of costs prudently incurred should be allowed, as the appellant characterized it. The matter was compounded by the added issue of how to deal with the accumulation of costs caused by the appellant's inadvertence. The Board determined that customers must pay the prudently incurred unrecorded costs of the appellant, but the impact of recovery of the accumulated total should be ameliorated by allowing recovery over three years. The accumulated cost of the time over which recovery from customers would be required and the appellant's regulatory costs ... must be borne by the appellant. That issue was not a question of law but one involving fact-finding, policy considerations, rate-setting expertise, and law.

23 I agree. While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.

24 Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness.

IV Is the Decision in This Case Reasonable?

25 The Supreme Court of Canada, in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), explained (at 270) what the reasonableness standard requires of a reviewing court:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

26 NRG submits that, as a matter of law, rates that deny utilities recovery of their legitimate prudently incurred costs cannot be "just and reasonable". Rates must be "just and reasonable" to utilities as well as to consumers.

Utilities cannot be expected to provide service if they are not allowed to recover their costs and a fair return.

27 NRG relies on the decision of the Federal Court of Appeal in *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*, [2004] F.C.J. No. 654 (F.C.A.). Under its governing legislation, the National Energy Board's authority to determine just and reasonable tolls, like that of the OEB, is not limited by any statutory directions. Rothstein J.A. indicated that the impact on customers or consumers could not be a factor in the determination of the utility's cost of equity capital. However, any resulting increase could be so significant that it would be proper for the Board to phase in the tolls over time provided there was no economic loss to the utility. He said (at para. 43), "In other words, the phased in tolls would have to compensate the utility for deferring recovery of its cost of capital."

28 I do not read the OEB's decision to be inconsistent with the proposition that a utility must be allowed to recover all of its prudently incurred costs. The OEB, upon concluding that the unrecorded gas costs had been prudently incurred, allowed NRG to recover them. However, the OEB did not accept the premise of NRG's position on this appeal — that if the unrecorded gas costs were prudently incurred, it must logically follow that the regulatory costs to recover them and the interest costs associated with the deferral of their recovery were also prudently incurred. Rather, the OEB found the accumulation of these costs was attributable to NRG's failures to properly record them and to discover its error promptly:

> We are surprised and disappointed with the time that it took NRG to realize that its PGCVA mechanism was incorrect, which exposed the utility and its customers to unnecessary risk and created a difficult situation for the customers and the Board. However, we accept that the misrecording was the result of error, not a purposeful action by NRG.

29 The OEB went on to observe:

> Had NRG recorded the gas cost variances properly in the PGCVA, the present conundrum would have been avoided.
>
> ... we find the NRG's error has resulted in a substantial and avoidable accumulation of potential customers' charges, through no fault of the customers.

30 These factual findings of the OEB are not open to question on appeal. In light of these findings, the OEB said, "[W]e must therefore look for a balance". The OEB struck that balance in the following terms:

> Considering the need for NRG to recover its prudently incurred unrecorded gas costs and mitigating the impact on customers, as well as not creating undue inter-generational inequity, we find that a reasonable balance is recovery of the $531,794 amount over a three year period, in equal portions, without interest.

31 The OEB went on to say that NRG could not recover its regulatory costs incurred in the proceeding.

32 On my reading, the OEB took the view that NRG's regulatory costs were not prudently incurred. That view is reasonable. But for NRG's accounting error and the delay in recognizing it, NRG would not have had to incur costs to seek and obtain the OEB's decision to permit recovery of the unrecorded costs.

33 NRG emphasizes that it did not seek recovery of any interest charges from the time the costs were not recorded to the date of the OEB's decision finding the costs to have been prudently incurred. Therefore it submits that the interest charges it claims are the direct result of the OEB's decision to rate-smooth and not of NRG's

accounting error.

34 In my view, it was open to the OEB to consider the underlying as well as the direct cause of the interest charges. The OEB said, "It is also our view that customers should not be burdened by any interest charges that would not have accrued had the customers been presented with the appropriate timely billing". While the interest charges directly result from the OEB's decision to defer their recovery, the OEB would not have faced the situation that prompted that decision "had NRG recorded the gas costs variances properly" and there had been no "substantial and avoidable accumulation of potential customers' charges". Rather, the "present conundrum could have been avoided".

35 The line of analysis from the OEB's findings of fact to the conclusion it reached is reasonable. It's balancing of the various considerations and interests before it lies at the heart of its function and expertise. Its reasons withstand a probing analysis.

V Disposition

36 I would find that the OEB's decision was reasonable and dismiss NRG's appeal.

37 The parties indicated they would make efforts to resolve the issue of costs. If they are unable to do so they make written submissions through the court's senior legal officer.

***Laskin J.A.*:**

I agree.

***Borins J.A.*:**

I agree.

Appeal dismissed.

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TAB 6

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Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)

Toronto Hydro-Electric System Limited (Appellant / Respondent in Appeal) and Ontario Energy Board (Respondent / Appellant in Appeal)

Ontario Court of Appeal

K. Feldman, S.E. Lang, J. MacFarland JJ.A.

Heard: October 9, 2009
Judgment: April 20, 2010
Docket: CA C49980

Proceedings: reversing *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2008), 93 O.R. (3d) 380, 2008 CarswellOnt 5372, 298 D.L.R. (4th) 231, 53 B.L.R. (4th) 48 (Ont. Div. Ct.)

Counsel: Glenn Zacher, Patrick G. Duffy for Appellant, Ontario Energy Board

James D.G. Douglas, Morgana Kellythorne for Respondent, Toronto Hydro-Electric System Limited

Subject: Public; Corporate and Commercial; Civil Practice and Procedure

Public law --- Public utilities — Operation of utility — Rates — Approval

T Ltd. was electricity distributor — Board made decision under s. 78 of Ontario Energy Board Act, 1998 requiring that dividend paid to city be approved by majority of T Ltd.'s independent directors — T Ltd.'s appeal from part of decision regarding jurisdiction was allowed — Determination set aside to extent that it required dividend be approved by independent directors of board — Trial judge found OEB protects interests of ratepayers, but in ways authorized by statute — Trial judge found no express power to dictate how dividends are declared by directors — Trial judge found core function of OEB is rate-setting, and imposing restrictions on dividends by directors was not necessary or essential to core function — Board appealed — Appeal allowed — True question of jurisdiction did not emerge — Legislative intent was that board could set electricity rates in subjective and open ended manner — Board was entitled to consider history of dividend payments — Board's reasons provided intelligible explanation for determination — Considerations for public monopolies are different from private entities — Board's concerns regarding payout when infrastructure needs were pending, and inter-affiliate relations were reasonable — Board's

determination was within range of acceptable outcomes — Authority to approve dividends did not take power away from directors contrary to Business Corporations Act.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Lack of jurisdiction

T Ltd. was electricity distributor — Board made decision under s. 78 of Ontario Energy Board Act, 1998 requiring that dividend paid to city be approved by majority of T Ltd.'s independent directors — T Ltd.'s appeal from part of decision regarding jurisdiction was allowed — Determination set aside to extent that it required dividend be approved by independent directors of T board — Trial judge found OEB protects interests of ratepayers, but in ways authorized by statute — Trial judge found no express power to dictate how dividends are declared by directors — Trial judge found core function of OEB is rate-setting, and imposing restrictions on dividends by directors was not necessary or essential to core function — Board appealed — Appeal allowed — True question of jurisdiction did not emerge — Legislative intent was that board could set electricity rates in subjective and open ended manner — Board was entitled to consider history of dividend payments — Board's reasons provided intelligible explanation for determination — Considerations for public monopolies are different from private entities — Board's concerns regarding payout when infrastructure needs were pending, and inter-affiliate relations were reasonable — Board's determination was within range of acceptable outcomes — Authority to approve dividends did not take power away from directors contrary to Business Corporations Act.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

T Ltd. was electricity distributor — Board made decision under s. 78 of Ontario Energy Board Act, 1998 requiring that dividend paid to city be approved by majority of T Ltd.'s independent directors — T Ltd.'s appeal from part of decision regarding jurisdiction was allowed — Determination set aside to extent that it required dividend be approved by independent directors of T board — Trial judge found OEB protects interests of ratepayers, but in ways authorized by statute — Trial judge found no express power to dictate how dividends are declared by directors — Trial judge found core function of OEB is rate-setting, and imposing restrictions on dividends by directors was not necessary or essential to core function — Board appealed — Appeal allowed — Standard of review was reasonableness — Issue was one of mixed fact and law with policy considerations — Although corporate law principles were involved, regulator had duty to use expertise to apply principles within standard of its objectives — Board did not exceed authority.

Cases considered by *J. MacFarland J.A.*:

Advocacy Centre for Tenants-Ontario v. Ontario Energy Board (2008), 293 D.L.R. (4th) 684, 2008 CarswellOnt 2830, 238 O.A.C. 343 (Ont. Div. Ct.) — considered

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

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

Enbridge Gas Distribution Inc. v. Ontario (Energy Board) (2005), 2005 CarswellOnt 39, 193 O.A.C. 180, 74 O.R. (3d) 147 (Ont. C.A.) — considered

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, [2009] 1 S.C.R. 339 (S.C.C.) — considered

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

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

Pasiechnyk v. Saskatchewan (Workers' Compensation Board) (1997), 37 C.C.L.T. (2d) 1, (sub nom. *Pasiechnyk v. Procrane Inc.)* 216 N.R. 1, 149 D.L.R. (4th) 577, (sub nom. *Pasiechnyk v. Procrane Inc.)* 158 Sask. R. 81, (sub nom. *Pasiechnyk v. Procrane Inc.)* 153 W.A.C. 81, [1997] 2 S.C.R. 890, 30 C.C.E.L. (2d) 149, [1997] 8 W.W.R. 517, 50 Admin. L.R. (2d) 1, 1997 CarswellSask 401, 1997 CarswellSask 402 (S.C.C.) — considered

Ryan v. Law Society (New Brunswick) (2003), 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 31 C.P.C. (5th) 1 (S.C.C.) — considered

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298 (1988), 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148, 35 Admin. L.R. 153 (S.C.C.) — considered

Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board) (2009), 2009 CarswellOnt 2889, 252 O.A.C. 188 (Ont. Div. Ct.) — considered

VIA Rail Canada Inc. v. Canadian Transportation Agency (2007), 2007 SCC 15, 2007 CarswellNat 608, 2007 CarswellNat 609, 360 N.R. 1, 279 D.L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. Via Rail Canada Inc.)* 59 C.H.R.R. D/276, 59 Admin. L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.)* [2007] 1 S.C.R. 650 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 127(3)(d) — considered

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Electricity Act, 1998, S.O. 1998, c. 15, Sched. A

s. 29 — considered

s. 142 — referred to

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

Pt. IV — referred to

s. 1(1) — considered

s. 1(1) ¶ 1 — considered

s. 1(1) ¶ 2 — considered

s. 23(1) — considered

s. 36(3) — considered

s. 44(1) — considered

s. 78 — considered

s. 78(2) — considered

s. 78(3) — considered

s. 128(1) — considered

APPEAL by board from judgment reported at *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2008), 93 O.R. (3d) 380, 2008 CarswellOnt 5372, 298 D.L.R. (4th) 231, 53 B.L.R. (4th) 48 (Ont. Div. Ct.), allowing appeal by corporation regarding terms of dividend payments.

***J. MacFarland J.A.*:**

1 This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ., Lederman J. dissenting) dated September 9, 2008. The court declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

Overview

2 Toronto Hydro-Electric System Limited ("THESL") is an electricity distributor licensed and regulated by the

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Ontario Energy Board ("OEB"). THESL is a wholly-owned subsidiary of Toronto Hydro Corporation ("THC"). All of the shares of THC are owned by the City of Toronto (the "City").

3 In 2004-2005, THC paid over $116 million to the City in the form of dividends and interest payments. THC funded a significant part of these payments through substantial annual increases in dividends from THESL and by charging THESL an above-market rate of interest on an inter-company loan. At the time THESL made the payments it had not completed a capital plan for reinvestment in its aging infrastructure.

4 When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the City demanded substantial increases in dividends from THC which, in turn, demanded increased dividends from THESL.

5 The OEB is the regulator of Ontario's electricity industry, and is statutorily mandated to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." The OEB manages this mandate primarily by setting just and reasonable rates.

6 In its decision, the OEB disallowed as a regulatory expense any interest charges above market rates, and required a majority of THESL's independent directors to approve any future dividend payments. In reaching this decision, the OEB noted that if a utility like THESL was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which in turn could harm ratepayer interests by causing higher costs and degradation in services. THESL appealed this decision.

7 In the Divisional Court, THESL argued that the OEB had no jurisdiction to impose the condition it did, either by statute or at common law, and further that the imposition of such a condition represented an unwarranted and indeed unlawful restriction on the authority of the board of directors to declare a dividend.

8 The majority in the Divisional Court accepted THESL's position on both bases advanced, allowed the appeal and set aside the part of the OEB decision that imposed the condition.

9 The OEB argues that the majority of the Divisional Court panel failed to appreciate and distinguish the principles that govern regulated utilities like THESL, which operate as monopolies, from those that apply to private sector companies, which operate in a competitive market. The OEB submits that this distinction is critical because whereas the directors and officers of an unregulated company have a fiduciary obligation to act in the best interests of the company (which usually equates to the interests of the shareholders), a regulated utility must operate in a manner that balances the interests of the utility's shareholders against the interests of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

10 For the reasons that follow I would allow the appeal, set aside the order of the Divisional Court and restore the part of the rate decision that imposed the condition.

11 The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends.

Analysis

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12 This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236 (Ont. C.A.), at para. 18.

13 The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B (the "Act"):

> **Boards objectives, electricity**
>
> 1.(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.[FN1]

14 In short, the OEB is to balance the interests of ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

15 The *Electricity Act, 1998*, S.O. 1998, c. 15, Sch. A, requires a distributor of electricity to sell electricity to every person connected to the distributor's distribution system (s. 29). However, the distributor can only charge for the distribution of electricity in accordance with an order of the OEB. Section 78 of the Act provides in part:

> 78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> . . . . .
>
> (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*.

16 In relation to its ability to make orders the Act provides:

> 23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

17 In order to determine the appropriate standard of review, the inquiry must begin with a consideration of the nature of the OEB's decision.

I. Avoiding the "Jurisdiction" Trap

18 In recent years administrative law has undergone a significant transformation. Ever since Dickson J.

championed the notion of increased deference to specialized administrative tribunals in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), courts have sought to avoid labelling matters as jurisdictional where such a label might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.), Bastarache and LeBel JJ. underlined the importance of *CUPE* in this regard at para. 35:

> Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

19 Support for the *CUPE* conceptualization of jurisdiction is also found in the majority reasons of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), at paras. 88-89:

> The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise. It ignores Dickson J.'s caution in [*CUPE*] that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".
>
> *If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding.* Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority. [Emphasis added; citations omitted.]

20 Genuine questions regarding the boundaries of administrative authority under statute do arise. Administrative bodies must be correct in answering these questions. It is crucial to distinguish, however, between these "true" matters of jurisdiction and the wider understanding of jurisdiction that Dickson J. rebuked in *CUPE*. This point was highlighted by Bastarache and LeBel JJ. in *Dunsmuir* at para. 59:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. *"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.* The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary*

> *(City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added; citations omitted.]

21 David Phillip Jones and Anne S. de Villars offer a helpful analysis of the difference between the "narrow" and "wide" meaning of jurisdiction in their text, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at pp. 140-41:

> In its broadest sense, "jurisdiction" means the authority to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors - such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result - which take place *after* the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction.
>
> . . . . .
>
> It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to *exceed* its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction. [Italics in original; footnotes omitted.]

22 Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in *VIA Rail*. At para. 91, she cited *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.), at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), at p. 1087, where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

23 Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir* at para. 54), and Abella J.'s conclusion that "[a] tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (*VIA Rail* at para. 92). It also accords with Jones and de Villars observation at p. 146:

> [A] conscious and clearly-worded decision by the legislature to use a subjective or open-ended grant of power has the effect of widening the delegate's jurisdiction and, therefore, narrowing the ambit of judicial review of the legality of its actions.

24 Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons - on either a

reasonableness or correctness standard - but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its decisions to be *ultra vires.* These principles are consistent with Abella J.'s reasoning in *VIA Rail* at para. 96:

> It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction... in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

II. Broad Powers of the OEB

25 The case law suggests that the OEB's power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task.

26 For example, in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (2008), 293 D.L.R. (4th) 684 (Ont. Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate." In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

> [T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates."... the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the *Act.* Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."
>
> . . . . .
>
> [T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."
>
> The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner.

