EB-2015-0240

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 Essex Powerlines Corporation for an order approving a Smart Meter Disposition Rate Rider ("SMDR") and a Smart Meter Incremental Revenue Requirement Rate Rider ("SMIRR"), each to be effective January 1, 2015;

AND IN THE MATTER OF an application by Essex Powerlines Corporation for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015.

# Book of Authorities of the Vulnerable Energy Consumers Coalition (VECC)

1. ***Northwestern Utilities Limited and The Public Utilities Board of Alberta v. The City of Edmonton*, [1979] 1 S.C.R. 684 at 691 (p.11 B of A)**

   **Pages 1-18**

2. ***City of Calgary et al v. Madison Natural Gas Co. Ltd. et al* (1959] A.J. No. 56** **Pages 19-27**

3. ***Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission***

*12.* ***Trusts and Guarantee Co. v. National Debenture Corp*** **[1946] 3 D.L.R. 28**

**(OCA)** **Pages 201-208**

*Case Name:*

# Northwestern Utilities Ltd. v. Edmonton (City)

**Northwestern Utilities Limited and The Public Utilities Board of the Province of Alberta, Appellants; and The City of Edmonton, Respondent.**

[1978] S.C.J. No. 107

[1978] A.C.S. no 107

[1979] 1 S.C.R. 684

[1979] 1 R.C.S. 684

1978 CanLII 17

89 D.L.R. (3d) 161

23 N.R. 565

7 Alta. L.R. (2d) 370

12 A.R. 449

[1978] 3 A.C.W.S. 214



Supreme Court of Canada

1977: November 28 / 1978: October 3.

**Present: Laskin C.J. and Ritchie, Spence, Pigeon, Dickson, Estey and Pratte JJ.**

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Public utilities -- Application for interim rate increase -- Order of Public Utilities Board permitting*

*recovery of losses incurred before date of application -- Board thereby offending provisions of s. 31 of The Gas Utilities Act, R.S.A. 1970, c. 158 -- Application of s. 8 of The Administrative Procedures Act, R.S.A. 1970, c. 2, to proceedings -- Matter returned to Board for continuation of hearing.*

Commencing on August 20, 1974, the appellant company filed an application with the Alberta Public Utilities Board for an order determining the rate base and fixing a fair return thereon and approving the rates and charges for the natural gas supplied by the company to its customers. The application made reference to the powers under s. 31 of The Gas Utilities Act, R.S.A. 1970, c. 158, by asking for an order "giving effect to such put of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application". Finally the application sought an order fixing interim rates pending the establishment of "final rates". As a result of this application several interim orders were issued between November 15, 1974, and June 30, 1975. In response to the application of August 20, 1974, the Board by order made on September 15, 1975, established the rate base, a fair return thereon and the total utility requirement at $72,141,000. These items were respectively found and included in the order on the basis of "actual 1974" figures and "forecast 1975" figures. The Board then directed the company to file a schedule of rates "designed to generate the foregoing total utility revenue requirements approved by the Board".

On August 20, 1975, the company filed with the Board an application for an order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by [the company] to its customers"; and on September 25, 1975, it filed an application for an interim order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by [the company] to its customers pending final determination of the matter". The application of 1975 recited the history of the 1974 application and stated that the operating costs and gas costs of the company "have increased substantially over the amounts included in the 1974 application and continue to increase". After reciting that the Board in response to the 1974 application has awarded the applicant "interim refundable rates", the 1975 application went on to state that the "existing rates charged by the applicant for natural gas do produce revenues sufficient to provide for its present or prospective proper operating and depreciation expense and a fair return on the property used in the service to the public". Therefore the company went on to apply for an order determining the rate base, and a fair return thereon, and fixing and approving rates for natural gas supplied by the company to its customers. The company sought as well an order giving effect to "such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of application". The 1975 application sought as well interim rates "pending the fixing of final rates".



By its order of October 1, 1975, the Board granted an interim increase in rates the effect of which was to allow the company to receive $2,785,000 in excess of its revenues for 1975 which would have been received under the then existing rates. The City of Edmonton appealed from this interim order to the Appellate Division of the Supreme Court of Alberta pursuant to s. 62 of Public Utilities Board Act, R.S.A. 1970, c. 302. The majority of the Appellate Division set aside the order and remitted it to the Board for reconsideration on two grounds: (1) that the effect of the order was a contravention of s. 31 of The Gas Utilities Act in that the company was thereby granted recovery of losses incurred before the date of application, namely, August 20, 1975; and (2) that the Board failed to comply with s. 8 of The Administrative Procedures Act, R.S.A. 1970 c. 2, by reason of its failure to give reasons for its decision. The company and the Board appealed to this Court from the decision of the Appellate Division.

Held: The appeal should be dismissed and the matter returned to The Public Utilities Board for continuation of the hearing of the company's application of August 20, 1975.

The word "losses" as it is employed in s. 31 does not refer to accounting losses in the sense of a net loss occurring in a defined fiscal period but rather refers to the loss of revenue suffered by a utility during a defined period by reason of the delay in the imposition during that period of the proposed increased rates.

The first of the two principal issues in this appeal, i.e., whether the Board by its interim order of October 1, 1975, offended the provisions of s. 31 by granting as alleged by the City an order permitting the recovery of losses incurred before the date of the application, August 20, 1975, was very narrow. The issue was simply whether or not the company by not applying in the 1974 application for a further interim order caused the Board to respond to the new application in 1975 in such a way as to authorize a new tariff which when implemented by the company will have the effect of recovering from future gas consumers revenue losses incurred by the company with respect to gas deliveries made to consumers prior to the date of the application in question (August 20, 1975) or prior to the advent of the October 1, 1975, rates in a manner not authorized by s. 31.

The majority in the Court below observed that "prima facie the new tentative rate base includes an amount for revenue losses in 1975 up to the date of the application in August, since the figures do not purport to apportion the loss between the two periods of the year". This Court was not prepared to say that a prima facie case had been established that the effect of the application of the interim rates from October 1, 1975, onwards will be the recovery in the future of revenue shortfalls incurred prior to August 20, 1975. The test was not whether the new tentative rate base includes an amount for revenue losses" but rather the question was whether or not the interim rates prospectively applied will produce an amount in excess of the estimated total revenue requirements for the same period of the utility by reason of the inclusion in the computation of those future requirements of revenue shortfalls which have occurred prior to the date of the application in question, whether or not those "shortfalls" have been somehow incorporated into the rate base or have been included in the operating expenses forecast for the period in which the new interim rates will be applied, subject always to the Board's limited power under s. 31.



The company submitted that a determination of what is or is not a 'past loss' is a pure question of fact and as such is not subject to appeal by reason of s. 62 of The Public Utilities Board Act, which limits appeals from Board decisions to questions of "law or jurisdiction". The appeal before this Court involved a determination of the intent of the Legislature with respect to the Board's jurisdiction to take into account shortfalls in revenue or excess expenditures occurring or properly allocable to a period of time prior to an application for the establishment of rates under the Act. The Board's decision as to characterization of "the forecast revenue deficiency in the 1975 future test year" of the company involved a determination of the matters of which cognizance may be taken by the Board in setting rates under the statute. This is a question of law and may properly be made the subject of an appeal to a court pursuant to s. 62. The disposition of an application which involved the Board in construing ss. 28 and 31 of The Gas Utilities Act raises a question of law and may well go to the jurisdiction of the Board.

However, it was not possible for the reviewing tribunal in the circumstances in this proceeding to ascertain from the Board's order whether the Board acted within or outside the ambit of its statutory authority. The form and content of the Board's order were so narrow in scope and of such

extraordinary brevity that one was left without guidance as to the basis upon which the rates had been established for the period October 1, 1975, onwards. Hence this submission of the company failed.

As to the second issue, namely the application to these proceedings of s. 8 of The Administrative Procedures Act, which provision imposes upon certain administrative tribunals the obligation of providing the parties to its proceedings with a written statement of its decision and the facts upon which the decision is based and the reasons for it, the Board in its decision allowing the interim rate increase failed to meet the requirements of this section. The failure of the Board to perform its function under s. 8 included most seriously a failure to set out "the findings of fact upon which it based its decision" so that the parties and a reviewing tribunal were unable to determine whether or not in discharging its functions, the Board had remained within or had transgressed the boundaries of its jurisdiction established by its parent statute. The appellants were not assisted by the decision in Dome Petroleum Ltd. v. Public Utilities Board (Alberta) and Canadian Superior Oil Ltd. (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822, to the effect that under s. 8 of The Administrative Procedures Act the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal. Nor could the Board rely on the peculiar nature of the order in this case, being an interim order with the amounts payable thereunder perhaps being refundable at some later date, to deny the obligation to give reasons. The order of the Board revealed only conclusions without any hint of the reasoning process which led thereto. The result was that a reviewing tribunal could not with any assurance determine that the statutory mandates bearing upon the Board's process had been heeded.

As for the participation of The Public Utilities Board in these proceedings, there is no doubt that s. 65 of The Public Utilities Board Act confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given locus standi as a participant in the nature of an amicus curiae but not as a party. That this is so is made evident by s. 63(2) under which a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself.



The policy of this Court is to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.

**Cases Cited**

Gill Lumber Chipman (1973) Ltd. v. United Brotherhood of Carpenters and Joiners of America Local 2142 (1973), 7 N.B.R. (2d) 41; MacDonald v. The Queen (1976), 29 C.C.C. (2d) 257; Re Canada Metal Co. Ltd. et al. and MacFarlane (1973), 1 O.R. (2d) 577; Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Ltd., [1961] S.C.R. 72; Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Ltd., [1947] S.C.R. 336; International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board (1958), 18 D.L.R. (2d) 588; Central Broadcasting Co. Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers. Local Union No. 529, [1977] 2 S.C.R. 112; Canada Labour Relations Board v. Transair Ltd. et al., [1977] 1 S.C.R. 772, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division [(1977), 2 A.R. 317.], setting aside an order of The Public Utilities Board of the Province of Alberta granting an interim increase in rates pursuant to s. 52(2) of The Public Utilities Board Act, R.S.A. 1970, c. 302. Appeal dismissed.

T. Mayson, Q.C., for the appellant Northwestern Utilities Ltd.
W.J. Major, Q.C., and C.K. Sheard, for the appellant Public Utilities Board of the Province of Alberta.
M.H. Patterson, Q.C., for the respondent.

Solicitors for the appellant, The Public Utilities Board for the Province of Alberta: Major, Caron & Co., Calgary.
Solicitors for the appellant, Northwestern Utilities Ltd.: Milner & Steer, Edmonton.
Solicitor for the respondent, The City of Edmonton: M.H. Patterson, Calgary.

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The judgment of the Court was delivered by

**ESTEY J.**:-- This is an appeal by The Public Utilities Board for the Province of Alberta and Northwestern Utilities Limited from a decision of the Appellate Division of the Supreme Court setting aside an order of the Board granting an interim increase in rates pursuant to s. 52(2) of The Public Utilities Board Act, R.S.A. 1970, c.
302.

The majority of the Court of Appeal set aside the order and remitted it to the Board for reconsideration on two grounds:

(1) That the effect of the order was a contravention of s. 31 of The Gas Utilities Act, R.S.A. 1970, c. 158, in that Northwestern Utilities Limited was thereby granted recovery of losses incurred before the date of application, namely, the 20th of August 1975; and
(2) That the Board failed to comply with s. 8 of The Administrative Procedures Act, R.S.A. 1970, c. 2, by reason of its failure to give reasons for its decision.

The appellant, The Public Utilities Board (herein referred to as 'the Board'), is constituted under The Public Utilities Board Act to "deal with public utilities and the owners thereof as provided in this Act" (s. 28(1)), and is given more specific duties and powers with respect to gas utilities under The Gas Utilities Act. The appellant, Northwestern Utilities Limited (herein referred to as 'the Company'), is a gas utility regulated under these statutes:

The Board is by the latter statute directed to "fix just and reasonable ... rates, ... tolls or charges ..." which shall be imposed by the Company and other gas utilities and in connection therewith shall establish such depreciation and other accounting procedures as well as "standards,

classifications [and] regulations ..." for the service of the community by the gas utilities (s. 27, The Gas Utilities Act). In the establishment of these rates and charges, the Board is directed by s. 28 of the statute to "determine a rate base" and to "fix a fair return thereon". The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. The fiscal year of the utility is generally found to be a convenient but not a mandatory period for these purposes. It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. Thus the rate when finally established will be such as the Board deems just and reasonable to allow the recovery of the expenses incurred by a utility in supplying gas to its customers, together with a fair return on the investment devoted to the enterprise. We are here concerned only with the rate establishing process and, hence, this summation of the Board's functions and powers is limited to that aspect of its statutory operations.

While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application (vide City of Edmonton et al. v. Northwestern Utilities Limited [[1961] S.C.R. 392.], per Locke J. at pp. 401, 402).

The rate-fixing process was described before this Court by the Board as follows:

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

The statutory pattern is founded upon the concept of the establishment of rates in futuro for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of The Gas Utilities Act that the Board must act prospectively and may not award rates which will recover

expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the Act which make this clear and I take but one example, found in s. 35, which provides:

> (1) No change in any existing rates...shall be made by a ... gas utility ... until such changed rates or new rates are approved by the Board.
> (2) Upon approval, the changed rates ... come into force on a date to be fixed by the Board and the Board may either upon written complaint or upon its own initiative herein determine whether the imposed increases, changes or alterations are just and reasonable.

Section 32 likewise refers to rates "to be imposed thereafter by a gas utility". The 1959 version of the legislation before the Court in this proceeding was examined by the Alberta Court of Appeal in City of Calgary and Home Oil Co. Ltd. v. Madison Natural Gas Co. Ltd. and British American Utilities Ltd. [(1959), 19 D.L.R. (2d) 655.] wherein Johnson J.A. observed at p. 661:

> The powers of the Natural Gas Utilities Board have been quoted above and the Board's function was to determine "the just and reasonable price" or prices to be paid. It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.

Vide also Regina v. Board of Commissioners of Public Utilities (N.B.), Ex parte Moncton Utility Gas Ltd. [ (1966), 60 D.L.R. (2d) 703.], at p. 710; Bradford Union v. Wilts [(1868), L.R. 3 Q.B. 604.], at p. 616.



There is but one exception in this statutory pattern and that is found in s. 31 which is critical in these proceedings. It is convenient to set it out in full.

> It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

It should be noted that s. 31 has been amended by s. 5 of The Attorney General Statutes Amendment Act, 1977, 1977 (Alta.), c. 9, which received Royal Assent on May 18, 1977. However, s. 5(3) of that Act provides that s. 31 "as it stood immediately before the commencement of" s. 5 "... continues to apply to proceedings initiated ..." before May 18, 1977. Accordingly, this case stands to be determined in accordance with s. 31 as set out above.

The interpretative difficulties raised by s. 31 are manifold. For one thing, the word 'losses' which is not defined in the Act is employed with reference to the Board's power to establish rates with respect to the period after an application has been made and before the Board has fully disposed of the application by taking into account "excess revenues and losses" which the Board determines have

been "due to undue delay in the hearing and determination of the application". It is in my view apparent once the statute is examined as a whole that 'losses' as the word is employed in s. 31 does not refer to accounting losses in the sense of a net loss occurring in a defined fiscal period but rather refers to the loss of revenue suffered by a utility during a defined period by reason of the delay in the imposition during that period of the proposed increased rates. The word in short is an abbreviation for 'lost revenue' which may indeed be suffered by a utility during a period when the utility is not in a net loss position in the accounting sense of that term. This Court had occasion to consider s. 31 collaterally in City of Edmonton et al. v. Northwestern Utilities Limited, supra. Locke J. writing on behalf of the whole Court on this point so interpreted and applied the word "losses" as it appears in this section.