27 The jurisdiction of the OEB was also reviewed in *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 74 O.R. (3d) 147 (Ont. C.A.). In *Enbridge*, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act in paras. 27-28:

> [The appellants] say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. ...
>
> In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. ... Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

28 A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2009), 252 O.A.C. 188 (Ont. Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in *Dunsmuir*. Rather, a reasonableness standard applied because the decision in the case - whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement - was squarely within the rate-setting authority of the OEB and went to very core of the OEB's mandate. The court noted the expansive content of the rate-setting power at para. 17:

> An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the *OEBA* which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests. [Citations omitted.]

29 The present appeal does not engage a "true" question of jurisdiction. As confirmed above, the Act is to be interpreted broadly. It is clear that the legislative intent of s. 78 of the Act is that the OEB have the principal responsibility for setting electricity rates. The Act specifies that in carrying out its responsibilities the OEB *shall* be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity service. The Act also permits the OEB in making an order, to impose such conditions as *it* considers proper, and states that these conditions may be general or particular in application (s. 23(1)). Thus, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the OEB to engage in the impugned inquiry in the course of rate setting.

30 Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are

insulated from review (see Part IV).

III. The ATCO Decision

31 THESL argues that the Supreme Court of Canada's recent decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.), militates in favour of reviewing OEB decisions using a correctness standard. *ATCO* involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The *Alberta Energy Board Utilities Act* set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

32 Writing on behalf of three other justices, Bastarache J. divided the inquiry into two questions. The first question was whether the Board had the power pursuant to its enabling statutes to allocate the proceeds from the sale of the utility's asset to its customers when approving the sale. The second question was whether the Board was permitted to allocate the proceeds of the sale in the way that it did. Bastarache J. concluded that the first question was to be reviewed on a correctness standard and the second question was to be reviewed on a more deferential standard.

33 This case is distinguishable from *ATCO*. The statutory grant of power in *ATCO* to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic, and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives are not vague, elastic, and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the *ATCO* provision, the objectives in the Act require that the OEB protect the interests of *both* the customer and the utility.

34 There are four other factors that support distinguishing *ATCO* from this case. First, the decision in *ATCO* reveals that Bastarache J. reasoned that *ATCO* was not a rate-setting case. He noted that the provision granting the power to impose conditions could not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "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" (para. 7).

35 Second, at para. 30, Bastarache J. determined that the Board's protective role -safeguarding the public interest in the nature and quality of the service provided to the community by public utilities by ensuring that utility rates are always just and reasonable- did not come into play. This factor pointed to a less deferential standard of review. In the present case, the OEB's "protective role" was central to the dividend condition.

36 Third, Bastarache J., viewed the issue in *ATCO* as the Board's power to transfer proprietary rights in the assets of the utility to the customers. In this case, the dividend condition did not result in the transfer of proprietary rights.

37 Fourth, in giving examples of conditions that could attach to the approval of a sale, Bastarache J. stated at para. 77 that the Board "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." As will be explained, the OEB placed the condition on the payment of dividends to ensure that dividends would not be paid

when there was insufficient capital for plant maintenance.

IV. Reviewing the Exercise of OEB Jurisdiction: The Reasonableness Standard

38 Having determined that the OEB did not exceed its statutory grant of power, the question remains whether it could order that the declaration of a dividend requires the approval of the majority of THESL's independent directors. This question is reviewable on a reasonableness standard.

39 Recently, a reasonableness standard was used by this court in *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236 (Ont. C.A.). The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriansz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations:

> In two recent decisions, *Graywood Investments Ltd. v. Toronto Hydro-Electric System*, [2006] O.J. No. 2030 (C.A.) and *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.
>
> In *Enbridge*, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".
>
> In *Graywood*, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):
>
> > First, the OEB is a specialized and expert tribunal dealing with a complicated and multifaceted industry. Its decisions are, therefore, entitled to substantial deference.
>
> In order to take this case outside the application of this general conclusion, [the distributor] must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in *Graywood*. [At paras. 7-10.]
>
> . . . . .
>
> It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.
>
> The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction". [At paras. 18-19.]
>
> . . . . .
>
> While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining

> the question.
>
> Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness. [At paras. 23-24.]

40 The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision - structuring a condition that will protect the long-term integrity of THESL's energy infrastructure - falls squarely within the category of "mixed fact and law" with "policy considerations".

41 One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation the fact that corporate law principles are at play does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

V. Is the Decision a Reasonable One?

42 At para. 47 of *Dunsmuir*, Bastarache and LeBel JJ. described the two inquiries involved in assessing the reasonableness of a decision:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*
>
> [Emphasis added.]

43 The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process." The second inquiry is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law." Thus, the first inquiry deals with the justification process as articulated in the reasons for the decision and the second inquiry looks at the outcome. As noted in *Dunsmuir*, the reasonableness analysis will concern mostly the first inquiry.

(a) Justification, transparency and intelligibility

44 The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), Iacobucci J. at para. 55 articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing

> examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.* [Emphasis added; citations omitted.]

45 Further, as Abella J. explained in *Via Rail* at para. 104:

> Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

46 And as more recently noted by Binnie J. in *Khosa v. Canada (Minister of Citizenship & Immigration)*, [2009] 1 S.C.R. 339 (S.C.C.), at para. 59:

> Reasonableness is a single standard that take its colour from the context. ... [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

and at para. 63:

> *Dunsmuir* thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court.

47 The OEB's reasons provide an intelligible explanation for the condition. The reasons both disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern.

48 Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in *ATCO* at para. 3, "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". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see *Advocacy Centre for Tenants-Ontario*. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of *Advocacy Centre for Tenants-Ontario*, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."

49 While THESL is incorporated, as is required by s. 142 of the *Electricity Act*, under the provisions of the *Business Corporation Act*, R.S.O. 1990, c. B.16, ("*OBCA*") it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons in the court below at para. 78:

> At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.

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50 The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

51 The decision reveals that the OEB was concerned about the aging plant and the lack of necessary capital. At the hearing it was argued that there appeared to be underinvestment in the physical plant over the past several years (para. 4.4.1). Evidence was presented that 30 to 40 per cent of the plant in service had exceeded its expected life (para. 4.5.3). The Board concluded that increased capital spending was required to address the issues of the aging plant (para. 4.7.1) and to maintain system reliability (para. 4.10.8).

52 However, despite the need for capital, the evidence was that there was a very dramatic increase in the dividend payouts in 2004 and 2005. As the OEB noted at para. 6.4.1, "[t]he level of dividends appears to be greater than the net income of the utility over at least a two year period." At para. 6.4.4 the OEB explained why these events were of concern:

> The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating.

53 In sum, the OEB was concerned because THESL was paying THC very large dividends even though increased capital spending was going to be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately, as the OEB explained, have adverse effects on ratepayers. Lederman J. effectively summarized these circumstances at paras. 80 and 85:

> The setting of rates will accomplish little in terms of public protection if the revenue can be stripped out of the company without any controls.
>
> . . . . .
>
> The OEB had evidence before it that THESL was paying increased dividends and an above market rate of interest while it was under investing by about $60 million in its capital expenditures. The OEB noted that if a utility like THESL was to pay all its retained earnings to its shareholder, this could adversely impact its credit rating, which in turn, could cause higher costs and degradation in service to electricity consumers.

54 The OEB also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts, was to require that any dividend paid by THESL be approved by a majority of its independent directors.

55 At the time of the hearing, the composition of the board of directors of THESL was identical to the THC. The reasons reveal that the OEB was very concerned about the about the relationships between THESL, THC, and the City. For example, at para. 3.2.3 the OEB questioned the percentage of THC's costs recovered from THESL:

> It is readily apparent to the Board that allocating these costs based on gross revenues produces an unwarranted bias against the ratepayers. The revenues of the utility are inflated by the high cost of wholesale power. That is an ever increasing amount. Because these costs are increasing, it does not follow the utility's share of the

> overhead costs should be increasing. In short, there is no necessary relationship between the revenue share and the share of overhead cost.

56 The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional $16 million per year which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note at para. 5.3.8, it is "apparent that the financing decisions are being made unilaterally by the City, which is the sole shareholder of the utility."

57 With respect to dividends, as already noted, the OEB was concerned about the very dramatic increase in the dividend payouts in 2004 and 2005. At para. 5.3.18 the OEB stated:

> *Nor is it any defence to say this is not a decision of the utility but is being made unilaterally by the City of Toronto. That is exactly the problem. In fact it could be argued that this is part of a pattern.* The City has extracted extensive dividends from this utility in recent years. It is likely one of the rare occurrences in Canadian financial markets where the level of dividends exceeds the net income. [Emphasis added.]

58 Moreover, the OEB was aware of a change in a shareholder direction and the payment of special dividends. These facts are referred to in para. 6.4.2:

> At one time, there was a shareholder direction that limited the dividend payout to 40% of the utility's income, but that was changed to 50% of consolidated income. Moreover, it appears that were special dividends over and above that amount.

59 Thus, the OEB was of the opinion that one of the reasons for the THESL's unusual dividend payouts was the THC's, and ultimately the City's, control over THESL's decision making. The OEB explained at paras. 6.4.5 and 6.4.6 of the decision:

> A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical.
>
> And none of the members of management are to be on the Board. This is an unusual situation.
>
> There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

60 Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the *Affiliate Relationship Code for Electricity Distributors and Transmitters* ("*ARC*") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the *ARC* required that one third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates.

61 Following this line of reasoning, the Board concluded at paras. 6.4.7 to 6.4.9 that the condition was needed to balance the interests of *both* the customer and the shareholder:

> Given the unusual high level of dividend payout and the concern expressed by a number of parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.
>
> Much of the controversy in this case has been dominated by discussion about non arms length transaction between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. *The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders.* The Board believes this is in keeping with the policy intent of Section 2 of the ARC.
>
> This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations. [Emphasis added.]

62 For the reasons set out above, this was a reasonable decision.

(b) Acceptable Outcomes

63 To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." It is in this part of the analysis where, in my opinion, this court should address THESL's argument that the imposed condition violated corporate law.

64 THESL argued at the Divisional Court, and argues before this court, that the OEB order was contrary to settled principles of corporate law that the directors of a public company cannot delegate their power to declare dividends. Section 127(3)(d) of the *OBCA* confirms this prohibition by expressly excluding any delegation of the board of directors' power to declare a dividend from the general rule permitting delegation to a managing director or committee of directors.

65 The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act which provides that, "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails."

66 The majority judgment below accepted THESL's argument, and found that the OEB had effectively delegated the power to declare dividends to the majority of the independent directors contrary to the *OBCA* and long-standing corporate law principles.

67 In dissenting reasons, Lederman J. accepted the submission of the OEB - that the order leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors.

68 In the context of a regulated corporation, I agree with Lederman J. As he explained at para. 81, "the OEB has crafted a reasonable and less intrusive remedy that balances the interests of THESL's shareholder and its ratepayers and is consistent with the 'regulatory compact'."

Conclusion

69 For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an order in accordance with these reasons. In the circumstances, I would not order costs.

K. Feldman J.A.:

I agree.

S.E. Lang J.A.:

I agree.

Appeal allowed.

FN1 On September 9, 2009, three additional objectives were added to s. 1(1).

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TAB 7

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1982 CarswellOnt 753, 141 D.L.R. (3d) 641

Dow Chemical Canada Inc. v. Union Gas Ltd.

In The Matter of an appeal from the Ontario Energy Board

In The Matter of Sections 15(8), 19 and 32 of the Ontario Energy Board Act, R.S.O. 1980 Ch. 332

In The Matter of an application by Union Gas Limited to the Ontario Energy Board pursuant to Section 15(8) and 19 of the said Act for interim Orders approving or fixing reasonable rates and other charges for the sale, distribution and storage of gas

Supreme Court of Ontario, Divisional Court

O'Leary, Craig and Steele JJ.

Subject: Public

Public Utilities --- Regulatory boards — Regulation of rates

Retroactive rate-making — Board not bound by contract between distributor and consumer with respect to rates -- Ontario Energy Board Act, R.S.O. 1980, c. 332, ss. 16, 19, 27, 30, 41, 47, 48 — Public Utilities Act, R.S.A. 1955, c. 267, s. 67.

The Ontario Energy Board Act empowers the Board, where it has for sound administrative reasons postponed consideration of an expense for rate-making purposes, to include that past expense as one to be collected in future rates. In determining that a rate increase shall apply to a particular consumer, the Board is not bound by a contractual provision between the distributor and the consumer which provides for a different rate or price and attempts to exempt the consumer from rate increases.

***O'Leary J.*:**

1 This is an application by Dow Chemical Canada Inc. (hereinafter called "Dow") for leave to appeal and if leave be granted, to appeal from an order issued on February 3, 1982 by the Ontario Energy Board (hereinafter called the "Board"). By that order the Board authorized Union Gas Limited (hereinafter called "Union") to recover through increased rates and charges to its customers over a four-year period the sum of $25,544,000.00 expended by Union between December 1977 and October 31, 1981 in the purchase by it of synthetic natural gas (hereinafter called "SNG") from Petrosar Limited (hereinafter called "Petrosar"). The $25,544,000.00 represented the amount by which the cost of the SNG Union bought from Petrosar during the period mentioned exceeded the cost of an equivalent volume of gas purchased from Union's other sources of natural gas.

2 It is Dow's position that the Board's order has retroactive effect, in that present and future users of Union's gas are and will be required to pay for SNG purchased and delivered prior to October 31, 1981; and that the Board did not have authority under *The Ontario Energy Board Act* , R.S.O. 1980, c. 332 to make such an order. Dow further submits that the Board exceeded its jurisdiction by directing that the rate increase is to apply to Dow, as to all other of Union's customers, when Dow had a contract with Union for a twenty-year term commencing on July 1, 1972, which provided that Dow would only be responsible to pay for any rate increases which the National Energy Board granted TransCanada Pipelines Limited (hereinafter referred to as "TransCanada"), Union's major gas supplier.

3 The Industrial Gas Users Association, which appeared at and participated in the hearing of the Board which preceded its order of February 3, 1981, with leave of this Court, appeared on this application and supported the first but argued against the second of Dow's positions that I have just outlined.

4 Before dealing with the two points raised by Dow, it is necessary to review the events leading up to the Board's order and the relevant provisions of *The Ontario Energy Board Act* (hereinafter referred to as the "Act").

5 In 1973, based on supply-demand forecasts which it had prepared, Union concluded that increased demand for its gas would soon greatly exceed its ability to acquire and supply that gas to its customers. Indeed, throughout 1974 and into 1975, Union believed that it was facing a gas supply problem so severe that it might not be able to meet demands for its gas even at existing levels of demand. This concern resulted from its inability to contract for any significant additional supplies through TransCanada and its being informed by Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle") that its contract for the supply to Union of some 15.5 Bcf (billion cubic feet) of natural gas a year would be cancelled in 1976. All indications were that the reserves of natural gas in western Canada were dwindling to the point that gas would be in short supply. TransCanada had not been able to purchase any significant quantities of additional gas for several years.

6 In 1974, Union was convinced not only that it was facing a gas supply problem but also that the cost of gas would greatly increase. The Alberta Government had indicated its intention of increasing the price of gas leaving the Province and was supporting the linking of gas prices to the price of oil and other fuels. It is of interest to note that the Federal Government became involved in the pricing of gas in 1975 and, through agreements with the Alberta Government, the price of gas began to increase steadily. The Federal Government on February 18, 1975 announced its intention of bringing the price of natural gas in line with domestic oil prices on an energy equivalence basis, by allowing the price of gas to increase from its 1974 65% equivalent level to a 100% equivalent level in 1978. During the summer of 1975 the Federal Government revised the schedule but still forecasted parity between oil and gas prices by 1979.

7 The anticipated shortage of natural gas and rise in its price led TransCanada and Union both to examine seriously the question of coal gasification and other alternative methods of increasing the supply of natural gas. In late 1973, Union learned that a proposed Petrosar plant to be built near Sarnia, Ontario would produce SNG as a by-product and Union entered into negotiations with Petrosar for the purchase of that SNG. On November 20, 1974, Union signed a contract with Petrosar to buy approximately 7 Bcf of SNG a year for 15 years commencing in 1977 (by delays extended to 15 years from 1978). The agreed price was approximately double the price Union was paying for natural gas supplied by TransCanada and other suppliers and further the price to be paid for the SNG was tied to and would rise with the price of oil. The Board in its reasons for the decision under appeal concluded that Union was not imprudent in entering into that contract.

8 Circumstances have changed substantially since November 20, 1974. Canada is no longer facing an imminent shortage of natural gas but oil reserves are said to be declining. As a result the Federal Government changed its policy towards the oil-gas pricing relationship and no longer plans to allow the price of gas to rise so as

to achieve parity with the price of oil, and has slowed the rate of increase of the price of gas.