Much of the difficulty encountered before the Board and again reflected in the judgment of the Court of Appeal has arisen by the use of the expression 'loss' sometimes to refer to a net loss for a period in the past and sometimes by applying the term to a shortfall of revenue in the sense in which I believe the Legislature uses the term in s. 31. This difficulty appears to have been obviated by the new s. 31 which is not now before the Court (vide The Attorney General Statutes Amendment Act, 1977, supra).



Section 52(2) of The Public Utilities Board Act should also be noted:

> The Board may, instead of making an order final in the first instance, make an interim order and reserve further direction, either for an adjourned hearing of the matter or for further application.

Section 54 provides in similar language the authority for the Board to make such interim orders ex parte. These interim orders are couched in the same terms as the final or basic orders establishing rates and tariffs and hence are likewise prospective.

Against this statutory background a brief outline of the historical facts of this proceeding and its origins bring the two issues now before the Court into sharper focus. Commencing on August 20, 1974, the Company filed an application for an order determining the rate base and fixing a fair return thereon and approving the rates and charges for the natural gas supplied by the Company to its customers. The application made reference to the powers under s. 31 by asking for an order "giving effect to such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application". Finally the application sought an order fixing interim rates pending the establishment of "final rates". As a result of this application several interim orders were issued between November 15, 1974, and June 30, 1975. In response to the application of August 20, 1974, the Board by order made on September 15, 1975, established the rate base, a fair return thereon and the total utility revenue requirement at $72,141,000. These items were respectively found and included in the order on the basis of "actual 1974" figures and "forecast 1975" figures. The Board then directed the Company to file a schedule of rates "designed to generate the foregoing total utility revenue requirements approved by the Board".

The practice and terminology historically adopted by the Board in the discharge of its statutory functions are no doubt clear to the industry and to persons attending upon the Board in the discharge of its functions but leaves something to be desired in the sense that the terminology does not precisely fit that employed by the legislation to which reference has been made. It is clear, however, that in its order with respect to the August 1974 application, the Board has attempted to establish in the

prospective sense those rates which the Company will require to enable it to carry on its business as a gas utility in the future and until such further and other rates are established by the Board. Had the Company then responded to the September 15 order by filing a proposed schedule of rates the Board would no doubt in completion of its statutory response to the August 1974 application by the Company have established the appropriate schedule of rates to be brought into effect by the Company in its billings from and after a date prospectively prescribed by the Board.

The complication which gives rise to these proceedings occurred on August 20, 1975, when the Company filed with the Board an application (not to be confused with the application filed on August 20, 1974) for an order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by Northwestern Utilities Limited to its customers"; together with an application on September 25, 1975, for an interim order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by Northwestern Utilities Limited to its customers pending final determination of the matter". The application of 1975 recites the history of the 1974 application and states that the operating costs and gas costs of the Company "have increased substantially over the amounts included in the 1974 application and continue to increase". After reciting that the Board in response to the 1974 application had awarded the applicant "interim refundable rates", the 1975 application went on to state:

> The existing rates charged by the Applicant for natural gas do not produce revenues sufficient to provide for its present or prospective proper operating and depreciation expense and a fair return on the property used in the service to the public.

Therefore the Company went on to apply for an order determining the rate base, and a fair return thereon, and fixing and approving rates for natural gas supplied by the Company to its customers. The Company sought as well an order giving effect to "such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application", apparently paraphrasing s. 31 of The Gas Utilities Act. The 1975 application seeks as well interim rates "pending the fixing of final rates".

It is also relevant to note in passing that the 1974 application indeed had its own roots in a prior procedure before the Board initiated by the Board itself under s. 27 of The Gas Utilities Act in 1974. In June 1974, the Company applied for an interim rate increase. and after a hearing in July 1974 the application was denied on August 19, 1974, and the application of August 20, 1974, was thereupon filed.

By its order of October 1, 1975, the Board granted an interim increase in rates the effect of which was to allow the Company to receive $2,785,000 in excess of its revenues for 1975 which would have been received under the then existing rates. The question immediately arises as to whether this sum represents increased expenses to be incurred by the Company for the period after the interim rates became effective (October 1, 1975) or whether it represents expenses incurred and unrecovered in the past. It was from this interim order that the City of Edmonton (herein referred to as 'the City') appealed to the Appellate Division of the Supreme Court of Alberta pursuant to s. 62 of The Public Utilities Board Act:

(1)

> Subject to subsection (2) [the requirement of leave], upon a question of jurisdiction or upon a question of law, an appeal lies from the Board to the Appellate Division of the Supreme Court of Alberta.

The Appellate Division of the Supreme Court of Alberta set aside the Board order of October 1, 1975, and referred the matter to the Board "for further consideration and redetermination". One preliminary argument can be disposed of at the outset. It was argued in the Courts below, as well as in this Court, that the interim order under appeal (dated October 1, 1975) was made pursuant to the 1974 rate application, either as a variance of the 1974 order pursuant to s. 56 of The Public Utilities Board Act, or as an interim order in respect of the 1974 application. That submission, whatever its effect, was rejected by the Court of Appeal and must be rejected here. On the face of the interim order is found a reference to "the application of N.U.L. dated the 20th day of August, 1975". That reference, when read with the transcript of the evidence at the hearing leaves no doubt that the interim order was made with respect to the 1975 application which clearly was an independent application to establish, pursuant to the aforementioned sections of The Gas Utilities Act, the statutory prerequisites to a new tariff of rates, and then a new tariff of rates.

I turn then to the first issue as to whether the Board by its interim order of October 1, 1975, has offended the provisions of s. 31 of The Gas Utilities Act by granting as alleged by the City an order permitting the recovery of losses incurred before the date of the application, August 20, 1975. It was not argued before this Court that the Board could not through s. 31 reach back to August 20, 1975, and grant a rate increase to recover costs thereafter incurred. The recitals to the order of October 1975 make it difficult to determine whether in fact the Board has invoked s. 31 in the interim rates established by the order or whether the Board has simply made an interim order under s. 51(2) of The Public Utilities Board Act. We need not determine the answer to that question in order to deal with this issue.

The issue is at this stage very narrow. No contest is raised as to the validity of the September 15, 1975, order nor the various interim rates authorized in the 1974 application. The issue is simply whether or not the Company by not applying in the 1974 application for a further interim order has caused the Board to respond to the new application in 1975 in such a way as to authorize a new tariff which when implemented by the Company will have the effect of recovering from future gas consumers revenue losses incurred by the Company with respect to gas deliveries made to consumers prior to the date of the application in question (August 20, 1975) or prior to the advent of the October 1, 1975, rates but in a manner not authorized by s. 31.

The Appellate Division of the Supreme Court of Alberta in both the judgments of Clement J.A. and McDermid J.A., as well as counsel before this Court, devoted a considerable amount of attention to the accounting evidence filed by the Company with reference to the total revenue requirement of the Company in the years 1974 and 1975 and to the possibility that the inclusion in the rate base or the operating expenses established in Phase I of the 1975 application of the additional expenses which gave rise to the 1975 application, will have the effect of violating or going beyond s. 31 by authorizing rates which will have the effect of recovering past losses. We are here not concerned with capitalized losses because there is no suggestion that the rate base will be enlarged by the inclusion of any historical loss in the sense of an accounting deficit in prior fiscal intervals but rather with revenue losses other than those which may be recovered pursuant to s. 31 and which relate to the period from and after August 20, 1975. These losses of course have no relationship to a rate base computed and established pursuant to s. 28 of The Gas Utilities Act. We are concerned only with whether or not the

Board in its processes has determined the total operating expenses for some period, as well as the fair return on the rate base, so as to enable the Board to calculate prospectively the anticipated total revenue requirement of the utility and thereby establish rates which prospectively will produce future revenues to match the estimated future total revenue requirement.

This procedure was the subject of comment by Porter J.A. in Re Northwestern Utilities Ltd. [ (1960), 25 D.L.R. (2d) 262.] at p. 290, and which comments I find apt in the circumstances now before us:

> One effect of this ruling is that future consumers will have to pay for their gas a sum of money which equals that which consumers prior to August 31, 1959 ought to have paid but did not pay for gas they had used. In short, the undercharge to one group of consumers for gas used in the past is to become an overcharge to another group on gas it uses in the future. When the Board capitalized this sum, it made all the future consumers debtors to the company for the total amount of the deficiency, payable ratably with interest from their respective future gas consumption.

It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.

The evidence submitted by the Company on the hearing of the 1975 application centred largely upon the urgent need for interim refundable rates by which the Company;

> can recover its costs of service and earn an adequate return on its utility assets for the year 1975. If the interim rates requested are nor granted, the costs of providing natural gas service would not be fully recovered.

The evidence goes on to outline the utility income under existing rates for the years 1975 and 1976 and it is stated that these rates unless augmented by interim rates as proposed will produce a shortfall in revenue of approximately $700,000 per month. The accounts so filed reveal computations which show the need for an additional $2.785 million for the year 1975 of which operating expenses represent $2.105 million. Unhappily, the record does not reveal whether all the components of the additional $2.785 million are recurring expenses and costs, or legitimate demands for return on capital, which will run evenly into the future. It may be that in the quarterly period of 1975 remaining at the time of the order, these projections will exceed or be less than the actual expenses to be incurred in that very quarterly period. On this the evidence is strangely silent. The evidence of the treasurer of the Company deals with the revenues for the year 1975 as follows:

> A. The revenues from gas sales for the test year 1975 of $87,265,000 as shown on line 6 of Statement 2.01 (Forecast--Proposed Rates) constitutes $84,480,000 of revenues forecast under existing rates as shown on Line 6 of Statement 2.01 (Forecast--Existing Rates) and

> $2,785,000 of additional revenues to earn a utility rate of return of 9.93 per cent. The increase is that estimated to be derived from introduction on October 1, 1975, of the requested interim rates, including an increase in franchise tax of $120,000.
>
> Q. On what year are the interim rates designed?
>
> A. 1975 was chosen as the test year and rates were designed to recover 1975 costs.

In its application for interim rates the Company reduces the effect of the anticipated loss of revenue to the conclusion:

> The rate of return on the base rate drops from 9 percent in 1974 to 8.43 percent in 1975 and further declines to 6.77 percent in 1976. The requested rate of return on rate base for 1975 under the proposed rates is 9.93 percent. This difference of 1 1/2 percent represents $1,600,000 in utility income.

This reference would appear to be to the difference between the prevailing rates in 1975 prior to October 1st and the rates which would prevail in 1975 under the proposal made for the rates effective October 1, 1975. The application for the interim rates goes on to state:

> Without rate relief in the form of interim rates for the balance of 1975, the imputed return on common equity drops to 10.2 percent compared to the recommended equity return of 14 5/8 percent to 15 1/8 percent ...

From this and like excerpts from evidence, testamentary and documentary, the City has taken the view that the augmentation to rates for the last quarter of 1975 sought by the Company and granted by the Board has in effect been a recognition of a deemed increase in the rate base or operating expenses by the inclusion therein of an otherwise unrecoverable loss in that part of the year 1975 preceding the 1975 application filed on August 20. Additionally, or perhaps more accurately, alternatively, the City has put the argument that the Company by its interim rate proposal has sought to recover in 1975 additional costs of $2.785 million without in any way establishing that the revenue so sought is required to match expenses to be incurred either during the effective period of the new interim rates, or is to recover lost revenue in the manner authorized by s. 31. In support of this argument, the City points out that the sum of $2.1 million, which is said to be required to meet increases in operating expenses, is not isolated and shown to be additional expenses to be incurred in the last quarter of 1975 but rather is the excess of 1975 expenses over and above those forecast in the earlier proceedings and which excess is forecast on the basis of actual expenditures in the first 6 months of 1975 together with anticipated expenditures in the last 6 months of 1975.

The Company meets this argument by the submission that losses contemplated by s. 31 cannot be discerned until the close of the fiscal period selected as the basis for the application for new rates and that this is peculiarly so in the case of a gas utility by reason of fluctuating conditions beyond the control of the utility. The Board in disposing of these opposing positions states simply:

> AND THE BOARD having considered the argument of counsel for Interveners that the application for interim refundable rates by N.U.L. should be rejected, in whole or in part, on the grounds that the increased interim

> refundable rates are for the purpose of recovering "past losses" which they claim have been incurred by N.U.L. since January 1, 1975:
>
> AND THE BOARD considering that the forecast revenue deficiency in the 1975 future test year requested by N.U.L. cannot be properly characterized as "past losses".

The terminology "past losses", employed perhaps by all parties before the Board and adopted by the Board in its order, makes it difficult in reviewing the record as well as the various orders of the Board to determine whether or not the Board was indeed attempting to isolate the elements to be taken into account by the Board in discharging its functions under ss. 27, 28 and 29 of The Gas Utilities Act with reference to specific parts of the calendar year 1975. If, for example, the Board had assumed that the additional revenue sought in the application of September 25, 1975, for an interim order pending the determination of the application of August 20, 1975, was to match expenses forecast to be incurred by the Company in the last quarter of 1975, then there would be no attempt by the Board to take into account revenue losses incurred prior to August 20, 1975, and thus no failure on the part of the Board to comply with the statute and with s. 31 in particular. The process of matching forecast revenues to be realized from the proposed interim rates against the forecast expenses comprising the total revenue requirements for the last quarterly period would be complete. It is impossible to discern whether or not that is the result which is sought to be reflected by the Board in its order of October 1, 1975. Such may well be the case, but on the other hand, it might be as submitted by the City that these additional expenses totalling $2.785 million are in whole or in part the result of annualizing expenses incurred before and/or after August 20, 1975, so that the total revenue requirement for the "test year" need be augmented by $2.785 million in order to meet the total revenue requirements for the year. It is in my view wholly unnecessary to enter the debate as to whether or not in making the estimates for future expenses a fiscal period of a year, two years, a half year, etc., need be selected. What is required by the statute is an estimate by the Board of the future needs of the utility which are recognized in the statute to be compensable by the operation in the future of the rates prescribed by the Board. Similarly the forecast of revenues to be recovered by the proposed rates need not be predicated necessarily upon a hypothetical or real fiscal year or a shorter period. Obviously in a seasonal enterprise such as the gas utility business a full calendar fiscal period represents the marketing picture throughout the four seasons of the year. Equally obviously, recurring cash outlays relevant to expenses unevenly incurred throughout the year can be annualized either by an accounting adjustment where the expense incurred relates to a longer period or extends beyond the fiscal year in question, or can be annualized where the expense incurred relates to a segment of the fiscal period. In any case the administrative mechanics to be adopted in the discharge of the function mandated by The Gas Utilities Act are exclusively within the power of the Board. We need not here deal with the question of arbitrariness in the discharge of administrative functions for there is no evidence on the record before this Court raising any such issue. This Court is concerned only with the issue as to whether the Board in the performance of its duties under the statUte has exceeded the power and authority given to it by the Legislature. Clement J.A. has observed in his reasons:

> [P]rima facie the new tentative rate base includes an amount for revenue losses in 1975 up to the date of the application in August, since the figures do not purport to apportion the loss between the two periods of the year.

I am not prepared to say that a prima facie case has been established that the effect of the application of the interim rates from October 1, 1975, onwards will be the recovery in the future of revenue

shortfalls incurred prior to August 20, 1975. Indeed, in my respectful view, the test is not whether the "new tentative rate base includes an amount for revenue losses" but rather the question is whether or not the interim rates prospectively applied will produce an amount in excess of the estimated total revenue requirements for the same period of the utility by reason of the inclusion in the computation of those future requirements of revenue shortfalls which have occurred prior to the date of the application in question, whether or not those "shortfalls" have been somehow incorporated into the rate base or have been included in the operating expenses forecast for the period in which the new interim rates will be applied, subject always to the Board's limited power under s. 31.