9 In the result the amount by which the cost of SNG has exceeded the cost of natural gas from TransCanada and its other suppliers has increased substantially beyond that anticipated by Union on November 20, 1974.

10 The contract of November 20, 1974 between Union and Petrosar provided in part:

> 16.10 This Agreement and the performances by the parties of their respective obligations hereunder are subject to the valid laws, orders, rules and regulations (collectively referred to as "Approval") of all duly constituted authorities having jurisdiction. Buyer shall use its best efforts to obtain the necessary Approval from the Ontario Energy Board or any other regulatory body or bodies having jurisdiction in the matter to obtain any authorization which Buyer may require to construct facilities to accept delivery of Product hereunder. Buyer shall make such application as is necessary for the foregoing purpose as soon after the execution of this Agreement as is reasonably practicable. Buyer shall keep Seller informed of the progress and the result of such application. If the necessary Approval and/or authorization contemplated herein has not been received in terms satisfactory to the parties on or before July 31, 1975 or such later date as is agreed to in writing by the Seller, this Agreement shall become null and void and the parties shall be relieved of all further obligations to each other hereunder or in respect hereof.

11 In fulfilment of its obligation under its contract with Petrosar, Union did make application to the Board for leave to construct a metering station to receive the SNG from Petrosar. Union could not construct the station without leave of the Board because of the provisions of sections 38 and 39 of *The Ontario Energy Board Act*, R.S.O. 1970, c. 312, now sections 46 and 47 of the Act, which read:

> 46.-(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.
>
> . . . . .
>
> 47. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.

12 The Board granted Union the leave it requested, stating in its reasons for so doing that the SNG from Petrosar "represents a valuable incremental source of gas in a period when supply shortages are feared. In the Board's opinion construction of the facilities proposed for the metering and delivery of the SNG into Union's transmission system is necessary. ...The Board has concluded that construction of the meter station is in the public interest and an order will issue".

13 The Board in granting leave for the construction of the metering station was acting under then section 40(8), now section 48(8), of the Act which reads:

> 48.-(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

14 While the Board was satisfied that having more gas available for Union's customers was in the public interest, the Board made it clear it was not then dealing with Union's cost of servicing its customers resulting from the relatively expensive SNG to be obtained from Petrosar. In that regard, the Board stated:

While evidence in these proceedings indicates the impact of the cost of the SNG on the overall cost of Union's gas supply, the Board cannot, in this decision, approve the contractual cost of this gas as a component of the company's cost of service. This approval can only flow from a future rate proceeding which would examine not just the cost of gas but the overall cost of service. At such a hearing all interested parties would be given the right to question Union's witnesses or to make their own submissions related to this incremental gas cost.

15 In December 1977, deliveries commenced under the Petrosar agreement. In the three year period following the execution of the agreement, additional supplies of natural gas were discovered, the price of crude oil escalated and with it the costs of SNG. In order to mitigate the cost consequences, Union attempted to sell the Petrosar supply for export to Northern Natural Gas Company (hereinafter called "Northern"), an American company.

16 In November 1977, pending the anticipated consummation of the export sale to Northern, Union applied for and received from the Board an interim accounting order requiring Union to accumulate the costs and volumes relating to the Petrosar supply of gas in a separate inventory account with no portion of the cost of such gas charged to expense and no rate treatment granted thereon. Subsequent interim accounting orders were issued by the Board continuing that accounting treatment of Petrosar gas costs. The result of the interim orders was that until December 31, 1980, the costs and volumes of the SNG were, by Board order, excluded from Union's utility expenses and cost of service; the costs were not considered in Union's rate applications, and therefore were not recovered in rates.

17 In February 1980 U.S. regulatory approvals were denied for the export sale to Northern. Shortly thereafter Union entered into negotiations to sell the gas for export to Transcontinental Gas Pipe Line Company of Houston, Texas (hereinafter called "Transco"). All Canadian and American regulatory approvals were obtained for the export sale to Transco and the gas has been exported on a daily basis since December 24, 1980, but at a price less than Union pays Petrosar for the SNG.

18 No one disputes the jurisdiction of the Board to make the various accounting orders that have been mentioned. The Board's authority to make those orders is to be found in the Act and the regulations thereunder.

19 Section 27 of the Act reads in part:

27.-(1) Subject to the approval of the Lieutenant Governor in Council, the Board may,

•

. . . . .

(d) prescribe a uniform system of accounts applicable to any class of distributors, transmitters or storage companies.

(2) Any uniform system of accounts prescribed under clause (1)(d) may require the approval, consent or determination of the Board in respect of any of the matters provided for in such system.

20 Regulation 628 under *The Ontario Energy Board Act* , R.R.O. 1970 reads in part:

2.-(1) ...every ... gas utility shall, ... keep its accounts in accordance with such uniform system of accounts and with the approvals, consents or determinations of the Board...

21 Section 5 of The Uniform System of Accounts provided for by Regulation 628 reads:

SUBMISSION OF QUESTIONS

Since uniformity of accounting by gas companies in Ontario is a basic reason for this system of accounts, companies shall submit all questions of doubtful interpretation of the accounting rules to the Board for determination.

22 On June 13, 1980, Union made application to the Board for a determination of the accounts of Union to which the costs of the Petrosar gas accumulated in the inventory account pursuant to the accounting orders should be transferred, the establishment of the accounting treatment of future costs of SNG received and for the recovery in its rates of the costs of the Petrosar supply of gas.

23 The power of the Board to fix rates is found in section 19 of *The Energy Board Act* , subsection (1) of which reads as follows:

19.-(1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.

24 There is nowhere in the balance of section 19, nor elsewhere in the Act, nor in the regulations, any words which purport to restrict the wide discretion given the Board by section 19(1) to decide which costs and expenses of Union are to be recovered out of the rates fixed by the Board. If that discretion is limited, so as to prevent the Board from ordering that Union recover in future rates the cost of SNG already incurred, it must be because of judicial decisions so holding when interpreting *The Ontario Energy Board Act* or similar statutes. It is apparent that, until March 8, 1979, when Union learned it was not going to be able to sell the SNG to Northern at the price originally agreed to because the Economic Regulatory Administration of the Department of Energy of the United States of America (ERA) denied the import of the SNG primarily due to its high price, Union did not anticipate that it would suffer any loss on the SNG. Its proposed contract with Northern had provided that Northern would take delivery of all the SNG Union received from Petrosar or equivalent amounts of natural gas, at prices in excess of those paid Petrosar by Union. After the original Northern contract fell through, Union renegotiated the agreement with Northern but at a lower sale price for the SNG. In February 1980 ERA still refused import of the SNG into the United States. Union then began negotiations to sell the SNG for export to Transco but Union did not know until it had made firm arrangements to export the gas to Transco just how great the difference would be between its purchase price and its sale price of the SNG. Accordingly it would have been pointless for Union to have applied to the Board sooner than it did for the recovery in its rates to customers of the costs of the SNG received from Petrosar.

25 Both Dow and the intervenor, The Industrial Gas Users Association, were fully aware that the financial aspects of the purchase of the SNG were being recorded in a special account and played no part in the fixing of Union's rates to customers prior to June of 1980. In its reasons for decision dated July 7, 1978 in regard to a rate application by Union, and referring to what had transpired on October 31, 1977 at a hearing before the Board at which hearing both Dow and The Industrial Gas Users Association were represented, the Board stated at page 7:

Mr. Thomson, on behalf of Dow Chemical of Canada, Limited, stated his client's only interest was in regard to Union's contract to take synthetic natural gas from Petrosar Limited ("Petrosar") and withdrew from active participation, subject to recall, upon being given reasonable assurance that an accounting order applied for by Union and pending Board approval would effectively exclude Petrosar gas from consideration during the hearing.

26 Further, at page 12, the Board stated as follows:

Accounting Order re Petrosar Gas

In the early stages of the hearing of the main application, Union sought and was granted an accounting Order to set aside the cost of the synthetic gas from Petrosar, including the cost of its financing, in anticipation of approval of applications to the appropriate regulatory bodies for permission for Union to supply such gas by displacement to Northern Natural Gas Company ("Northern Natural") of Omaha, Nebraska, under a pending contract. The consequent exclusion of the cost of gas from Petrosar reduced the indicated revenue deficiency of the Applicant by some $11 million in the test year and, along with other causes, necessitated substantial revisions to the supporting evidence, which Union submitted as Exhibit 19E on December 15, 1977. The claimed revenue deficiency, according to that exhibit, was $17,330,000 as shown in Appendix B.

27 At page 30 of that decision, the Board stated:

The Board assumes that Union's self-interest will prompt it to apply, in good time and with supporting evidence, for rate adjustments if the contract with Northern Natural is not completed. The Board cannot make the same assumption if the contract is completed and if it provides for some contribution to over-all system costs. As already mentioned, this is expected to happen, if at all, before the final determination of rates in the present application. The Board, therefore, will direct Union to furnish the Board, as soon as the information is available to Union, with its estimate of such contribution during the initial year of the Northern Natural contract so that the Board may, if it then sees fit, deduct the amount from the revenue requirements used in the final determination of rates in Phase II of this case.

28 The failure by Union to get permission prior to December 31, 1980 to export the SNG, combined with the various accounting orders in regard to the SNG made by the Board, meant that the SNG received to that date had not been sold at any price to any customer of Union. Rather the SNG or equivalent volumes of natural gas were placed in inventory by Union as received from Petrosar.

29 The effect of the Board's accounting order and a short history of the SNG problem to that date is to be found in a letter from Union to the Board dated March 29, 1979 from which I quote:

As the Board is aware, Union is receiving and paying for the Petrosar SNG. The accounting for this supply to date has been in accordance with Accounting Order U.A. 30. Union has reported monthly since December, 1978 to the Energy Returns Officer concerning the accumulated quantity and cost of this supply. At March 31, 1979 the total accumulated supply from Petrosar is estimated to amount to 7.3 trillion Btu's (7.3 billion cubic feet on the basis of 1,000 Btu's per cubic foot), at a cost of approximately $24.8 million. Including interest accumulated against these payments the total cost is estimated to be $26.0 million.

Union originally entered into the Petrosar contract at a time when governmental authorities, both in Ontario and federally, were stating that there would be a serious, significant, on-going shortage of natural gas in Canada. Union became aware that Petrosar was negotiating for the sale of its SNG to a United States buyer and, after consulting with the Ontario government, entered into the Petrosar contract in order to preserve this gas supply in Canada for Union's customers. Union considered that contracting for this gas supply was not only in the interest of its customers but also in the interest of Canada in that the supply would increase the amount of gas available for allocation, a subject on which discussions were then under way. Union understands that, but for it having contracted for this SNG, the SNG would have been sold to a Michigan purchaser even though at the time there was an impending significant gas shortage in Canada. Intervening developments such as OPEC, the Petroleum Administration Act, the federal government's policy of seeking equivalent pricing for natural gas and oil, the economic turn-down, conservation, and the so-called 'gas bubble' have had the effect of the Petrosar contract

becoming a burden rather than the benefit perceived by all parties concerned at the time of its execution. Accordingly in an effort to mitigate this burden, Union has agreed to extend the date by which regulatory authority approvals must be obtained for the Northern Natural gas service agreement and, in light of the recent ERA decision, has agreed to a lower sales price to Northern Natural. The originally proposed sales price to Northern Natural would have resulted in proceeds exceeding the cost of the Petrosar supply; the new lower price, however, is less than such cost. Nevertheless, it is considered that the Northern Natural extension agreement, having regard to the time constraints and regulatory considerations, is the only practical way of mitigating the costs that flow to Union and its customers from the Petrosar contract. The new lower price is the highest price which Northern Natural is prepared to agree to in light of the recent ERA decision.

. . . . .

It is Union's position that, as the proceeds in excess of the cost of the Petrosar supply to have been derived from the Northern Natural contract would have gone into cost of service as a benefit to Union's customers, the apparent short-fall which will result from the new amended Northern Natural contract should also go into cost of service. At this time Union is not in a position to know the amount of the costs in respect of which relief will be required and will not have this knowledge at least until Northern Natural's import application has been dealt with by regulatory authorities.

For these reasons Union requests extension of Accounting Order U.A. 30 substantially in its present form, except that it should not expire until the Board has dealt with the Petrosar contract for rate making purposes, whether in the light of a termination of the Northern Natural agreement or its approval by U.S. regulatory authorities....

30 In its application to the Board, of June 13, 1980, Union requested.

(1) that the total volume of SNG accumulated in the separate inventory account be transferred to the regular inventory account valued at the average cost of all gas purchased;

(2) that the balance in the separate account representing the excess of the cost of the Petrosar supply over the average costs (the "SNG premium") be transferred to a deferred charge account (the "premium account") amortized over 5 years with the amortization included as a charge to cost of service, and

(3) that the balance in the premium account be recognized as a component of rate-base.

31 Between the time of filing the original application in June, 1980, and the disposition of the case in December of 1981, Union changed the basis of accounting for the SNG purchases. The interim accounting orders had required segregation of the Petrosar volumes and costs in a separate inventory account for two reasons: (1) the proposed agreement with Northern required Union to segregate receipts of SNG for future delivery to Northern and (2) to withhold the costs from expense and cost of service until the board ruled on the accounting and rate treatment.

32 Three factors required a change in the accounting as of December 31, 1980:

(i) the termination of the agreement with Northern;

(ii) the agreement with Transco for an export sale with commencement of deliveries in December, 1980;

(iii) the size of the Petrosar inventory account in December, 1980, which would have exceeded actual inventory

had purchases been allowed to accumulate in the Petrosar inventory account.

33 As a result, Union transferred the Petrosar volumes from the separate inventory account to its regular inventory account valued at the average cost of its other gas purchases as of December 31, 1980. From this time forward the SNG volumes became available for delivery to customers of Union.

34 In its disposition of the application the Board approved the accounting treatment of the SNG premium as outlined. The Board did not, however, accede to Union's request that the balance in the premium account be recognized as a rate base component with return thereon. It treated the SNG premium as a cost of gas item and rejected Union's proposal for future interest on those costs. As already indicated, it directed that this cost of gas item be collected by means of increased rates over a four-year period.

35 It should perhaps be noted that the Board was required by section 19 of *The Energy Board Act* (on the application before it), to determine a rate base before fixing the rates Union was to charge consumers. As mentioned earlier this requirement did not detract from the discretion given the Board by section 19(1) to decide which costs of Union were to be recovered out of the rates fixed. The requirement that the Board determine a rate base is contained in subsections 19(2) and (3) of the Act, which read:

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

36 I turn now to a consideration of the first issue raised on this application, namely: Whether the Board erred in law or exceeded its jurisdiction in permitting Union to recover the amount in the SNG premium account by amortizing such amount over the following four years.

37 Nowhere in *The Ontario Energy Board Act* is there any express prohibition against including in future rates, costs incurred in the past. Apart from certain provisions relating to the determination of rate base, there is no mechanical procedure laid down in the Act as to how the Board is to perform its function of fixing just and reasonable rates.

38 Under section 27(1)(d) of the Act, the Board may by Regulation prescribe a Uniform System of Accounts applicable to a gas distributor such as Union. That Uniform System of Accounts now appears in R.R.O. 1980, Regulation 702. Under section 27(2) of the Act the Uniform System of Accounts may require the approval, consent or determination of the Board in respect of any of the matters provided for in such system. As already mentioned, Section 5 of the Uniform System of Accounts provides:

> **5. Submission of Questions**

> Since uniformity of accounting by gas companies in Ontario is a basic reason for this system of accounts, companies shall submit all questions of doubtful interpretation of the accounting rules to the Board for determination.

39 At the time Union applied to and obtained from the Board the accounting orders referred to, the question of how Union should account for the purchase of the Petrosar gas was doubtful and required Board determination. The effect of the accounting orders was to postpone rate treatment of the SNG premium until it was determined whether the Petrosar gas could be sold to Northern and if so, at what price and on what terms. Shortly after the Northern transaction fell through, Union entered into a contract with Transco. At that time, the Board extended the accounting order then outstanding until the pending rate case could be decided.

40 The accounting order of the Board of June 30, 1980 reads in part:

> 1. IT IS ORDERED THAT Union is hereby authorized to continue to carry in a separate inventory account the volumes and costs of the Petrosar gas being purchased pursuant to a contract dated November 20, 1974, from the first delivery of such gas to Union while this order is in effect, and during such time no portion of the costs of the Petrosar gas shall be charged by Union to expenses; details of the accounting including the accumulation of interest, shall be in accordance with Appendix "B" attached hereto;
>
> 2. THIS ORDER shall be in effect from July 1, 1980, and remain in effect until November 1, 1980, or until the appropriate ratemaking treatment and accounting treatment of the Petrosar gas have been determined, whichever comes sooner.