The Company submitted to this Court that a determination of what is or is not a 'past loss' is a pure question of fact and as such is not subject to appeal by reason of s. 62 of The Public Utilities Board Act, supra, which limits appeals from Board decisions to questions of "law or jurisdiction". The appeal before this Court involves a determination of the intent of the Legislature with respect to the Board's jurisdiction to take into account shortfalls in revenue or excess expenditures occurring or properly allocable to a period of time prior to an application for the establishment of rates under the Act. The Board's decision as to the characterization of "the forecast revenue deficiency in the 1975 future test year" of the Company involves a determination of the matters of which cognizance may be taken by the Board in setting rates under the statute. This is a question of law and may properly be made the subject of an appeal to a court pursuant to s. 62. The disposition of an application which, as I have said, involved the Board in construing ss. 28 and 31 of The Gas Utilities Act, raises a question of law and may well go to the jurisdiction of the Board.

However, it is not possible for the reviewing tribunal in the circumstances in this proceeding to ascertain from the Board order whether the Board acted within or outside the ambit of its statutory authority. The form and content of the Board's order are so narrow in scope and of such extraordinary brevity that one is left without guidance as to the basis upon which the rates have been established for the period October 1, 1975, onwards. Hence this further submission of the Company must fail.



I turn now to the second issue, namely the application of s. 8 of The Administrative Procedures Act of Alberta, supra, to these proceedings. This provision imposes upon certain administrative tribunals the obligation of providing the parties to its proceedings with a written statement of its decision and the facts upon which the decision is based and the reasons for it. Section 8 states:

> Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
>
> (a) the findings of fact upon which it based its decision, and
> (b) the reasons for the decision.

The "reasons" handed down by the Board consist of the following:

> INTERIM ORDER
>
> UPON THE APPLICATION of Northwestern Utilities Limited, (hereinafter referred to as "N.U.L.") to the Public Utilities Board for an Order or Orders

approving changes in existing rates, tolls or charges for gas supplied and services rendered by N.U.L. to its customers;

AND UPON READING the application of N.U.L. dated the 20th day of August, 1975 and the Affidavit of Dorothea E. Blackwood concerning service by mail and by newspaper publication of a Notice of the matter as directed by the Board and written evidence of witnesses of N.U.L. and other material filed in support of the application;

AND UPON HEARING an application made by N.U.L. on September 25, 1975, for an Interim Order approving changes in existing rates, tolls or charges for gas supplied and services rendered by N.U.L. to its customers pending final determination of the matter;

AND UPON HEARING the application, testimony and submission of witnesses and counsel for N.U.L.;

AND THE BOARD having considered the argument of counsel for Interveners that the application for interim refundable rates by N.U.L. should be rejected, in whole or in part, on the grounds that the increased interim refundable rates are for the purpose of recovering "past losses" which they claim have been incurred by N.U.L. since January 1, 1975;

AND THE BOARD considering that the forecast revenue deficiency in the 1975 future test year requested by N.U.L. cannot be properly characterized as "past losses".

AND THE BOARD considering that delay in granting an interim increase in rates may adversely affect N.U.L.'s financial integrity and customer service;

AND N.U.L. having undertaken to refund to its customers such amounts as the Board may direct if any of the said interim rates are changed after further hearing.

IT IS ORDERED as follows: ...

The law reports are replete with cases affirming the desirability if not the legal obligation at common law of giving reasons for decisions (vide Gill Lumber Chipman (1973) Ltd. v. United Brotherhood of Carpenters and Joiners of America Local 2142 [(1973), 7 N.B.R. (2d) 41 (N.B.S.C.A.D.).], per Hughes C.J.N.B. at p. 47; MacDonald v. The Queen [ (1976), 29 C.C.C. (2d) 257.], per Laskin C.J.C. at p. 262). This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal and if taken, the opportunity in the reviewing or appellate tribunal of a full hearing which may well be denied where the basis of the decision has not been disclosed. This is not to say, however, that absent a requirement by statute or regulation a disposition

by an administrative tribunal would be reviewable solely by reason of a failure to disclose its reasons for such disposition.

The Board in its decision allowing the interim rate increase which is challenged by the City failed to meet the requirements of s. 8 of The Administrative Procedures Act. It is not enough to assert, or more accurately, to recite, the fact that evidence and arguments led by the parties have been considered. That much is expected in any event. If those recitals are eliminated from the 'reasons' of the Board all that is left is the conclusion of the Board "that the forecast revenue deficiency in the 1975 future test year requested by the Company cannot be properly characterized as "past losses"". The failure of the Board to perform its function under s. 8 included most seriously a failure to set out "the findings of fact upon which it based its decision" so that the parties and a reviewing tribunal are unable to determine whether or not, in discharging its functions, the Board has remained within or has transgressed the boundaries of its jurisdiction established by its parent statute. The obligation imposed under s. 8 of the Act is not met by the bald assertion that, as Keith J. succinctly put it in Re Canada Metal Co. Ltd. et al. and MacFarlane [(1973), 1 O.R. (2d) 577.], at p. 587, when dealing with a similar statutory requirement, "my reasons are that I think so".

The appellants are not assisted by the decision of the

Appellate Division of the Supreme Court of Alberta in Dome Petroleum Ltd. v. Public Utilities Board (Alberta) and Canadian Superior Oil Ltd. [(1976), 2 A.R. 453.], affirmed by this Court at [1977] 2 S.C.R. 822 to the effect that under s. 8 of The Administrative Procedures Act the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal. Nor can the Board rely on the peculiar nature of the order in this case, being an interim order with the amounts payable thereunder perhaps being refundable at some later date, to deny the obligation to give reasons. Brevity in this era of prolixity is commendable and might well be rewarded by a different result herein but for the fact that the order of the Board reveals only conclusions without any hint of the reasoning process which led thereto. For example, none of the factors which the Board took into account, in reaching its conclusion that the amounts contested were not "past losses" are revealed so that a reviewing tribunal cannot with any assurance determine that the statutory mandates bearing upon the Board's process have been heeded.



The Appellate Division of the Supreme Court of Alberta, after coming to the same result, vacated the Board's order and referred the matter to the Board for further consideration and determination pursuant to s. 64 of The Public Utilities Board Act. In doing so, it is evident from the reasons for judgment of the said Court that the Court properly viewed its appellate jurisdiction under s. 64 of The Public Utilities Board Act as a limited one. It is not for a court to usurp the statutory responsibilities entrusted to the Board, except in so far as judicial review is expressly allowed under the Act. It is, of course, otherwise where the administrative tribunal oversteps its statutory authority or fails to perform its functions as directed by the statute. Questions as to how and when operating expenses are to be measured and recovered through prescribed rates are, subject to the limits imposed by the Act itself, for the Board to decide, and the procedures for such decisions if made within the confines of the statute are administrative matters which are better left to the Board to determine (vide City of Edmonton v. Northwestern Utilities Limited, supra, per Locke J. at p. 406).

As for the participation of The Public Utilities Board in these proceedings, it was pointed out to the Court that s. 65 of The Public Utilities Board Act entitles the Board "to be heard ... upon the

argument of any appeal". Under s. 66 of the Act the Board is shielded from any liability in respect of costs by reason or in respect of an appeal.

Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given locus standi as a participant in the nature of an amicus curiae but not as a party. That this is so is made evident by s. 63(2) of The Public Utilities Board Act which reads as follows:

> The party appealing shall, within ten days after the appeal has been set down, give to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the secretary of the Board, notice in writing that the case has been set down to be heard in appeal, and the appeal shall be heard by the court of appeal as speedily as practicable.

Under s. 63(2) a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.



This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. (Vide The Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Limited et al. [ [1961] S.C.R. 72.]; The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited et al. [ [1947] S.C.R. 336.]) Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board [(1958), 18 D.L.R. (2d) 588.], at pp. 589, 590:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in

> all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. (Vide Central Broadcasting Company Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union No. 529 [[1977] 2 S.C.R. 112.].)

In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions. In Canada Labour Relations Board v. Transair Ltd. et al. [[1977] 1 S.C.R. 722.], Spence J. speaking on this point, stated at pp. 746-7:

> It is true that the finding that an administrative tribunal has not acted in accord with the principles of natural justice has been used frequently to determine that the Board has declined to exercise its jurisdiction and therefore has had no jurisdiction to make the decision which it has purported to make. I am of the opinion, however, that this is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of certiorari and is not a matter of the tribunal's defence of its jurisdiction. The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review.

There are other issues subordinate to the two principal submissions which I have discussed above but which are inappropriate for comment at this stage by reason of the disposition which I propose in respect to this appeal. I would dismiss the appeal with costs to the respondent The City of Edmonton as against the appellant Northwestern Utilities Limited. In the result, therefore, the matter would revert to the Board for a continuation of the processing of the application by the Company of August 20, 1975, involving, as discussed above, the ascertainment by any means appropriate to the provisions of the statute, the expenses estimated to be incurred in the future and to be therefore properly recoverable by the application of the rates to be established by the Board; and in the event that s. 31 be invoked for the ascertainment of only those expenses which had been incurred after the application of August 20, 1975. Any further analysis of the factual background and subordinate issues would, in view of this disposition, be inappropriate.

Appeal dismissed with costs.

*Case Name:*

# CITY OF CALGARY AND HOME OIL CO. LTD. v. MADISON NATURAL GAS CO. LTD. AND BRITISH AMERICAN UTILITIES LTD.

**[1959] A.J. No. 56**

19 D.L.R. (2d) 655

28 W.W.R. 353

80 C.R.T.C. 85

1959 CarswellAlta 32

Alberta Supreme Court, Appellate Division

**Clinton J. Ford C.J.A., Egbert J., Boyd McBride, Porter, Johnson JJ.A.**

Judgment: April 29, 1959

(12 paras.)



**Counsel:**

*S. J. Helman*, Q.C., and *R. R. Neeve*, for Calgary (City), appellant

*J. R. McColough*, for Home Oil Co., appellant by order

*J. V. H. Milvain*, Q.C., and *J. H. Laycroft*, for Madison Natural Gas Co., respondent

*R. L. Fenerty*, Q.C., for Br. American Utilities Ltd., respondent.

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1 **CLINTON J. FORD C.J.A.**:--I concur in the judgment of my brother H. G. Johnson, and in his reasons. I add a few words merely to guard against any inference that we have been concerned in this appeal with what the Board of Public Utility Commissioners may take into consideration in arriving at or fixing prices to be paid for gas on an application to it for such purpose.

2 The question before us has been that of the authority or jurisdiction of the Board to deal with cls. (a) and (b) of the application in the sense in which they must be interpreted, rather than that of the elements or factors that enter into the problem of fixing prices. We have held that the Board has no power to entertain these portions of the application for the reasons given in our judgment.

3 The decision of this Division in *Wainwright Gas Co. v. Wainwright & Bd. Public Utility Com'rs*, [1930] 4 D.L.R., 1000, 25 A.L.R. 181; affd [1931] 4 D.L.R. 80, dealt entirely with whether there was a question of law or jurisdiction involved so as to give a right of appeal from the decision of the Board in respect of the prices it had fixed for gas on the ground that it had exceeded its jurisdiction. The majority held that there had been no violation of any legal provision. An attempted appeal by the Gas company to the Supreme Court of Canada was quashed for want of jurisdiction in that Court to hear the appeal.

4 It is quite clear that the *Wainwright* decision as well as the decision in *Northwestern Utilities Ltd. v. Edmonton*, [1929], 2 D.L.R. 4, S.C.R. 186 referred to therein, were both dealing with the question of what may be considered in the fixing of prices, as to which, as I have said, we have not been concerned in this appeal.

> "(a) The disposition of surpluses earned by Madison Natural Gas Co. Ltd. and/or British American Utilities Ltd. over the rate of return allowed the said utilities by the said Board;
>
> "(b) The future rate of return to be allowed the said Madison Natural Gas Co. Ltd. and/or the said British American Utilities Ltd."
>
> (c), (d) and (e) asked for decreases in the price of gas charged by the respondents but that part of the application is not before us.

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13 When the application was made with respect to (a) and (b), objection was taken that the Board had no authority to entertain the application or grant the orders asked for. The Board gave effect to this objection and it is that decision which is the subject-matter of this appeal.

14 To understand the problem that is raised by this appeal, it is necessary to refer to the problem these orders dealt with, some of the decisions and orders made by the Natural Gas Utility Board and the legislation under which they were made. The following is taken from O. 34 of the Natural Gas Utilities Board issued in 1947:

> "Turner Valley Oil and Gas Field is situate approximately thirty miles south-west from the City of Calgary. Drilling for oil began in this field in the year 1914 but it was not until 1924 that Royalite Oil Company Limited brought in a well ... known as Royalite No. 4, which had an initial gas flow of approximately 22,000,000 cubic feet per day. The gas produced was

saturated with naphtha and as a result development followed rapidly and many wells were drilled, to secure the naphtha production. In the meantime, The Canadian Western Natural Gas, Light, Heat and Power Company Limited, which furnished natural gas to consumers through a distribution system which extended from Calgary to Lethbridge and thence to communities on the Crows Nest Line of the Canadian Pacific Railway Company, required additional supplies for its market and negotiated an agreement with Royalite, whereby the latter secured the exclusive right to supply natural gas from Turner Valley to Canadian Western for the needs of its customers.

"In course of time, crude oil was discovered in the westerly part of the field and again intensive development took place, until a time came when the limits of the field became reasonably well defined. The known productive area of Turner Valley is about twenty miles long and varies in width from one to two miles. It is divided longitudinally into two areas known respectively as 'the gas cap' on the east flank and 'the crude oil zone' on the west flank, the former of which produces natural gas containing natural gasoline and naphtha, while the latter zone produces crude oil under the lifting power of connate natural gas, which also contains natural gasoline. The northern area of the gas cap formerly was largely and now is controlled by Royalite which, in course of time, constructed two absorption plants for the recovery of natural gasoline. The natural gas in both areas of the field contains sulphuretted hydrogen in noxious quantities and a scrubbing plant was built for the removal of this dangerous substance. In the central portion of the field, Gas and Oil Products Limited established an absorption plant for the recovery of natural gasoline.

"British American Oil Company Limited established an absorption plant in the southern portion of the field for the recovery of natural gasoline. The result was that natural gas was being produced from the gas cap in tremendous quantities, primarily for the recovery of its naphtha and natural gasoline content, while natural gas -- the lifting power -- was produced in the crude oil zone. In the case of Gas and Oil Products Limited and the British American Oil Company Limited, gas from which natural gasoline had been recovered was used in relatively small quantities for field purposes and the balance was burned in flares. Royalite used its gas after absorption, to some extent, for use in the field for drilling fuel, for plant fuel, and for sale to Canadian Western to the extent of the latter's demand, and some was stored in the Bow Island field. Up until 1938 the balance was flared. ... In the crude oil zone, gas produced from wells not connected to absorption plants and not required for field purposes or drilling fuel was wasted. Between the year 1924 and the present time literally billions of cubic feet of natural gas were wasted either by being burned in flares or by being dissipated in the air."

"This Board was then constituted under and its powers defined by The Natural Gas Utilities Act. Pipe lines, scrubbing plants, wells, systems, plant and equipment, for the production of natural gas were declared to be public

> utilities. Any exclusive feature in a contract such as that contained in the agreement between Royalite and Canadian Western was declared to be null and void and the Board was given wide powers respecting the sale of natural gas, the prices to be paid to producers, the production from wells, the return to the underground formation of gas not required for the market, and the retention of natural gas in the ground by the restriction of production."

**15** Among the very wide powers given to the Board, was the power to fix and determine (again quoting from O. 34):

> "(a) the just and reasonable price to be paid to producers for natural gas, ...
>
> "(b) the just and reasonable price for gas which has been delivered to an absorption plant ...
>
> "(c) the just and reasonable price for gas after it has been purified, ...
>
> "(d) the just and reasonable price to be paid for gas which is returned to the underground formation;
>
> "(e) a price to be paid for gas retained in the underground formation;
>
> "(f) the proportions in which the proceeds from the sale of absorption plant products shall be divided between producers and the owners of absorption plants."