41 By order of the Board dated November 7, 1980 the Board's order was further extended as follows:

> IT IS ORDERED THAT Clause 2 of accounting order U.A. 38 dated June 30, 1980, be amended to read as follows:
>
> > 2. THIS ORDER shall be in effect from July 1, 1980, and remain in effect until otherwise ordered by the Board.

42 The accounting treatment ordered by the Board caused Union to carry in a separate inventory account the costs of the Petrosar gas and for the duration of the accounting orders to charge no part of such costs to expense. The costs of the Petrosar gas were not passed on to Union's customers in rates, did not appear on Union's income statement and accordingly, did not affect its financial results in any year.

43 What occurred in this case was a postponement of the determination of an expense for rate-making purposes for a period of time for reasons determined by the Board to be valid.

44 Section 19(1) of the Act which gives the Board power to make orders approving or fixing just and reasonable rates for the sale of gas by a gas distributor such as Union, is made subject to the Regulations under the Act, one of which is the Uniform System of Accounts.

45 Where the Board by ordering the setting up of the SNG account (an order made under the Regulations under the Act), has in effect agreed to a postponement of a determination of the issue as to whether the premium cost of SNG should be recovered from Union's customers in its rates, and where the power of the Board is specifically by section 19(1) of the Act made "Subject to the regulations", it would be most remarkable if the Board had somehow lost the power to deal with that issue as soon as the full particulars of that cost became known.

46 Yet it is the position of Dow and The Industrial Gas Users Association that the Board did not have the power to order that the premium cost of the SNG accumulated prior to October 31, 1981 be recovered out of future rates to customers. It is submitted by them that such is the effect of the decisions in *Edmonton v. Northwestern Utilities* (1961), 28 D.L.R. (2d) 125 (S.C.C.) and *Re Northwestern Utilities Ltd. et al. and City of Edmonton* (1978), 89 D.L.R. (3d) 161 (S.C.C.).

47 In *Edmonton v. Northwestern Utilities* the Board of Public Utility Commissioners, in exercising its jurisdiction to fix rates under *The Public Utilities Board Act*, 1960 (Alta.) c. 85, concluded initially, and before the Act was amended in that regard, that it had no power to permit the Utility to recover in future rates, losses (referred to as "transitional losses") suffered by reason of the delay in raising rates between the date of the application to raise rates and the date when the new rates would become effective. In commenting on that decision of the Board, Locke J. stated at page 133:

> While the reasons given do not explain the grounds upon which the Board proceeded, it may, I think, be fairly assumed that it was based upon the language of s.67(a) which speaks of rates which shall be imposed, observed and followed thereafter by any proprietor.

48 Section 67(a) of *The Public Utilities Board Act* reads:

> 67. The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested,
>
> > (a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation, mileage and other special rates, which shall be imposed, observed and followed thereafter by any proprietor.

49 The comparable section of *The Ontario Energy Board Act* reads:

> 19.-(8) Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

50 The subsection just quoted does not contain the word "thereafter" and once again includes the phrase "Subject to the regulations".

51 Before the Board in the *Edmonton v. Northwestern Utilities* case actually fixed the rates, *The Public Utilities Board Act* was amended by the addition of the following subsection:

> 67.-(8) It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

52 The decision of the Supreme Court of Canada was simply that such amendment empowered the Board to authorize the Utility to recover "transitional losses" in future rates. In arriving at that conclusion, Locke J. made the following comments as to construction of statutes, at page 134:

In the *Sussex Peerage* case (1844), 11 Cl. & Fin. 85 at p. 143, 8 E.R. 1034 , Tindal, L.C.J., said that -

> the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

In *Vacher & Sons Ltd. v. London Society of Compositors*, [1913] A.C. 107 , where the question was as to the interpretation of a section of the *Trade Disputes Act* of 1906, Viscount Haldane, L.C., said (p. 113) that he proposed -

> to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particu lar section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

Section 9 of the *Interpretation Act* , R.S.A. 1955, c. 160, declares that every Act shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In my opinion, the language of the subsection makes its meaning perfectly clear and it is unnecessary to resort to any outside aid to interpretation.

53 The court in *Edmonton v. Northwestern Utilities* also had to deal with the propriety of the Board including in the terms of the rate structure what was referred to as "a purchased gas adjustment clause". Northwestern Utilities Ltd. had large natural gas reserves of its own but in addition purchased large quantities of natural gas for use in its operations from the operators of other gas and oil wells. The Board's estimate of its expense for its purchased gas for 1959 was $3,825,690.00 and for 1960 was $3,722,300.00.

54 Locke J. stated at page 128:

> It was impossible in the circumstances disclosed by the evidence for the respondent to determine with certainty in advance the amounts it would expend for purchased gas from year to year, and the figures above mentioned were, of necessity, estimates only. The respondent, accordingly, asked that the order to be made by the Board should contain what was called a purchased gas adjustment clause, a provision which, it was said, was approved by public utility boards in various states of the Union. The practical effect of such a clause would be that, assuming by way of illustration that the estimate of the cost of purchased gas for the year 1959 should prove to be $800,000 less than the actual expenditure for that purpose, this amount would be recouped by the company by an increase in the price of gas to consumers for the year 1960. Should, however, the estimated figure for this cost, used in approving the rates for the year 1959, be greater than the actual expenditure, the rates fixed for the year following would be reduced to give to the purchasers of gas the benefit of the saving.

and at p. 130:

> Dealing with the proposed purchased gas adjustment clause and the objections raised to the application of any such principle, the Board said in part:
>
> > The board undoubtedly has jurisdiction to fix just and reasonable individual rates, joint rates, tolls or

> charges or schedules thereof as well as other special rates which shall be imposed, observed and followed thereafter by any proprietor. It appears to the board that it has jurisdiction to say that the rate would be a certain amount per MCF. or per therm plus the cost of purchased gas or a certain rate plus or minus an adjustment for any variation in the cost of purchased gas which is in effect what is done by the adoption of a purchased gas adjustment clause.

After pointing out that the cost of purchased gas was one of the main items of expense of the company and that it was obvious that it is entitled to recover this expense through the rates charged, the Board said:

> After reviewing very carefully all the evidence in this respect and giving consideration to what was said in argument this board is convinced that a provision for purchased gas adjustment is in the best interests of the consumer and is essential to the company if its financial integrity is to be maintained, which of course is also in the best interests of the consumer.

and at pp. 136 and 137:

> In approving rates which will yield a fair return to the utility upon its rate base, it is, of course, essential for the Board to estimate the expenses which will necessarily be incurred thereafter in rendering the service. ...The Board can only come to a conclusion as to what rates should be approved by determining as closely as may be done in advance the probable amount of these expenditures.
>
> . . . . .
>
> That, in determining what was a fair return and deciding what rates should be authorized to earn such a return, the expenses of operation must be estimated as accurately as is reasonably possible is not questioned by anyone. The Board was apparently satisfied that, in the circumstances, it was not possible to estimate for years in advance the cost to which the respondent would be put for purchased gas from year to year, and concluded that such a provision as was proposed was in the best interests of the consumers and essential to the company if its financial integrity was to be maintained.
>
> What was proposed was that the utility should submit to the Board, and to such other interested parties as the Board might direct should be notified, not later than November 1st in each year, the figures as to its cost for purchased gas during the first 9 months of the year and its estimate of the amounts required for such purpose during the months of October, November and December. Dependent upon whether these costs were in excess of or less than the amount estimated, in approving the rates the Board would be asked to make such adjustments in the rates for the following year to carry out the purpose above explained.
>
> ...however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

55 In spite of the fact that section 67 of *The Public Utilities Act* provided that the Board was to "fix just and reasonable ... rates ... which shall be ... followed thereafter...", Locke J. held that the Board was entitled to include in its rate structure a purchased gas adjustment clause which empowered the Board to adjust future rates to compensate for any proven inaccuracy in the predictions as to the cost of gas purchased by Northwestern Utilities Ltd. Such adjusted rate would, following the date of adjustment, compensate or penalize Northwestern to the extent it had prior

to that date been paid more or less than its predicted cost for purchased gas - and so would have retrospective effect. Locke J. held that dealing with an uncertain cost of gas in such fashion "was an administrative matter for the Board to determine", given its duty to allow the utility a fair return on its investment.

56 In my view the Board in the case before us faced with the duty to allow Union a reasonable return on its investment and with a far greater uncertainty as to the cost of the SNG was entitled to in effect postpone dealing with that cost until it was ascertained and to permit it to be collected in future rates. *Edmonton v. Northwestern Utilities* supports the decision of the Board in that regard.

57 In *Re Northwestern Utilities Ltd. et al. and City of Edmonton* (1978), 89 D.L.R. (3d) 161 , the Supreme Court of Canada held that, apart from section 31 (which relates to losses or profits occurring after the making of an application to the Board), "there is nothing in the Act [*The Gas Utilities Act* , R.S.A. 1970, c. 158] to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application" (Estey J., p. 163), and "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" (Estey J., p. 164).

58 In the final result, as was said by Estey J. in *Nova v. Amoco Canada Petroleum Company Ltd et al.* (1981), 128 D.L.R. (3d) 1 at page 9, "...each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes".

59 In regard to *The Ontario Energy Board Act* , I note in particular:

(1) Section 16 provides:

> The Board in making an order may impose such terms and conditions as it considers proper, ...

(2) Section 27 provides:

> ...the Board may, ... prescribe a uniform system of accounts.

(3) The Uniform System of Accounts provided for by Regulation 702 provides:

> ...companies shall submit all questions of doubtful interpretation of the accounting rules to the Board for determination.

(4) Section 19 provides in part:

> Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates...

(5) Section 30 provides:

> The Board may at any time ... rescind or vary any order made by it.

60 Employing the cannons of interpretation of statutes already quoted from the judgment of Locke J. in *Edmonton v. Northwestern Utilities* , I conclude that, unlike *The Gas Utilities Act, The Ontario Energy Board Act* does empower the Board where it has for sound administrative reasons postponed consideration of an expense for ratemaking purposes to include that past expense as an expense to be collected in future rates. If the Board had the

power to direct Union to segregate those expenses pending a rate application, it must by necessary implication have the power to direct Union to deal with the expenses so separated in a future rate application. It cannot reasonably be presumed that the legislature intended to so truncate the Board's jurisdiction as to allow it to accomplish only a partial result, with no power to finalize and complete a regulatory order. 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. Accepting that ordinarily current expenses should be matched with current revenues for rate-making purposes, the Uniform System of Accounts under *The Ontario Energy Board Act* contemplates that the Board may cause postponement of rate-making treatment in regard to an uncertain or undetermined expense, as it did in this case.

61 I deal now with the second issue raised on this application: Whether the Board had jurisdiction to apply the rate increase to Dow the holder of a vintage contract which stipulated that Dow would have to pay only for increases in rates granted TransCanada by the National Energy Board and that Union would not ask the Board to increase Dow's rates.

62 In fact Union did not ask the Board to increase Dow's rates and the proposal it made to the Board as to rate increases did not propose any increase in Dow's rates; rather, it suggested that the rates to its other customers be increased sufficiently to give it the return determined by the Board without changing Dow's rate.

63 Section 19(8) of *The Ontario Energy Board Act* provides:

> Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board *which is not bound by the terms of any contract* .
>
> [Emphasis added.]

64 Section 41(a) of the Act also provides as follows:

> (a) every distributor affected by a regulation, an order of the Board or an allocation plan approved under this part, and *every consumer affected by an order of the Board, shall comply therewith in accordance with its terms notwithstanding anything in any contract between a distributor and a consumer* ;
>
> [Emphasis added.]

65 Union may therefore only sell gas to a customer, including Dow, in accordance with a Board order. In determining that a rate increase shall apply to Dow, it is clear that the Board is not bound by a contractual provision which provides for a different rate or price and attempts to exempt Dow from rate increases.

66 It was submitted by Dow that even if the Board has power to reflect Union's SNG premium costs in rates and charges imposed on Dow, that the Board can exercise such power only after due consideration of Dow's existing contractual arrangements, and that the Board ought to have had regard to the question of whether or not excluding Dow from the effect of SNG costs would cast an excessive burden onto Union's other customers.

67 There is no indication that the Board ignored the provisions of the Dow contract or failed to consider its contractual arrangements. In fact, Dow's written argument was before the Board, was referred to by the Board in its reasons for decision, and Dow's position was clearly considered by the Board.

68 The Board dealt with the issue of whether Dow should be treated differently in a previous decision in a rate application brought by Union. Dow was an intervenor in that proceeding and was represented at the hearing. At page 85 of its reasons for decision dated September 14, 1981, the Board said:

> The Board has concluded that Dow Chemical will not be exempt from rate increases and to the extent that this affects the revenue return from that class of customer, adjustments will be made so that the total increase in revenues is equal to the revenue deficiency found by the Board.

and at page 97:

> The Board has directed that Dow Chemical should not be excluded from the rate increases and should make its contribution towards the revenue deficiency.

69 Dow maintains that it did not receive any of the SNG gas purchased by Union from Petrosar. There is no evidence on this issue in this case. The SNG received by Union is mixed with supplies received from TransCanada and subject to the flow in the storage, transmission and distribution system, the combined gas may go to any customer. If Dow contends that it should be treated differently from Union's other large industrial customers, then, surely, it ought to have laid a foundation in fact for that argument by introducing the appropriate evidence. Dow did not call evidence at the hearing. The Board treated all large industrial customers in the same way.

70 By so doing, it reached a proper conclusion and perhaps the only conclusion it could reach on the evidence before it.

71 The result is that leave to appeal is granted but the appeal is dismissed. Costs are to be spoken to.

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TAB 8

2005 CarswellOnt 375, 194 O.A.C. 241

2005 CarswellOnt 375, 194 O.A.C. 241

Graywood Investments Ltd. v. Ontario (Energy Board)

Graywood Investments Limited, Applicant and Ontario Energy Board and Toronto Hydro-Electric System Limited, Respondents

Ontario Superior Court of Justice (Divisional Court)

Lane J., Molloy J., Pitt J.

Heard: November 15, 2004
Judgment: February 3, 2005
Docket: 724/02

Counsel: Robert J. Howe, David S. Cherepacha, for Applicant

F.J.C. Newbould, Q.C., for Respondent, Toronto Hydro-Electric System Limited

M. Philip Tunley, for Respondent, Ontario Energy Board

Subject: Public

Administrative law --- Standard of review — Reasonableness — Patently unreasonable.

Public utilities --- Regulatory boards — Licensing (public convenience and necessity).

Public utilities --- Regulatory boards — Practice and procedure — Judicial review — Natural justice — Procedural fairness.

Public utilities --- Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Error of law.

Cases considered by *Molloy J.*:

Arding v. Buckton (1956), 20 W.W.R. 487, 6 D.L.R. (2d) 586, 1956 CarswellBC 153 (B.C. C.A.) — followed

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — referred to

Consumers' Gas Co. v. Ontario (Energy Board) (2001), 2001 CarswellOnt 4503 (Ont. Div. Ct.) — considered

Graywood Investments Ltd. v. Toronto Hydro-Electric System Ltd. (2003), 2003 CarswellOnt 1852 (Ont. S.C.J.) — referred to

Graywood Investments Ltd. v. Toronto Hydro-Electric System Ltd. (2004), 2004 CarswellOnt 204, 181 O.A.C. 265 (Ont. C.A.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — followed

Cases considered by *Pitt J.*:

Casurina Ltd. Partnership v. Rio Algom Ltd. (2004), 2004 CarswellOnt 180, 40 B.L.R. (3d) 112, 181 O.A.C. 19 (Ont. C.A.) — considered

Consumers' Gas Co. v. Ontario (Energy Board) (2001), 2001 CarswellOnt 4503 (Ont. Div. Ct.) — referred to

Petty v. Telus Corp. (2002), 2002 BCCA 135, 2002 CarswellBC 325, 164 B.C.A.C. 152, 268 W.A.C. 152, 33 C.C.P.B. 111 (B.C. C.A.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — referred to

Q. v. College of Physicians & Surgeons (British Columbia) (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — referred to

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

Statutes considered by *Molloy J.*:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

s. 19(1) — referred to

s. 19(2) — referred to

s. 21(2) — considered

s. 33 — referred to

s. 33(1) — considered

s. 33(2) — considered

s. 44 — referred to

s. 70.1 [en. 2003, c. 3, s. 48] — referred to

s. 75 — considered

s. 75(1) — referred to

s. 75(2) — considered

s. 75(3) — considered

s. 75(4) — considered

Statutes considered by *Pitt J.*:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

***Molloy J.*:**

A. Introduction

1 Graywood Investments Limited ("Graywood") seeks to judicially review, or alternatively, appeal from a decision of the Ontario Energy Board (the "OEB" or "the Board") dated July 25, 2001, in which the OEB dismissed Graywood's complaint that the Toronto Hydro-Electric System Limited ("Toronto Hydro") had failed to comply with certain provisions of its licence and the *Ontario Energy Board Act, 1999* ("the Act"). In particular, Graywood argued before the OEB that the subdivision project it was developing was governed by new rules which came into force on September 29, 2000 and that it was entitled to hire a contractor at competitive rates to install the electrical distribution system for the subdivision. Toronto Hydro took the position that the old monopolistic regime applied and that Graywood was obliged to retain Toronto Hydro at the rates applicable under the old system. The OEB dismissed Graywood's complaint based on its finding that Graywood and Toronto Hydro had entered into an

agreement before November 1, 2000 such that an exception applied and the subdivision project did not fall within the new regime.