**16** The respondent British American Gas Utilities Ltd. is a subsidiary of British American Oil Co., and the respondent Madison Natural Gas Co., is a wholly-owned subsidiary of Royalite.

**17** The purpose of the Act, as understood by the Board, was "to effect conservation of natural gas and to secure to producers, as far as it is possible to do so, a share in any market which can utilize natural gas" (O. 34). The Board commenced the hearing in 1945 and rendered its decision in 1947. Several interim orders were made while the hearings were in progress. Order 41 which implements the Board's decision (O. 34) was issued January 28, 1948. In its decision the Board considered that the rate of return should be 7% per annum and fixed 9c per mcf. as the "just and reasonable price" to be paid to the respondents. In arriving at this figure of 9c the Board had no previous experience to guide it. By experience I mean years of previous operation under controlled prices. In fixing its rates, the Board acted upon evidence of experts and the limited information which was obtained while the interim orders were in effect. In their decision (O. 34) they said: "A price of Nine (9) cents will afford what the Board hopes to be a margin of safety so that a deficit for the period will be avoided and if it should turn out that there is a surplus, it can be dealt with when the time arrives."

**18** Order 41, which I have said implements their decision, contained the following: "(3)(d) At any period when Madison's operations are under review, any excess or deficiency of earnings over or under the prescribed rate of return shall be dealt with and disposed of as the Board may direct." A similar provision deals with British American Utilities.

**19** It is the contention of the appellants that both respondents have received monies in excess of the rate of return fixed by the Board and its application is to dispose of these surpluses. While the respondents do not admit that they have received such surpluses, the appeal has been argued on the basis that a surplus exists.

**20** There was discussion before us as to what was meant by "shall be dealt with and disposed of" in the portion of O. 41 which I have quoted. Does it mean that these companies shall be required to pay out or "disgorge" monies received in excess of the rate of return, or does it contemplate an application of these monies within the company so as to reduce the rate base or otherwise affect the future earning of the company? As will be pointed out later, the latter disposition is not before us, so it can only be a disposition which would require these respondents to disgorge these excess monies that will be considered.

**21** In my opinion, the decision of the Board under appeal is correct for the reasons set forth therein. The Board has held that it has no jurisdiction to deal with or dispose of this surplus.

**22** The powers of the Natural Gas Utilities Board have been quoted above and the Board's function was to determine "the just and reasonable price" or prices to be paid. It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.

**23** It is argued that O. 41 has not been appealed and that by s. 44(8) of the *Natural Gas Utilities Act*, 1944 (Alta.), c. 4, every decision of the Board not appealed is final and may not "be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court". If it is sought to enforce orders which are beyond the power given by the Legislature, it is settled law that Courts can declare such orders bad, notwithstanding provisions such as are contained in s. 44(8).

**24** It was submitted that the respondents, having for over 10 years accepted money under the terms of O. 41, one of which was that the Board was reserving the right to deal with and dispose of any surplus earned above the rate of return set by the Board, they cannot now be heard to say that it is invalid. This can only be so if these facts establish estoppel. The essential elements to create estoppel are missing, and, in any case, a decision, invalid for lack of jurisdiction, cannot be a foundation for estoppel: *Toronto R. Co. v. Toronto*, [1904] A.C. 809 at p. 815.

**25** Section 35*a* [enacted 1945 (Alta.), c. 31, s. 2] of the *Natural Gas Utilities Act* provided:

> "35*a*(1) In addition to, and without limiting or restricting any other powers or jurisdiction conferred on it by the provisions of this Act, in any case where notice has been given by the Board of any hearing or investigation (in this section referred to as 'the final hearing') to be held or conducted by it for the determination or fixing of rates, prices, charges or any other matter or thing within its jurisdiction, the Board, --

> "(*a*) if it be of the opinion that the public interest or the interest of any proprietor or of any person affected by the operations of a public utility so requires; and
>
> "(*b*) after notice to, and hearing any oral or written representations that may be made by any person interested in or to be affected thereby, --
>
> may make such interim or temporary order or orders relative to the matters with respect to which notice of a final hearing has been given, as it may deem just and reasonable, to be effective until the determination of the final hearing and the making of the Board's decision or order giving effect thereto (in this section referred to as 'the final order').
>
> "(3) The Board is hereby authorized, empowered and directed, on the final hearing, to give consideration to the effect of the operation of such interim or temporary order and in the final order to make, allow or provide for such adjustments, allowances or other factors, as to the Board may seem just and reasonable."

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



**27** In 1949 (Alta. 2nd Sess.), c. 4, s. 2, the *Natural Gas Utilities Act* was repealed, and the functions previously exercised by the Board under that Act were distributed between the Public Utilities Board and the Conservation Board created by the *Oil and Gas Resources Conservation Act* [now R.S.A. 1955, c. 227]. Section 2 of this repealing Act provided: "Notwithstanding the repeal of this Act all orders made by the Board shall be valid and remain in full force and effect until they are annulled or expire, or until others are made in their stead by the Board of Public Utility Commissioners or by The Petroleum and Natural Gas Conservation Board." It is the argument of the appellants that by this section, the Legislature intended to validate all orders of the Board including orders which went beyond the jurisdiction of the Board to make. Great stress was placed on the words "shall be valid". It is argued that these words would be surplusage unless such an interpretation was placed upon them. There arc other expressions in the section which to mo indicate a contrary intention. "Notwithstanding the repeal of this Act" appears to limit the orders which are validated to those orders which, upon the repeal of the Act, would otherwise become invalid. The words "remain in full force and effect" certainly could not apply to an order or a portion of an order which was invalid at the date of repeal and which could not be said to have "force and effect" at that time.

**28** In *Minister of Health v. The King*, [1931] A.C. 494, the House of Lords was considering a provision in the *Housing Act* of 1925 which gave the Minister power to confirm by order an improvement scheme made under the Act, and the Act went on to provide that "the order of the Minister when made shall have effect as if enacted in this Act". The scheme submitted to the Minister was inconsistent with the provisions of the Act, and the effect of the order of the Minister which

confirmed the scheme, with modifications, had to be considered. Viscount Dunedin at pp. 501-2 says: "It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a per capita contribution of 5*l.* to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect, it could not be touched." Lord Tomlin at p. 520: "The Minister's jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the sub-section in question."

**29** Although the legislation here considered is retrospective in that it confirms orders already made, it is equally inconceivable that the Legislature would be giving vitality to orders or parts of orders which were invalid before the repealing Act was passed.

**30** If the Legislature had intended specifically to validate orders that were of questionable validity, one would have expected that it would have followed the usual procedure of naming the orders in the Act.

**31** The portion of O. 41 which is in question is severable from the other portions of the order and a declaration that it was beyond the power of the Board which made it will not otherwise affect O. 41.

**32** There remains that portion of the motion which asks the Board to fix "a future rate of return to be allowed" to the respondents. As I have pointed out, the Board is required to fix "the price to be paid". In determining this, rate of return is one of several elements which have to be established when a price is being fixed. An application to fix a rate of return divorced from the application to fix rates is not authorized by the Act by which the Board operates.

**33** I have mentioned previously that other ways by which these surpluses could be "dealt with and disposed of" were discussed during the hearing of the appeal. We were asked to consider dispositions of the accumulated surpluses which would not require the company to pay out these funds -- crediting these monies against amortization reserve was one such method. It is clear, I think, that all the methods suggested would have the effect of altering the rate base. Like rate of return, rate base can only be considered as a part of the process by which "the just and reasonable price" is to be arrived at, and cannot be considered except on and as part of an application to fix prices.