B. Background Facts

2 Graywood is a real estate developer. In 1999, Graywood commenced development of a residential subdivision in north Scarborough. At that time, Toronto Hydro enjoyed a monopoly on the provision of new electrical supply facilities to developers in that geographic area. Accordingly, on November 1, 1999 Graywood consulted Toronto Hydro about the underground electrical distribution system for the subdivision.

3 Toronto Hydro replied by letter dated November 9, 1999 that it would proceed with the "design" of the electrical distribution system upon payment of a "deposit fee" of $110.00 per lot, which fee would later be "credited against the overall electrical charges which will be detailed in the project invoice". Graywood paid the requested design fee of $63,140.00 on December 23, 1999. Both parties obviously anticipated that Toronto Hydro would eventually be doing the installation work as at that time Toronto Hydro enjoyed a monopoly position in the market.

4 Toronto Hydro completed the design work and sent its design drawings to Graywood's engineers on June 27, 2000. At this point, Graywood was under no contractual obligation with Toronto Hydro to proceed any further.

5 It is clear that by the fall of 2000 Graywood was committed to proceeding with the development of this subdivision. In September, October and November 2000 sewers, water mains and roads were being constructed. In November 2000 Graywood contacted Toronto Hydro with respect to the installation of the electrical distribution system it had designed. Toronto Hydro refused to install the electrical system without a written contract.

6 By November 2000 a new regime had come into force with respect to the provision of certain electrical services, which regime was designed to end the monopoly electrical providers had previously enjoyed. Graywood took the position that the new regime applied to its subdivision and that Toronto Hydro should comply with the new scheme by making an offer to connect which Graywood could then consider and possibly exercise its option to obtain alternative bids from other electrical suppliers. Toronto Hydro disagreed, taking the position that the new regime did not apply to this subdivision and refusing to provide an offer to connect under the new scheme. Toronto Hydro insisted that it would only provide installation services pursuant to its pricing structure and policies in place prior to the new regime.

7 Ultimately, Graywood agreed to proceed with Toronto Hydro, but under protest with respect to the pricing structure. Toronto Hydro drafted a contract entitled "Agreement for the Installation of an Underground Electrical Distribution System in a Residential Subdivision" and forwarded it to Graywood in mid December 2000. Although executed by the parties in December 2000, the agreement stipulates that it is "made this 8th day of November, 2000". Schedule B to the agreement was a preliminary invoice for a full contract amount of $1,772,867.34. Against this, Toronto Hydro applied a credit of $63,140.00 being the "deposit" paid for the design work, such that the price to be paid by Graywood was $1,709,727.34. Toronto Hydro stipulated that the full contract price would have to be paid before it proceeded with any installation work. Graywood paid the invoice in full but stated this was without prejudice to its rights to challenge Toronto Hydro's position before the OEB and/or the courts.

C. Ending the Monopoly: Changes to the Legislative Scheme

8 On July 14, 2000, the OEB published a Distribution System Code ("the Code") which sets out minimum conditions with which distributors of electricity must comply. A "distributor" is defined as a person who owns or operates a system for distributing electricity, which includes Toronto Hydro. The Code's object was to end Toronto Hydro's monopoly and open the field to competition. Different aspects of the Code came into force at different times.

Chapter 3 of the Code, dealing with "Connections and Expansions" came into force on September 29, 2000 with one key exception. The Code provided in Article 1.7 that its provisions would "not apply to projects that are the subject of an agreement entered into before November 1, 2000". That exception provision is central to the determination of the proceeding now before this Court.

9 Article 1.7 does not specifically define what type of "agreement" would trigger the exception to the application of Chapter 3 of the Code, nor is the term "agreement" included in the general definition section of the Code. However, Chapter 3 relates to Connections and Expansions of electrical distribution systems. The general definition section of the Code refers to only one type of agreement, that being a "Connection Agreement", which is defined as follows:

> "Connection Agreement" means an agreement entered into between a distributor and a person connected to its distribution system that delineates the conditions of the connection and delivery of electricity to that connection;

10 Under the Conditions of Service attached to its licence, Toronto Hydro is required to enter into a contract of service with any customer before it connects a building for a new or modified supply of electricity (Conditions of Service, section 2.1.7.1). Further, in the absence of a written agreement, the Conditions of Service provide that an agreement will be implied "with any Customer who is connected to Toronto Hydro's distribution system and receives distribution services from Toronto Hydro". The terms of such an implied agreement are stipulated to be embedded in various sources, including the Conditions of Service and the Distribution System Code (section 2.1.7.2). These provisions are mirrored in the Code. Article 2 of the Code (dealing with standards of business practice and conduct) provides;

> A distributor shall ensure that it has an appropriate Connection Agreement in place with any customer prior to commencement of service. If a Connection Agreement is not entered into once service has commenced, the provision of service by the distributor shall imply acceptance of the distributor's Conditions of Service and the terms of any applicable Connection Agreement.

11 Article 3.2.2 of the Code provides that if an expansion of a distributor's main distribution system is needed in order to connect a customer, the distributor is required to make an offer to the customer that must include a description of the material and labour required to build the expansion required to connect the customer, an estimate of the amount that would be charged for construction of the system by the distributor and an estimate of what the distributor will charge for the connection of the new system to its main system. The distributor is also required to inform the customer of the option of obtaining alternative bids from qualified contractors. This is the provision relied upon by Graywood, but which Toronto Hydro took the position did not apply to Graywood's subdivision because of the exception in Article 1.7 for projects subject to an agreement entered into before November 1, 2000.

12 Article 3.2.3 provides that, "A distributor shall be responsible for the preliminary planning, design and engineering specifications of the work required for the distribution system expansion and connection." However, under the new regime, it does not necessarily follow that the distributor will obtain the contract to construct the distribution system expansion and connection. The consumer may elect to proceed with an approved private contractor for that portion of the work.

D. Proceedings Before the Ontario Energy Board

13 Graywood wrote to the Ontario Energy Board on March 9, 2001 alleging that Toronto Hydro was in breach of its licence by failing to comply with the provisions of the Code. Toronto Hydro outlined its position in a letter dated April 4, 2001, indicating that the Code did not apply to the Graywood subdivision because of the design work undertaken by Toronto Hydro prior to November 1, 2000. Graywood requested the OEB to schedule a hearing to

consider whether Toronto Hydro was in breach of its obligations.

14 The OEB advised Graywood in May 2001 that it would be treating Graywood's letter as a complaint and would conduct an investigation. The OEB's letter in that regard states, in part:

> While in your letter you requested a hearing to determine whether Toronto Hydro is in compliance with the Code, the Board will treat the matters raised in your letter as a complaint. Under the licensing provisions of the Ontario Energy Board Act, 1998, parties do not have a right to obtain a hearing on matters of non-compliance. Rather, where the Board believes a licensee is in non-compliance, it may issue a notice setting out its intention to issue a non-compliance order or suspend or revoke the licence. Where parties raise issues of non-compliance, the Board has adopted the practice of referring such complaints to the Director of Licensing to investigate and make recommendations regarding further action by the Board.

15 Graywood did not at the time object to the manner in which the OEB proposed to deal with its complaint, other than to take the position that a hearing should be held.

16 Section 75 of the *Ontario Energy Board Act, 1988*, provides:

> 75 (1) If the Board is satisfied that a licensee is contravening or is likely to contravene any licence, the Board may order the licensee to comply with its licence.
>
> (2) The Board shall give written notice to the licensee that it intends to make an order under subsection (1).
>
> (3) Notice under subsection (2) shall set out the reasons for the proposed order and advise the licensee that, within 15 days after the day that notice was given, the licensee may request the Board to hold a hearing.
>
> (4) If no request for hearing is made within the time permitted by subsection (3), the Board may make an order.
>
> (Emphasis added)

17 The OEB conducted an investigation and obtained extensive written submissions and documentation from Graywood. The investigation included a consideration of all of the dealings between Graywood and Toronto Hydro from the inception of the subdivision project as well as Graywood's own work within the project. Toronto Hydro was given the opportunity to provide further documentation or submissions, but did not do so.

18 Following its investigation, the OEB concluded that Toronto Hydro was not in breach of its licence and was not required to comply with the requirements of Chapter 3 of the Code for the Graywood subdivision project. Essentially, the OEB concluded that there was an agreement between Graywood and Toronto Hydro prior to November 1, 2000 such that the exception provision in Article 1.7 applied. The OEB's reasons for this determination are set out in a letter from the Board Secretary, the operative portion of which states:

> Based on the information provided, the Board finds that an implied agreement had been reached prior to November 1, 2000.
>
> The Board finds that in past industry practice, there was often no formal offer to connect and associated written connection agreement between parties on a specific project. The evidence indicates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further

demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November 1, 2000 and that Graywood was committed to the Project proceeding as municipal servicing had commenced prior to October of 2000.

Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed based on past industry practice.

E. Procedural Fairness

19 Graywood raises two issues of procedural fairness. First, it argues that the OEB breached its duty of fairness in failing to conduct a hearing before making its findings. Second, Graywood objects to the Board taking into account evidence of past industry practice without giving Graywood notice of its intent to do so and an opportunity to respond to it.

20 With respect to the first point, Graywood requested the OEB to hold a hearing and the OEB refused, based on its conclusion that there had been no breach by Toronto Hydro. I do not agree with the applicant's contention that the Board was required to hold a hearing before concluding there had been no breach.

21 The language used in s. 75 of the Act is instructive. Subsections (2) and (3) provide that the Board "shall" give written notice to the licensee if it intends to make a compliance order and "shall" provide reasons for the proposed order. However, mandatory language is not used in other parts of this provision. Thus, even if the Board finds there has been non-compliance, it "may" order the licensee to comply, but is not required to do so: ss. 75(2) and (4). Given the structure of these provisions, it cannot be the case that the legislature contemplated the Board would be required to hold a hearing before deciding the licensee had complied with its licence. If the Board was required to hold a hearing with respect to every complaint of non-compliance, clearly the licensee whose rights are directly affected would have to be given notice. However, ss. 75(2) and (3) contemplate notice to the licensee only if the Board intends to make an order and, at that point, the licensee is entitled to "request" a hearing. This provision would be meaningless if the Board had already been required to hold a hearing simply by virtue of the fact that a complaint had been filed.

22 There is no requirement that the Board hold a hearing every time a complaint is referred to it. Rather, the right to a hearing arises only where, after its initial investigation, the Board is inclined to issue a notice of non-compliance. Even then, it is the licensee rather than the complainant who is entitled to request a hearing. Apart from that, it is entirely within the discretion of the Board whether to hold a formal hearing in this type of situation. Unless that discretion is exercised improperly (which is not alleged here), this court will not interfere. The mere decision *not* to hold a formal hearing is not in itself a denial of procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).

23 Likewise, I find no procedural unfairness in the OEB taking into account industry practice. The Board is a highly specialized tribunal. It has considerable knowledge and experience as to the nature of this particular industry and how it operates. The Board noted that it is not uncommon in the industry for there to be no formal written connection agreement. The Board was fully entitled to draw on its expertise in this regard. That is one of the distinct advantages of having these types of matters decided by a specialized tribunal. I also note that both the Toronto Hydro operating licence and the legislation contemplate this very situation and provide that an agreement consistent with the distributor's conditions of licence and the legislation will be implied in the absence of a written agreement. The Board also noted that the subdivision project had been costed based on past industry practice. Again, the Board is uniquely positioned to draw such a conclusion based on its expertise. While evidence of past industry practice might be necessary before a court or in areas outside the expertise of the tribunal, no such evidence was necessary before the Board here. The matters taken into account were within the special expertise of the Board. The Board was

entitled to draw on that expertise and was not required to give any notice of such to the complainant before making a decision.

24 Accordingly, I find no breach of procedural fairness by the OEB in its handling of this matter.

F. Standard of Review

Is the OEB Decision an Order?

25 Section 33(1) of the Act provides that an appeal lies to the Divisional Court from an "order of the Board", the making of a rule under section 44 or the issuance of a code under section 70.1. Section 33(2) stipulates that the appeal may be made solely upon a question of law or jurisdiction. The first issue to be determined is whether the decision of the Board in this case is an "order" within the meaning of s. 33(1) and therefore subject to an automatic right of appeal.

26 Sections 19 (1) and (2) provide:

> 19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.
>
> (2) The Board shall make any determination in a proceeding by order.

27 The applicant also relies upon Section 21(2) of the Act, which prohibits the Board from making an "order" unless it has conducted a hearing on notice to the appropriate parties. However, this provision is stated to be "subject to any provision to the contrary in this or any other Act".

28 Section 75(4) of the Act is an example of a situation in which an "order" may be made without a hearing. It provides that where the Board is of the view that a licensee has failed to comply with the conditions of its licence, has given notice to the licensee of its intention to make a compliance order and has not received a request for a hearing from the licensee within the 15 day time limit, the Board "may make an order". However, the fact that some determinations made by the Board under s. 75 are "orders" subject to the appeal right, does not mean that every decision made by the Board in the administration of that section will necessarily be an "order". The Board performs many functions under the Act. Some are judicial, or quasi-judicial, in nature; others are more administrative. In my view, a decision by the Board that it is not appropriate to initiate the process leading up to a hearing under s. 75 is more administrative than judicial. That is not to say that important interests of other parties are not affected. Often they will be. However, in my opinion, a decision not to proceed further under s. 75 is simply a decision not to make an order. It is not itself an order, and is not subject to the appeal right set out in s. 33 of the Act.

Judicial Review

29 The OEB supervises the terms upon which electrical power is supplied to Ontario residents. Graywood was not able to simply retain somebody other than Toronto Hydro to connect electricity to its subdivision. Graywood attempted to obtain relief from the civil courts in respect of its contract with Toronto Hydro, but its case was dismissed on the grounds that the OEB had exclusive jurisdiction to deal with the matter: *Graywood Investments Ltd. v. Toronto Hydro-Electric System Ltd.*, [2003] O.J. No. 2091 (Ont. S.C.J.), aff'd [2004] O.J. No. 193, 181 O.A.C. 265 (Ont. C.A.). Whether or not Graywood was required to proceed with Toronto Hydro on its terms under the old monopoly regime, as opposed to the new regime, is a matter of considerable financial consequence for Graywood. Therefore, although the Board's decision not to proceed against Toronto Hydro was not an "order" subject to appeal,

it clearly affected the legal rights, powers and liabilities of Graywood. As such, it is a statutory power of decision and subject to judicial review by this Court.

Standard of Review

30 The Supreme Court of Canada ruled in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) that a "pragmatic and functional approach" should be taken in determining the level of deference to be accorded an administrative tribunal. The reviewing court is required to evaluate each situation taking into account four factors: (1) whether there is a privative cause; (2) the expertise of the tribunal; (3) the purpose of the legislation as a whole and the particular provision in issue; and (4) the nature of the question before the tribunal: *Pushpanathan*, *supra*, at paras 28-38.

31 There is no privative clause in the Act. There is a right of appeal, but limited to questions of law and jurisdiction. As noted by the Divisional Court in *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (Ont. Div. Ct.) at para 3, that is a factor which places the Board "on a continuum short of patent unreasonableness".

32 The OEB is a highly specialized tribunal with considerable expertise. *Consumers' Gas Co. v. Ontario (Energy Board)*, *supra*, was a judicial review of an OEB decision permitting Consumers Gas to use the value of past ratepayer benefits to pay deferred taxes amounting to $50 million. The Divisional Court applied a "reasonableness" standard of review, emphasizing the importance of deference due to the Board's high level of expertise. Carnwath J. noted, at para 2:

> The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate — the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment. The following are but some of the activities of the Board requiring expertise:
>
> - economic forecasting
> - familiarity with accounting and income tax principles
> - special features and requirements of a monopolistic utility

33 While the expertise brought to bear by the OEB in the case at bar is somewhat different from the situation before the Court in the *Consumers' Gas* case, it is no less complex or specialized. The Board was required to balance the interests of the consumer with those of electricity distributors, suppliers and contractors, all within the context of a market that was moving from a monopolistic structure to one with some aspects of competition, but still with supervision and controls. The OEB's expertise includes not just the provision of electricity but many other aspects of construction, engineering and subdivision planning and control. The specialized nature of the OEB's expertise demands a relatively high degree of deference to its decisions.

34 The nature of the legislation involved also supports a deferential standard of review. The subject matter is specialized and complex, involving the balancing of many different levels of public and private interests. Further, the particular provision before the Board in this case dealt with the phasing in of a new competitive regime and was squarely within the public interest mandate and expertise of the Board.

35 The matter decided by the OEB was whether the Graywood subdivision project fell within the new

competitive regime. This required the Board to decide whether the project was "subject to an agreement" with Toronto Hydro prior to November 1, 2000. This involves questions of law as to contract formation and statutory interpretation. However, it is not a pure question of law. To answer the question before it, the Board was also required to consider the dealings between the parties and make findings of fact. Accordingly, the question decided by the Board was one of mixed fact and law. As such, it is less likely to be held to the standard of correctness often applied to pure questions of law. On the other hand, although there are factual aspects to the question, they did not involve determinations of disputed questions of fact or findings of credibility.

36 Taking all of these factors into account, I am of the view that the appropriate standard to be applied is one of reasonableness. The OEB is not required to be "correct" in its decision. It is not the court's role, therefore, to substitute its own determination for that of the Board. Rather, the court must only interfere with the OEB's decision if it is an unreasonable construction of the law when considered in light of the established facts.

G. Analysis

37 The OEB found there was no unfairness to Graywood in requiring it to proceed under the old monopolistic regime, such that it was obliged to have Toronto Hydro construct and install its electrical system at prices fixed by Toronto Hydro. This finding was based on the Board's review of the construction plans and industry practice and its conclusion that Graywood had costed the subdivision based on the projected electrical prices under the old regime. This was a reasonable conclusion on the Board's part and I would not interfere with it.

38 However, the OEB's decision cannot be based solely on its view of what is fair in the circumstances. There was a system in place with established rules for the transition. The OEB was required to apply those rules. If Graywood's project was not subject to "an agreement" with Toronto Hydro prior to November 1, 2000, then Graywood was entitled to the benefit of the new regime even if that resulted in an unforeseen economic benefit to Graywood.

39 The central and dispositive finding made by the OEB was that an "implied agreement had been entered into prior to November 1, 2000". The Board does not set out the terms of that implied agreement, nor the operative date of the agreement. However, in the very next sentence following the finding of an implied agreement, the Board notes that in past industry practice there is often "no formal offer to connect and associated written connection agreement". The logical inference is that the Board was of the view that even though there was no written connection agreement prior to November 1, 2000, it is often the case that projects would not have such a written agreement and the Board therefore found there was an "implied" connection agreement prior to that date.

40 The basis for the OEB coming to that conclusion was the fact that Toronto Hydro had been involved with the project from 1999, having undertaken the preliminary design work for the electrical distribution system. Further, Graywood had committed to proceeding with the project prior to October 2000 as evidenced by the installation of municipal services. Once again, there is no issue with respect to these findings. The fact that Toronto Hydro did the design work in 1999/2000 is uncontroverted. Likewise, the OEB's conclusion on the evidence before it that Graywood had committed to going ahead with the project prior to October 2000 was a reasonable one.

41 If that had been the entire evidence and Toronto Hydro had proceeded with the construction and installation of the electrical distribution system in the absence of a written connection agreement, I would take no issue with the OEB's conclusion of an "implied" connection agreement, nor with the reasonableness of the Board's conclusion as to the timing of that implied agreement. However, that was not the entire evidence. The OEB was aware of, but did not refer to, the fact that Graywood and Toronto Hydro had an actual written connection agreement with respect to this project. The evidence is clear that Toronto Hydro was not contacted with respect to doing the installation until after November 1, 2000. Toronto Hydro then insisted on a formal written connection agreement before proceeding. The

contract was drafted by Toronto Hydro and Toronto Hydro dated the contract November 8, 2000, even though it was actually drafted and signed a month or so later. The question therefore is whether the OEB's finding of an implied connection agreement prior to November 1, 2000 is reasonable in light of the existence of an actual written connection agreement dated November 8, 2000. In my view, it is not.

42 There are many situations in which it may be appropriate to find an implied agreement in the absence of a formal written contract. The Conditions of Service attached to Toronto Hydro's license and the Distribution Code provide for such an agreement being implied. However, both contemplate that the agreement will be implied only once services have been connected and if there is no written agreement in place (see paragraph 10 above). This is consistent with basic contract law. A contract comes into existence only when its essential terms have been agreed upon by the parties. While such an agreement may be implied from the conduct of the parties, there must nevertheless be some indication of a meeting of the minds and an intention to be legally bound. The principle is succinctly stated by the British Columbia Court of Appeal in *Arding v. Buckton* (1956), 20 W.W.R. 487, 6 D.L.R. (2d) 586 (B.C. C.A.) as follows (at para 12):

> From the authorities it would follow that a contract may be implied only when the conduct of the parties indicates that they are proceeding on the basis of some legal relation so that the function of the court is merely to find as a fact that relation with its attendant obligations and rights which the parties have so indicated by implication but have failed to express: *Falcke v. Scottish Imperial Insur. Co., supra,* [(1886) 34 Ch D 234]; *McKissick, Alcorn, Magnus & Co. v. Hall,* [1928] 3 W.W.R. 509; *Leigh v. Dickeson* (1884) 15 Q.B.D. 60, 54 LJQB 18.
>
> (emphasis added)

43 The parties here chose to date their contract November 8, 2000. This was not inadvertent. Toronto Hydro drafted the contract in December 2000. It was deliberately back- dated to November 8, 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood with respect to the installation of the distribution system. In the face of that evidence, it is simply not reasonable to find that the agreement arose by implication earlier than November 1, 2000.

44 Chapter 3 of the Code came into force on September 29, 2000. At that time, there was no existing contract between Toronto Hydro and Graywood. Toronto Hydro had completed its contract for the design of the distribution system in June 2000. Graywood had paid for the design work in advance in December 1999. In 1999 when Toronto Hydro was retained to do the design work, it may well have been the expectation of the parties that Toronto Hydro would also be doing the installation. At the time, Toronto Hydro had a monopoly and, absent a change in the legislation, Graywood would have had no choice but to retain Toronto Hydro for the installation. However, an intention to enter into a contract, or even the shared expectation that a contract would eventually be formed, does not mean there is an agreement until those intentions coalesce into a meeting of the minds and the formation of a contract. Absent such a meeting of the minds, the contract does not arise, whether by implication or otherwise. As of September 29, 2000, the new regime was in force and it applied to all ongoing projects unless they were "subject to an agreement entered into prior to November 1, 2000". The exception provision is not framed to exclude all projects in which preliminary design work has already been done or where the parties have had discussions about entering into a contract. The exemption is clearly stated to apply to situation in which an agreement as been "entered into". The Board's finding that Graywood and Toronto Hydro had by implication entered into agreement prior to November 1, 2000 is unsustainable on the evidence and is an unreasonable construction of the scope of the exemption provision.

45 I have considered whether the OEB's finding of an implied agreement is a reference to the agreement for the design of the distribution system, rather than the connection agreement. I do not believe the Board's decision can

reasonably be construed as referring to an implied design agreement. The design agreement had been entered into the year before, had been fully performed by Toronto Hydro and had been paid for by Graywood. If the OEB meant that the existence of the design agreement prior to November 1, 2000 triggered the exemption provision, it surely would have simply said so. There would be no need to "imply" such an agreement prior to November 1, 2000. The design agreement clearly existed prior to that time. Indeed, it had been fully performed by then. In my view, it is clear from the Board's reasons that the agreement it implied was a connection agreement. It may well be the case that the exemption provision is capable of a broader construction than that, such that other types of agreements might also result in exempting a particular project from the new regime. However, it is not surprising that in the context of this case the Board interpreted Article 1.7 as referring to a connection agreement. It is the contract for the connection of services which Graywood sought to have to have governed by the new regime. Chapter 3 of the Code deals with connection agreements. The agreement at issue between Graywood and Toronto Hydro is a connection agreement. The central issue is whether that connection agreement is governed by the new regime. It makes perfect sense, therefore, that it is the timing of that connection agreement that governs which regime will apply.

H. Conclusion and Order

46 As I have already noted, the OEB is a tribunal with specialized expertise. The interpretation and application of the transition provisions in the Distribution Code falls squarely within that expertise and is entitled to deference. I have no difficulty accepting all of the factual and policy considerations noted by the Board. However, the question of when this particular contract was entered into is not really dependant upon findings of fact, or policy, or statute interpretation. The question is whether an agreement can be implied prior to the date upon which the parties actually entered into it, based on the fact that the parties had a prior contract in relation to the same project. That is more a straightforward question of law and less within the special expertise of the Board. All that existed prior to November1, 2000 was an already fully performed design agreement and the expectation prior to September 29, 2000, based on the then existing monopolistic regime, that Toronto Hydro would eventually be retained to install the system as well. In my view, the Board's finding of an implied agreement prior to November 1, 2000 was an error of law and unreasonable. It cannot stand.

47 The Board's decision is quashed.

48 The applicant also sought a declaration that its subdivision project is governed by the new Code, the issuance of a notice of intention to suspend or revoke Toronto Hydro's licence and ancillary relief by way of an accounting. These are matters within the sole jurisdiction of the OEB. It is not appropriate for this Court to usurp the function of the tribunal by making such orders.

49 This matter is remitted to the OEB for its further consideration, based on this Court's finding that the connection agreement between Toronto Hydro and Graywood was entered into on November 8, 2000.

50 If the parties cannot agree upon costs, written submissions may be forwarded to the court within 30 days.

***Lane J.*:**

I agree:

***Pitt J.*, (Dissenting):**

1 This is an application for judicial review of a decision of the respondent, Ontario Energy Board (OEB) holding that the subject subdivision was "a project that was the subject of an agreement" entered into by Graywood Investments Limited (Graywood) and Toronto Hydro-Electric System Limited (Toronto Hydro) before November 1,

2000.

2 I have read the reasons for judgment of my colleagues. I have no disagreement with their analysis of procedural fairness, judicial review or standard of review. However, I disagree with their conclusion that the decision of the respondent was either incorrect or unreasonable for the reasons that follow.

3 The undisputed evidence before the OEB was that Toronto Hydro (up to November 1, 2000) the sole supplier of electricity, and Graywood in its capacity as the developer of real property known as Warden Avenue Hydro Corridor Residential Subdivision, had discussions about the supply of electricity for the project, commencing in November 1999.

4 On July 14, 2000, the OEB approved and published the *Distribution System Code* (the "*Code*"), the object of which was to end Toronto Hydro's electrical monopoly.

5 On September 29, 2000, s. 1.7 of the *Code* was amended as follows:

> This Code comes into force on the day subsection 26(1) of the Electricity Act comes into force with the following exception.
>
> All of Chapter 3, Connections and Expansions and Subsection 6.2.3. of Section 6.2, Responsibilities to Generators come into force on September 29, 2000. These provisions do not apply to projects that are the subject of an agreement entered into before November 1, 2000.

6 By June 27, 2000, Toronto Hydro had already completed and forwarded to Graywood a design for the underground electrical system for the project, which was duly paid for by Graywood.

7 It is not disputed that as of November 1, 2000, there was no legally enforceable agreement between the parties for the *installation* of the underground electrical distribution system for the project.

The Process

8 The dispute is rendered more complicated than it needs be because when Toronto Hydro advised Graywood in July 2000 that the Warden Avenue project was considered to be subject to an agreement prior to November 1, 2000 and, therefore, was required to have its installation done by Hydro, Graywood filed a complaint to the OEB alleging that Toronto Hydro was in breach of its licence by virtue of the position it had taken with respect to its installation rights.

9 The OEB refused to accede to the request of Graywood, taking the view that the Warden project was, in fact, "subject to an agreement". The OEB's decision was issued in the form of a letter to Graywood's counsel. The relevant portions of which are as follows:

> Based on the information provided, the Board finds that an implied agreement had been entered into prior to November 1, 2000.
>
> The Board finds that in past industry practice, there is often no formal offer to connect and associated written connection agreement between parties on a specific. The evidence demonstrates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November

1, 2000 and that Graywood was committed to the Project as municipal servicing had commenced prior to October of 2000.

Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed on past industry practice.

The Board finds that Toronto Hydro is not required to comply with the requirements of Chapter 3 of the Code for this Project. Therefore the Board finds that Toronto Hydro is not in breach of its licence and the Board will not issue a notice of its intention to issue a compliance order under subsection 75 (2) of the Act.

I have produced these portions of the letter because the applicant has treated it as evidence of the unreasonableness of the OEB's position.

10 I respectfully disagree with the applicant for the following reasons:

Standard of Review

11 An application of the pragmatic and functional approach mandated by *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), reveals:

Privative Clause: The *Act* does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.

Expertise: As per this court in *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (Ont. Div. Ct.), the OEB has a "high level of expertise". The *OEBA* provides the OEB with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.

Purpose of the *OEBA*: The purpose of the *OEBA* is to maintain just and reasonable rates with respect to electricity.

Nature of the Problem: The nature of the problem in this case is whether the Project was subject to an agreement entered into before November 1, 2000, within the meaning of s. 1.7 of the *Code*.

In my view, the standard of review ought to be reasonableness.

Analysis

12 I agree with the respondent's view that the question whether the project was subject to an agreement entered into before November 1, 2000 within the meaning of s. 1.7 of the *Code* is more appropriately viewed as a question of mixed fact and law, and that the OEB's decision on that issue must be afforded a high degree of deference. The "law" component of that issue is the interpretation of the provisions of the *Code*, as they relate to the proper management of a major transition from monopoly to competition under the *OEB Act*, rather than general contractual principles. The determination is "fact-intensive", and involves an assessment of specialized facts and relationships, which are at the core of the OEB's exclusive jurisdiction. See *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), at para. 41; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.) at p. 240.

Frankly, if the question were as the appellant has formulated it, there would really be no issue. Contractual rights

are protected unless the legislative language purporting to infringe them is explicit and unambiguous.

13 There was evidence to support the OEB's view that the project was subject to an agreement, not the least of which was the existence of an agreement for the design work. Nothing in the *Code* suggests that an agreement must mean an "agreement for installation".

14 It is useful, in my view, to recognize that s. 1.7 of the *Code* was amended to establish a "cut-off date" for ending the monopoly and introducing competition. The use of the expression "projects that were subject to an agreement" gave the OEB the flexibility to divide projects into different categories based on the stage of development in terms of the relationship with Toronto Hydro.

15 The object of the exercise in which the OEB was engaged was not to make legal determinations on whether a certain "implied agreement" (to use the imprecise term used by the OEB) had become a full blown enforceable agreement. It was rather to determine whether the Warden Avenue project was one of those projects that was already subject to an agreement i.e. whether it was to be governed by the old regime or the new regime. Toronto Hydro had been involved with the project for at least nine months prior to the announcement; the project would have been budgeted on the basis that Toronto Hydro, the only supplier of electricity, would have been the installer and supplier. There was an executed agreement with respect to design, and much discussion about the installation had already taken place. It would have been the expectation of the parties and in their contemplation, at least up to the date of the announcement of the new regime in July 2000, that the installation would have been done by Toronto Hydro.

16 In making a determination on the reasonableness of such a decision, it seems to me imperative to consider the practical implications of the decision urged upon the court by the appellants. No developer, who had not signed a contract by November 1, 2000 would consider itself bound by the requirements of the old regime once the announcement of the new regime was made. Accordingly, whatever ruse or subterfuge that would postpone the final execution to a date beyond November 1, 2000 would likely be attempted if a postponement were perceived to produce an advantage to the developer. Effectively, the whole concept of a transitional period (from July to November) would be rendered academic. The new regime would have effectively begun on the date of the announcement. As I adumbrated earlier, developers with enforceable agreements would not, in any event, have been affected by changes in the policies of the OEB. It would have been unnecessary to refer to them in the new Code. Clearly the stipulation of a transition period was designed to deal in a fair manner with developers in the grey area.

17 The construction of written instruments:

> 12-046 Law and Fact. The construction of written instruments is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. Construction becomes a question of law a soon as the true meaning of the words in which an instrument as been expressed and the surrounding circumstances, if any, have been ascertained as facts. However, the meaning of an ordinary English word, of technical or commercial terms and of latent ambiguities, and the discovery of the surrounding circumstances (when they are relevant) are questions of fact.
>
> *Casurina Ltd. Partnership v. Rio Algom Ltd.*, [2004] O.J. No. 177 (Ont. C.A.) at para. 34, citing *Petty v. Telus Corp.* (2002), 164 B.C.A.C. 152 (B.C. C.A.) at para. 14 referring to H.G. Beal, ed. Chitty on Contracts 28 ed. (London: Sweet & Maxwell, 1998) at paras. 12-043 and 12-046.

18 It was at a minimum, eminently reasonable for the OAB to interpret "projects subject to an agreement" in the manner that it did.

Disposition

19 I would dismiss the application.

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TAB 9

2001 CarswellOnt 4503,

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2001 CarswellOnt 4503

Consumers' Gas Co. v. Ontario (Energy Board)

The Consumers' Gas Company Ltd., Applicant and Ontario Energy Board, Respondent and Industrial Gas Users Association, Intervenor

Ontario Superior Court of Justice (Divisional Court)

Carnwath J., Day J., Whalen J.

Heard: December 11-12, 2001
Judgment: December 19, 2001
Docket: 707/99

Counsel: *Fred D. Cass, K. John Harild*, for Applicant

Pat Moran, for Respondent

Peter C.P. Thompson, Q.C., for Intervenor

Subject: Public

Public utilities --- Regulatory boards — Practice and procedure — General.

APPLICATION by gas company for review of decision by energy board.

Carnwath J.:

1 We all agree the application must be dismissed.

2 The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate — the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment. The following are but some of the activities of the Board requiring expertise:

- economic forecasting

- familiarity with accounting and income tax principles

- special features and requirements of a monopolistic utility.

3 The lack of a privative clause and the right to an appeal on questions of law and jurisdiction place the Board on a continuum short of patent unreasonableness. Nevertheless, its special expertise demands a high degree of deference when its expertise is engaged.

4 Many of the applicant's submissions were based on doctrines of estoppel and legitimate expectation. For these submissions to succeed, we would have to find the Board "promised" or "undertook" or "represented" directly or by course of conduct that deferred taxes of the rental program would be paid by ratepayers. We do not so find. The applicant has attempted to isolate one decision of the Board to support its contention of an implied promise. To do so would ignore the changing nature of the problems the Board faced through the decades since 1961. The statement in EBRO 341-1 relied upon to support this contention we find to have general application to deferred capital expenses and, as the Board found, is not determinative.

5 Our review of Board decisions involving the applicant from 1961 forward leads us to conclude that the treatment of ancillary programs (including the rental program) evolved as the programs evolved. In 1961, ancillary programs were not treated separately. However, as the programs expanded, the Board examined them separately to ensure that ratepayers did not subsidize any activity not part of the core business of sales, transmission and distribution. In early decisions, the Board did not distinguish between ancillary program assets and the balance of the applicant's assets. The Board considered deferred taxes in the context of all the company's assets. Since the great percentage of those assets were core assets, it made sense for the applicant to recover deferred taxes from the ratepayers, since they benefited from lower rates flowing from the deferral. Once the programs expanded, it equally made sense that the applicant should look to the customers of ancillary programs, not the ratepayers, to recover deferred taxes. Thereafter, the Board consistently required ancillary program costs to be recovered from program customers. The Board did recognize that where ratepayers benefited from lower rates resulting from ancillary programs, the ratepayers should pay a proportional share of ancillary program costs. Therefore, in the decision under review, the Board permitted the applicant to recover $50 million as deferred taxes were paid, or became payable. The Board was required to balance the impact of the deferred taxes between ratepayers on the one hand and the shareholders on the other. We find the balancing carried out by the Board to be just and reasonable.

6 We reject the submission that the Board's reasons were "comments and observations". An analysis of the Board's decision reveals the following:

- the Board identified the matters it had to consider as complex and interwoven, with significant policy and financial consequences;

- the Board recognized it had to balance the interests of ratepayers, shareholders, and users of the programs in question. In doing so, it had to consider changing legislative, regulatory and market considerations while also taking into account previous Board decisions.

- the Board explained it was not prepared to allow the rental program to be operated as part of the core utility, as requested by the applicant, since it would be impossible to track costs of the program on a fully allocated basis as previously required by the Board;

- the Board decided the rental program should remain within the applicant on a non-utility basis with costs to be determined on a fully allocated basis, as in previous Board decisions;

• the Board rejected the applicant's submission that competition was "rapidly eroding the program's remarkably high penetration". The Board then examined both forecast and actual returns over the previous ten years and decided there was a total sufficiency from the program of $50 million. The Board concluded that ratepayers had benefited to some extent from the rental program over the years and the shareholder had absorbed some of the costs of the program. It decided that while the ratepayers should not be responsible for the entire deferred tax liability, the applicant was entitled to have the benefit enjoyed by the ratepayers recognized. This led to the provision of a notional utility account in the amount of $50 million, after tax, to allow the shareholder to use the value of past ratepayer benefits to pay a portion of the deferred taxes as they became due.

7 The reasons are more than adequate to support the Board's findings.

8 If costs cannot be agreed upon, the parties have 30 days to make written submissions.

Application dismissed.

END OF DOCUMENT

TAB 10

2005 CarswellOnt 763, 195 O.A.C. 234, 26 Admin. L.R. (4th) 233, 75 O.R. (3d) 72

2005 CarswellOnt 763, 195 O.A.C. 234, 26 Admin. L.R. (4th) 233, 75 O.R. (3d) 72

Enbridge Gas Distribution Inc. v. Ontario (Energy Board)

ENBRIDGE GAS DISTRIBUTION INC. (Appellant) and ONTARIO ENERGY BOARD (Respondent)

Ontario Superior Court of Justice (Divisional Court)

Lane, Molloy, Power JJ.

Heard: February 15, 2005
Judgment: March 2, 2005
Docket: 40/03

Counsel: J.L. McDougall, Q.C., Jerry H. Farrell, Michael Schafler for Appellant

Kenneth T. Rosenberg, Richard P. Stephenson for Respondent

Subject: Public

Public utilities --- Regulatory boards — Regulation of rates

Prior to 1996, gas distributor shipped gas through TransCanada Pipeline System — Distributor then entered into four agreements with various entities to deliver some of its gas through alternate pipeline routes — New routes proved more costly than TransCanada route — Distributor applied to energy board for increase in rates it could charge to its customers to reflect this increase in supply costs — Parties entered into provisional settlement, conditional upon various contentious issues being deferred to be argued at subsequent rates hearing — Distributor agreed to set up Notional Deferral Account to record differential between its actual costs for alternate lines and its hypothetical costs if it had used TransCanada line — Hearing was held to determine whether costs incurred by distributor with respect to alternate lines were prudently incurred — Board found that distributor did not act prudently in incurring costs with respect to two of four agreements, and was therefore not permitted to build those costs into rates it charged — Gas distributor appealed — Appeal allowed; matter remitted for reconsideration — Board made two clear references to matters of hindsight in portion of its reasons dealing with prudence of distributor's decisions — Board referred to delay, which occurred from November 1999 to December 2000, in determining whether a decision in 1996 was prudent; this reference, by itself, was not cause for serious concern — However, Board made reference with respect to one of agreements that was more troublesome — Board had found that distributor failed to provide sufficient evidence and analysis, including alternatives, to justify its decision — Reason cited by board for deferring matter was that costs consequences of agreement in question had not been included in calculation of Notional Deferral

Account — Inescapable inference was that board felt unable or was unwilling to make decision on prudence without that information — Information as to what actual costs of decision turned out to be after the fact was clearly application of hindsight and was not permitted as part of analysis of prudence.

Public utilities --- Regulatory boards — Practice and procedure — Statutory appeals — General

Prior to 1996, gas distributor shipped gas through TransCanada Pipeline System — Distributor then entered into four agreements with various entities to deliver some of its gas through alternate pipeline routes — New routes proved more costly than TransCanada route — Distributor applied to energy board for increase in rates it could charge to its customers to reflect this increase in supply costs — Parties entered into provisional settlement, conditional upon various contentious issues being deferred to be argued at subsequent rates hearing — Distributor agreed to set up Notional Deferral Account to record differential between its actual costs for alternate lines and its hypothetical costs if it had used TransCanada line — Hearing was held to determine whether costs incurred by distributor with respect to alternate lines were prudently incurred — Board found that distributor did not act prudently in incurring costs with respect to two of four agreements, and was therefore not permitted to build those costs into rates it charged — Gas distributor appealed — Appeal allowed on other grounds — Given right of appeal and nature of issued, appropriate standard of review was one of correctness — Expertise of board in regulatory matters was unquestioned — However, present case involved pure question of law — There was appeal as of right on question of law, and there was no applicable privative clause — Nature of legal issue did not engage expertise of board, vis a vis court — Board understood and correctly defined test to be applied — Only issue was whether board took into account impermissible factor in applying test — That was not question of mixed fact and law, but rather alleged error in applying correct legal test — If, in considering prudence, board took into account factors involving application of hindsight, then it had committed legal error and its decision could not stand.

Cases considered by *Molloy J.*:

Atco Electric Ltd. v. Alberta (Energy & Utilities Board) (2004), [2004] 11 W.W.R. 220, 18 Admin. L.R. (4th) 243, 31 Alta. L.R. (4th) 16, 2004 ABCA 215, 2004 CarswellAlta 949 (Alta. C.A.) — referred to

Atco Electric Ltd. v. Alberta (Energy & Utilities Board) (2004), 33 Alta. L.R. (4th) 207, 20 Admin. L.R. (4th) 1, 2004 ABCA 254, 2004 CarswellAlta 1049 (Alta. C.A.) — referred to

British Columbia Electric Railway v. British Columbia (Public Utilities Commission) (1960), [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689, 1960 CarswellBC 94 (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Consumers' Gas Co. v. Ontario (Energy Board) (2001), 2001 CarswellOnt 4503 (Ont. Div. Ct.) — referred to

Graywood Investments Ltd. v. Ontario (Energy Board) (2005), 2005 CarswellOnt 375 (Ont. Div. Ct.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — referred to

Q. v. College of Physicians & Surgeons (British Columbia) (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — referred to

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri (1923), 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981 (U.S. Mo. S.C.) — referred to

TransCanada Pipelines Ltd. v. Canada (National Energy Board) (2004), 2004 CAF 149, 2004 CarswellNat 2545, 319 N.R. 171, 2004 FCA 149, 2004 CarswellNat 987 (F.C.A.) — referred to

Violet v. F.E.R.C. (1986), 800 F.2d 280 (U.S. C.A. 1st Cir.) — considered

West Ohio Gas Co. v. Public Utilities Commission of Ohio (1935), 294 U.S. 63, 55 S.Ct. 316 7, 9 L.Ed. 761 (U.S. Ohio S.C.) — referred to

Statutes considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

s. 33(1) — referred to

s. 33(2) — referred to

APPEAL by gas distributor from decision of energy board with respect to proposed increase in rates to customers to reflect increase in supply costs.

***Molloy J.*:**

A. Introduction

1 Enbridge Gas Distribution ("Enbridge") appeals from a decision of the Ontario Energy Board ("the OEB" or "the Board") dated December 18, 2002.

2 Enbridge is a gas distributor and a seller of gas to consumers, and as such is subject to regulation by the OEB under the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 ("the Act"). The rates Enbridge is permitted to charge to its customers are fixed by the OEB, based on what the OEB deems to be just and reasonable. The OEB must balance fairness to the consumer (in terms of a reasonable price for gas) and fairness to Enbridge and its shareholders (in terms of a reasonable rate of compensation and profit). Generally speaking, Enbridge would be permitted by the OEC to pass on its costs to the consumer, but only to the extent those costs were prudently incurred.

3 Prior to 1996, Enbridge shipped its gas through the TransCanada Pipeline System ("the Trans Canada"). Between 1996 and 1999, Enbridge entered into a series of four agreements with various entities to deliver some of its gas through alternate pipeline routes. These new routes became operational in 2000 and proved to be more costly than the TransCanada route. In mid-2000, Enbridge applied to the OEB for an increase in the rates it could charge to its customers in 2001 in order to reflect this increase in its supply costs. (The OEB referred to the four agreements as Alliance 1, Alliance 2, Vector 1 and Vector 2, and for ease of reference I will do the same.)

4 The parties entered into a provisional settlement in 2000, which was conditional upon various contentious issues being deferred to be argued at a subsequent Enbridge rates hearing. As a term of the settlement, Enbridge agreed to set up a "Notional Deferral Account" to record, over a ten-month period, the differential between its actual costs for the Alliance/Vector lines and its hypothetical costs if it had used the TransCanada line.

5 The next year, Enbridge applied for approval of its rates proposed for 2002. One of the contentious issues still remaining to be resolved was whether the costs incurred by Enbridge with respect to the Alliance and Vector lines were "prudently incurred". That issue proceeded to a full hearing before the Board in June 2002.

6 The Board issued its decision on December 18, 2002. The Board found that Enbridge did not act prudently in incurring the Alliance 1 and Alliance 2 costs and was therefore not permitted to build those costs into the rates it charged. The Board found, however, that the Vector 1 costs were prudently incurred and could be passed on. The Board deferred its consideration of the Vector 2 costs. In the result, Enbridge was not permitted to recover $11 million in costs incurred in respect of Alliance 1 and 2.

7 The Act provides for an appeal to this court from the decision of the Board, but "only upon a question of law or jurisdiction": s. 33 (1) and (2). Enbridge argues on this appeal that the Board erred in law by failing to apply the correct legal test in determining whether Enbridge acted prudently at the time it entered into the two Alliance agreements. Specifically, Enbridge submits that although the Board articulated the correct legal test, it fell into error when it was influenced by the benefit of hindsight rather than confining itself to a consideration of prudence based solely on circumstances that existed at the time the decisions in question were made.

B. The Prudence Standard

8 Essentially, a utility is entitled to recover its prudently incurred costs. The test of prudence was first developed in United States jurisprudence, but has since been widely accepted in Canada: *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (U.S. Mo. S.C. 1923), at 289; *British Columbia Electric Railway v. British Columbia (Public Utilities Commission)*, [1960] S.C.R. 837 (S.C.C.), at 854; *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*, [2004] F.C.J. No. 654 (F.C.A.) at para. 32; *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63 (U.S. Ohio S.C. 1935), at 68.

9 Before us, and likewise before the Board, there was no dispute between the parties as to the applicability of the prudence standard and the nature of the test. Expenditures are deemed to be prudent, in the absence of some evidence suggesting the contrary. However, costs that are found to be dishonestly incurred, or which are negligent or wasteful losses, are excluded from the legitimate operating costs of the utility in determining rates that may be

charged. The examination of whether an expenditure was prudent must be based on the particular circumstances at the time the decision to incur those costs was made. That is so even if in hindsight it is obvious the decision was a bad one. As was stated by the United States Court of Appeals (First Circuit) in *Violet v. F.E.R.C.*, 800 F.2d 280 (U.S. C.A. 1st Cir. 1986), at 282:

> In an industry that combines long lead times for plant construction with wide fluctuations in supply and demand, constant changes in the regulatory environment, and unpredictability in the availability and price of alternative sources of fuel, some projects that seem prudent at the time when costs are incurred may appear, some years later, in hindsight, to have been unnecessary or inadvisable. The prudence of the investment must be judged by what a utility's management knew, or could have known, at the time the costs were incurred. (citations omitted)

10 The parties also agree that the Board in this case correctly defined the prudence standard at paragraph 3.12.2 of its decision as follows:

> • Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
>
> • To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
>
> • Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
>
> • Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

C. The Decision of the Board

11 The Reasons of the Board are extensive, covering 216 pages. For purposes of this appeal, it is unnecessary to review those Reasons in detail, as there is no real issue with respect to the facts. The portion of the Reasons dealing with the Alliance/Vector issues runs from pages 27-72. However, the actual findings of the Board commence at page 62. First, the prudence test is defined (see preceding paragraph). Next, the Board examined the presumption of prudence and whether it was rebutted. The Board noted the argument made by Enbridge that it was unnecessary to consider this aspect of the test as Enbridge conceded a prudence review was appropriate. However, the Board determined that it would nevertheless be useful to actually rule on the point.

12 There was evidence before the Board that Enbridge's corporate parent, Enbridge Inc., held an equity interest in both the Alliance and Vector pipelines at the time Enbridge entered into the agreements in question. The Board found that the fact Enbridge Inc. may have profited as a result of Enbridge entering into these contracts was not sufficient evidence to establish that the arrangements were not therefore prudent. However, the Board noted that the interests of Enbridge Inc. and Enbridge might not completely coincide and found the evidence of this ownership interest was "sufficient to overcome the presumption of prudence and invite further inquiry by the Board": paragraph 3.12.11 of the Reasons.

13 The Board noted that it is permissible to use hindsight in determining the threshold issue as to whether the presumption of prudence is rebutted. In this regard, the Board considered the balance in the Notional Deferral Account, which favoured the traditional TransCanada pipeline, and held this evidence would suggest that the prudence of Enbridge's decisions to use the Alliance and Vector routes should be examined.

14 The Board then concluded (at paragraph 3.12.13) that "the presumption of prudence has been overcome and that there are reasonable grounds to inquire into the prudence of [Enbridge's] decisions to enter into long term transportation arrangements with the Alliance and Vector pipelines."

15 The Board then proceeded (from pages 65 to 69) to consider whether Enbridge made prudent decisions to enter into each of the four contracts, examining the circumstances of each decision under a separate subject heading. At this point, the onus would be on Enbridge to establish its prudence in entering into each of the four contracts.

16 Under the heading "Alliance 1" (paragraphs 3.12.14 to 3.12.21), the Board considered the justifications advanced by Enbridge for its decision in 1996 to enter into this contract. The Board focused on what was referred to as the "Otsason Memo", based on Enbridge's testimony that the memo summarized all of the factors Enbridge took into account in making this decision. The Board described the Otsason Memo as a "rudimentary financial analysis". The Board then took issue with a number of conclusions in the Otsason Memo (the content of which is not relevant for purposes of this appeal) as well as noting Enbridge's failure to consider the full range of reasonable alternatives. The Board then concluded (at paragraph 3.12.23) that it was "not satisfied that [Enbridge's] decision to enter into the Alliance 1 contract in 1996 was prudent".

17 For purposes of this appeal, Enbridge does not take issue with this portion of the Board's Reasons in respect of Alliance 1, except for the Board's reference in paragraph 3.12.20 to the fact that a risk identified in the Ostason Memo had in fact materialized. Mr. McDougall, for Enbridge, submits that this reference illustrates error by the Board in using hindsight to evaluate prudence. The relevant paragraph of the Reasons states:

> 3.12.20 One of the disadvantages identified in the Ostason Memo was the risk of in-service delays for the Alliance pipeline. This risk in fact materialized; the in-service date was delayed by over one year from November 1999 to December 2000. (emphasis added)

18 Under the heading "Alliance 2", the Board held that all of its concerns with respect to Alliance 1 were equally applicable to the 1997 decision to enter into the Alliance 2 contract, and also noted two additional concerns. The Board then concluded (at paragraph 3.12.27) that it was not satisfied that Enbridge's 1997 decision to enter into the Alliance 2 contract was prudent.

19 The Board next considered Vector 1 (paragraphs 3.12.28 to 3.12.31) and concluded that Enbridge's decision to enter into that contract in 1999 was in fact prudent.

20 The last portion of the Board's consideration of prudence falls under the heading "Vector 2" (paragraphs 3.12.32 to 3.12.33). The Board started by noting that Enbridge had "advised" the Board that it entered into the Vector 2 contract in order to replace its expiring capacity on the TransCanada pipeline. The Board then found (at paragraph 3.12.32) that Enbridge "did not provide the Board with sufficient evidence and analysis, including alternatives, to justify this decision." The Board noted that the Vector 2 decision was independent from and unrelated to the Alliance 1 and 2 and Vector 1 contracts. The Board then stated, at paragraphs 2.12.33 to 2.12.34:

> 12.12.33 .... In addition, the Board notes that the costs consequences of the Vector 2 contract were not included in the calculation of the Notional Deferral Account, which is a key element of the Board's prudence review of the Alliance and Vector arrangements. (emphasis added)
>
> 12.12.34 As a result, the Board is not prepared at this time to make a determination of the prudence of [Enbridge's] decision to enter into the Vector 2 contract.

21 Mr. McDougall relies on this passage as a further illustration of the Board's improper use of hindsight in evaluating prudence.

22 The balance of the Board's decision on Alliance and Vector is devoted to "Relief and Remedies" at pages 70-71 of the Reasons and is not relevant for purposes of this appeal.

D. Standard of Review

23 It is well recognized that the applicable standard of appellate review is to be determined on a "functional and pragmatic approach" based on consideration of four factors: (1) the existence or absence of a privative clause in the enabling statute of the administrative tribunal; (2) the expertise of the tribunal relative to the court; (3) the purpose of the legislation; and (4) the nature of the problem: *Pushpanathan v. Canada (Minister of Employment & Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.), at 208-215; *Ryan v. Law Society (New Brunswick)* (2003), 223 D.L.R. (4th) 577 (S.C.C.), at 587-592, paras. 27-42; *Q. v. College of Physicians & Surgeons (British Columbia)* (2003), 223 D.L.R. (4th) 599 (S.C.C.), at 609-13.

24 In this case, the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy. That is why courts have accorded considerable deference to the Board and applied standards of reasonableness *simpliciter*, or even patent unreasonableness when reviewing decisions which engage the Board's expertise: *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (Ont. Div. Ct.); *Graywood Investments Ltd. v. Ontario (Energy Board)*, [2005] O.J. No. 345 (Ont. Div. Ct.); *Atco Electric Ltd. v. Alberta (Energy & Utilities Board)*, [2004] A.J. No. 823 (Alta. C.A.) ("ATCO No. 1"); *Atco Electric Ltd. v. Alberta (Energy & Utilities Board)*, [2004] A.J. No. 906 (Alta. C.A.) ("ATCO No.2").

25 However, the case before us involves a pure question of law. There is an appeal as of right to this court on a question of law, and there is no applicable privative clause. Further, the nature of the legal issue involved does not engage the expertise of the tribunal, *vis a vis* the court. The test is well understood and was correctly defined by the Board. The only issue is whether, in applying that test, the Board took into account an impermissible factor. That is not a situation of mixed fact and law, but rather an alleged error in applying the correct legal test. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at paragraph 27, the Supreme Court of Canada (referring to its own earlier decision in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.)) held as follows:

> 27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
>
> > . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

26 The Supreme Court's illustration applies equally well in the reverse. If the correct test requires the consideration of A, B and C and prohibits the consideration of D, and the decision-maker considers D, that is an error of pure law.

27 Given the right of appeal and the nature of the issue, in my opinion, the appropriate standard of review in this case is one of correctness. The Board was required to be correct on this point. If, in considering prudence, the Board took into account factors involving the application of hindsight, then it has committed legal error and its decision cannot stand.

E. Analysis

28 It is important to distinguish between things that can be considered at the stage of deciding if the presumption of prudence is rebutted, and things that can be considered as part of the prudence analysis itself. In considering the application of the presumption, it is acceptable to use the benefit of hindsight. Thus, a decision which turned out to have a bad economic outcome will not be presumed to be prudent, but rather will be subject to an analysis of the surrounding circumstances to determine if it was in fact prudent. In this case, the Board had before it evidence from the Notional Deferral Account as to the extra cost incurred by Enbridge as a result of the Alliance and Vector contracts, over and above what would have been the cost if the TransCanada pipeline had been used. The Board was entitled to use that information in determining the threshold issue as to whether the presumption of prudence was rebutted. It was not entitled to use the information as part of its analysis as to whether the decisions at issue were, or were not, prudent at the time they were made.

29 The Board in this case was well aware of that distinction. The Board held, at paragraph 3.12.36 of its decision:

> 3.12.36 The Notional Deferral Account was intended as a measure to ascertain whether the cost differential between the old and the new paths was substantial, such that it would raise the issue of whether the presumption of prudence had been overcome. It was not intended as a method of determining the cost consequences and any potential disallowance of costs if the Board were to find that entering into the Alliance and Vector agreements were not prudent.

30 Notwithstanding the Board's articulation of the proper use of this information, there are two clear references to matters of hindsight in the portion of its reasons dealing with the prudence of Enbridge's decisions.

31 The first such reference is at paragraph 3.12.20 of the Board's reasons in which the Board refers to delay which occurred from November 1999 to December 2000 in determining whether a decision in 1996 was prudent. The impact of this reference could, however, be minimized since it was made in the context of a risk which Enbridge had identified and took into account in 1996. The impact on the decision would obviously be worse if the Board had been pointing out a delay that had occurred after the fact and had not been predicted or considered back in 1996. Therefore, if the only hint of a hindsight type analysis was this one reference, I would not have serious concerns.

32 However, the Board's reference to later events in its analysis of the Vector 2 contract (in paragraph 3.12.33) is more troublesome. The Board had already determined that Enbridge "failed to provide sufficient evidence and analysis, including alternatives, to justify this decision." Since the onus was on Enbridge to establish prudence, that would have been sufficient to support a finding by the Board that Enbridge had not discharged that onus and that the extra costs of that decision could therefore not be passed on to consumers. Obviously, the Board was not required to

make such a finding, and it was perfectly open to the Board to defer the matter to give Enbridge an opportunity to file additional evidence. However, the reason cited by the Board for deferring the matter was that the cost consequences of the Vector 2 contract had not been included in the calculation of the Notional Deferral Account. The inescapable inference from this is that the Board felt unable, or was unwilling, to make a decision on prudence without this information. However, information as to what the actual costs of the decision turned out to be after the fact, is clearly an application of hindsight and is not permitted as part of the analysis of prudence.

33 Counsel for the OEB submits that the reference to the Notional Deferral Account relates only to the rebuttal of the presumption of prudence and that the Board was not discussing the use of the financial information as part of its prudence analysis. Rather, he argues, the Board was simply stating it was unable to deal with whether the presumption of prudence applied without the missing information as to actual costs after the fact. I cannot accept that argument. The Board's decision is very logically laid out, as I have discussed above in paragraphs 11 to 22. The Board dealt first with the general test for relevance and then with whether the presumption of prudence was rebutted. It was only after finding the presumption was rebutted that the Board turned to a consideration of each of the four contracts and a determination of prudence in respect of each of them. When the decision is looked at as a whole, it is clear that in paragraphs 3.12.32 to 3.12.34 the Board was dealing with whether the prudence standard had been met for the Vector 2 contract. That is the context in which the Notional Deferral Account is mentioned, and it can only logically be interpreted as referring to the prudence standard.

34 In any event, it was not necessary for the Board to have information from the Notional Deferral Account in order to deal with the presumption of prudence issue. For the Alliance 1, Alliance 2 and Vector 1 contracts, the Board had three bases upon which the presumption was rebutted:

(i) the concession by Enbridge that the presumption was rebutted and that a prudence review was warranted;

(ii) the potential for conflict of interest because of the ownership interest of Enbridges's parent in the Alliance and Vector pipelines; and

(iii) the substantial extra costs actually incurred as demonstrated by the Notional Deferral Account.

35 With respect to the Vector 2 contract, the Board did not have the information from the Notional Deferral Account, but it had already determined that the conflict of interest issue alone was sufficient to rebut the presumption and it had the concession from Enbridge that a review of prudence was appropriate in the circumstances. The Board did not need the Notional Deferral Account information to make its decision on the presumption, and indeed had already made that decision in respect of all four contracts at paragraph 3.12.13 of its Reasons.

36 Counsel for the OEB further argues that since the Board made no decision with respect to Vector 2, its reasoning on Vector 2 is not the subject of this appeal and not relevant to our consideration of whether the Board erred in its analysis of the Alliance contracts. That might well be a valid point if the Board had confined its reasoning in paragraph 3.12.33 to the Vector 2 contract itself. However, the Board referred to the absence of the Deferral Account information for Vector 2 and then commented that this information was "a key element of the Board's prudence review of the Alliance and Vector arrangements". Given the context in which these words appear as well as the actual language used, it seems clear that the Board did in fact consider the actual costs incurred for Alliance as compared to the TransCanada pipeline to be a "key element" in its determination that the Enbridge decision to enter into the Alliance contracts was not prudent.

37 The Board clearly articulated the correct test for the prudence review and appeared to understand that the prudence review must be based on circumstance that were known, or should reasonably have been known, by management making the decision at the time the decision was made. Because the test is so clearly stated by the

Board, I have considered very carefully whether the Board's references to matters of hindsight in paragraphs 3.12.20 and 3.12.33 ought to be considered as innocuous, or related to some other analysis. I cannot reach that conclusion. In my view, the Board must be taken to have meant what it said. There are two clear references to a consideration of events which occurred after the decisions were made in the context of the Board's consideration of the prudence of the decisions. Reading the Board's comments any other way would, in my view, unduly strain the language used, particularly in the context in which those words appear.

38 The retrospective application of the prudence test, ignoring the benefit of hindsight, is not an easy task for a decision-maker who is fully aware of the actual financial consequences of a decision. The decision-maker must shut out of his or her mind all knowledge of matters that are not permitted to be taken into account. This is something which is easier to describe than it is to carry out in practice. In this case, the Board described the test correctly, instructed itself not to use hindsight in evaluating prudence, but then slipped in its application of the test and did allow hindsight to creep into its consideration of prudence. That is a fundamental error of law.

F. Conclusions

39 There was certainly evidence before the Board upon which it could have reasonably concluded that the Alliance contracts were not prudent. However, it is not possible to determine the extent to which an impermissible line of thinking clouded the Board's determination in this case. This is particularly problematic in that the hindsight considerations involved only the first 10 months of contracts that were to run for a period of 15 years. The appellant is entitled to a decision based on the correct application of the legal test to the relevant facts. In the result, the Board's decision cannot stand and is therefore quashed in so far as it relates to the Alliance 1 and Alliance 2 contracts.

40 The determination of prudence and the remedies flowing from a determination that a particular decision was or was not prudent are matters within the specialized expertise of the Board. Such determinations are intended under the Act to be the sole province of the OEB and ought not to be made by courts. Accordingly, this matter is remitted back to the OEB for consideration by a differently constituted tribunal.

41 If the parties are unable to agree on the costs of this appeal, they may be addressed in writing. Counsel for Enbridge is requested to coordinate the timing of the costs submissions and to forward three copies of all of the submissions, preferably bound and indexed, to the Divisional Court office.

***Lane J.*:**

I agree.

***Power J.*:**

I agree.

Appeal allowed; matter remitted for reconsideration.

END OF DOCUMENT

TAB 11

1530

...

Mrs Helen Johns (Huron): It is with great pleasure that I join the debate today. This is a very important and probably very necessary day to happen in the province of Ontario.

...

In the Ontario Energy Board bill, we're trying to ensure that the consumer is adequately protected against any unfair business practices of both gas marketers and, in the future, electricity marketers. What are we doing to be able to protect the consumer in that case? What we're saying is that marketers have to be licensed. They're going to be licensed by the Ontario Energy Board. The Ontario Energy Board will be able to ensure that marketers are financially sound, they're responsible to the consumers, and they understand that they have a responsibility to care for the consumer. The Ontario Energy Board will be in charge of that.

The second thing that the Ontario Energy Board will be providing will be a code of conduct for people in the electricity market and in the gas market. What we're saying there is that we're going to come together, all of the stakeholders, to look at a code of conduct that makes consumers be protected in Ontario. That's another way we're protecting the consumer.

TAB 12

1910

...

Mr Joseph N. Tascona (Simcoe Centre): I'm pleased to speak on Bill 35, and I think it's important to know what the title of this bill is as we enter this debate. It's An Act to create jobs and protect consumers by promoting low-cost energy through competition, to protect the environment, to provide for pensions and to make related amendments to certain Acts.

This bill, as introduced by the Honourable Jim Wilson, Minister of Energy, Science and Technology, is a bill that is long overdue. I'm going to speak on two parts: municipal electrical utilities and the Ontario Energy Board's regulatory role.

With respect to the municipal electrical utilities, a competitive market would provide customers with greater choices and more services, and will offer some real opportunities to municipal utilities to do things in new ways. First of all, utilities will have to decide what business they want to be in. The proposed legislation spells out clear business mandates consistent with the Ontario Business Corporations Act. Utilities would be responsible for separating their competitive businesses from their monopoly wires business. Passage of the Energy Competition Act would allow utilities to operate on a commercial footing and respond to opportunities in a rapidly changing market. At present, Ontario Hydro approval is required for many operational business activities and expenditures.

...

At this time, I would like to speak about the Ontario Energy Board's regulatory role, as will be set up through the Energy Competition Act under Bill 35. Their new role is this: In a competitive electricity marketplace, it is proposed that the Ontario Energy Board, also called the OEB, would be the independent regulator for the electricity sector and continue to be the independent regulator for the natural gas sector with an expanded mandate. Bill 35 would strengthen the OEB's role in order to better protect electricity and gas consumers and to ensure that efficiencies achieved in the monopoly parts of the industry benefit all customers.

The board's role would be the following: to protect consumer's interests regarding prices, reliability and quality of electricity service; to facilitate a smooth transition to competition; to provide non-discriminatory access to Ontario's transmission and distribution systems; to facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources; to promote economic efficiency in electricity generation, transmission and distribution; and finally, to facilitate the maintenance of a financially viable electricity supply industry. The new legislation proposes that the Ontario Energy Board regulate tariffs for the remaining monopoly parts of the electricity system. The transmission and distribution of wires would be regulated in a manner similar to the current regulation of natural gas.