**34** A judgment of this Division, *Wainwright Gas Co. v. Wainwright & Bd. Public Utility Com'rs*, [1930] 4 D.L.R. 1000, 25 A.L.R. 181 [affd [1931] 4 D.L.R. 80] was relied upon by the appellants. Mitchell J.A. in delivering the majority judgment, appears to have approved procedures which took into account prior profits to the company in fixing future rates. Hyndman J.A., dissenting took the opposite view. The only question before the Court on that appeal was whether there was a matter of law to give the Court jurisdiction to hear the appeal. It was held that there was not; a consideration of the correctness of the Board's procedure was not before the Court and any comments concerning it were clearly *obiter dicta.*

**35** The appeal is dismissed with costs to be taxed on col. 5.

**5** EGBERT J. and BOYD MCBRIDE J.A. concur with JOHNSON J.A.

6 PORTER J.A.:--The scheme of the Act, [*Public Utilities Act*, R.S.A. 1955, c. 267], and the powers given to the Board, require it to fix the price of gas at the well-head, to fix the buying and selling price at each step of the process of making the gas merchantable, so that the spread between the buying price and the selling price will yield to the operators a gain that will make a return that is just and reasonable, having regard to the fact that the operators are declared to be and intended to function as public utilities. As a condition precedent to its ability to determine a just and reasonable rate, the Board of necessity had to determine the amount of capital employed in giving services by each of the respondent companies, and then to decide what rate of return upon the capital so found is proper. It will thus be seen that the just and reasonable price which the Board is to fix for the commodity in its different stages of treatment is the product of a number of things, no one of which by itself could effect the purpose of the Act.

7 What has been said with respect to the nature of the Board's duties under the statute affects as well the city's application to fix the future rate of return, as set out in cl. (b) thereof. In order to alter the rate of return the Board would have to reconsider the just and reasonable price to be paid to the respondents for the gas they handled. It seems apparent therefore, that the Board could not deal with the rate of return separately as requested by the city, but would be bound in dealing with the rate of return to resort to the process directed by the Act for fixing just and reasonable prices for the gas in its several states of treatment.

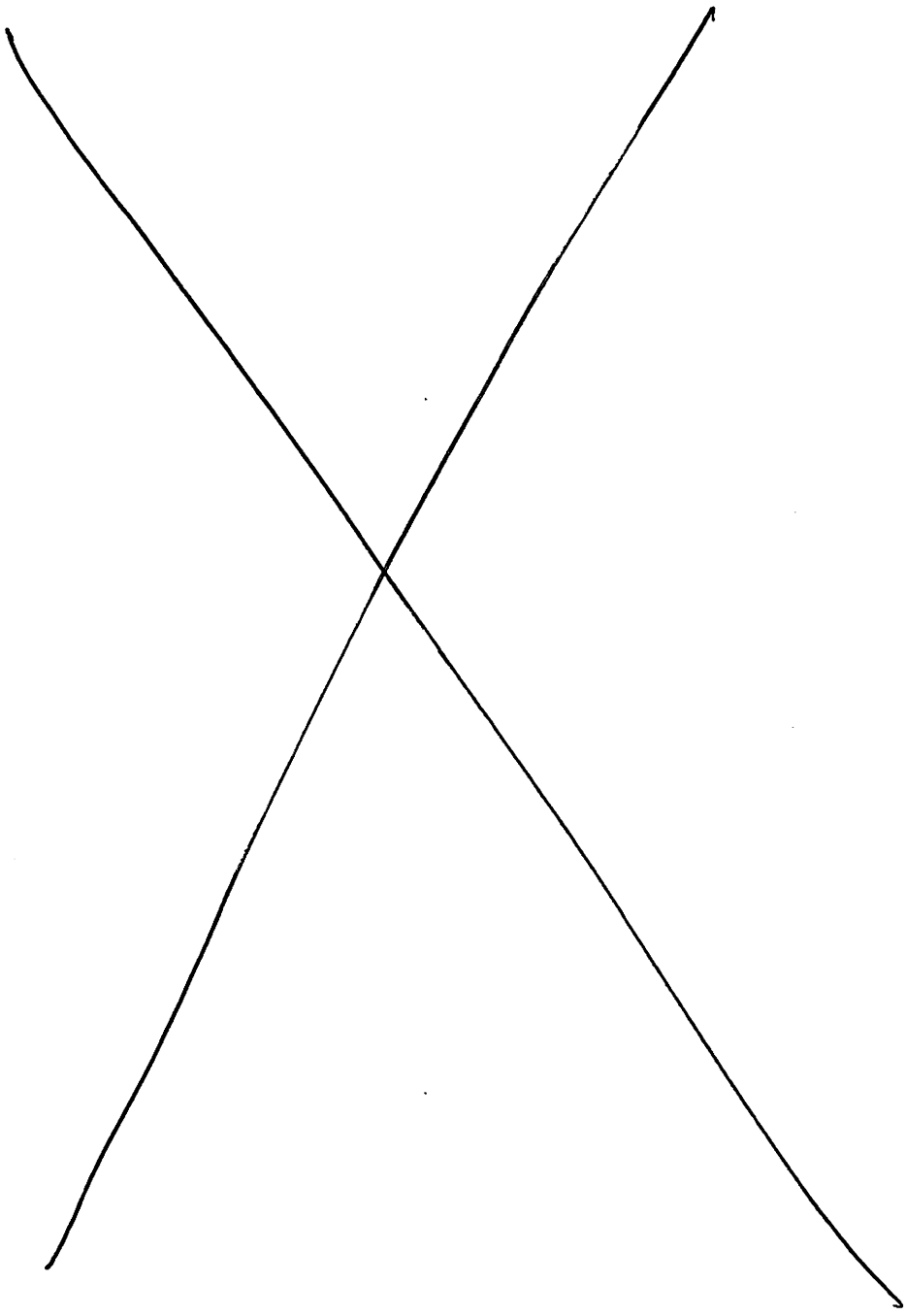
8 The City of Calgary and the Home Oil Co. contended that O. 41 of the Board was validated by a provision of the Act repealing the *Natural Gas Utilities Act*, 1944 (Alta.), c. 4, and therefore the Board had statutory authority to dispose of the earned surpluses under the provisions contained in that order, in terms as follows: "(3) (d) At any period when Madison's operations are under review, any excess or deficiency of earnings over or under the prescribed rate of return shall be dealt with and disposed of as the Board may direct." For this the city and the Home Oil Co. relied on s. 2 of 1949 (Alta. 2nd Sess.), c. 4, reading as follows: "Notwithstanding the repeal of this Act, all orders made by the Board shall be valid and remain in full force and effect until they are annulled or expire."

9 Whether the provisions of (3) (d) are within the Board's powers need not here be decided because they do not relieve the Board from the duty of following the methods directed by the statute in altering or fixing prices and rates.

10 In my opinion therefore the Board is without jurisdiction to hear the city's application to dispose of the surpluses earned by the respondents over the rate of return by causing them to be disgorged or paid out, and the Board cannot under its powers fix a future rate of return for the respondents as requested by the city's application cl. (b) without reconsidering a just and reasonable price to be paid by and to the respondents for the gas received in and delivered out of their plants, involving of course a consideration of all the elements that properly make a rate base and fix the rate of return. What elements the Board may take into consideration in carrying out its statutory duties is a question which is not before us on the issues raised in this appeal.

11 It follows that the decision of this Division in *Wainwright Gas Co. v. Wainwright & Bd. Public Utility Com'rs*, [1930] 4 D.L.R. 1000, 25 A.L.R. 181; affd [1931] 4 D.L.R. 80, which was much relied on in argument, has no application to the matters here involved. It may be that at another time and on different facts, the real meaning of that decision will fall to be considered by this Division. I would prefer to reserve until that time, a consideration of such questions as then may appropriately arise.

**12** JOHNSON J.A.:--This is an appeal, by leave, from the decision of the Board of Public Utility Commissioners which dismissed in part an application by the City of Calgary. This application as amended asked for an order or orders fixing and determining:



*Indexed as:*

# Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)

**The Canadian Radio-Television and Telecommunications Commission, appellant;**
**v.**
**Bell Canada, respondent;**
**and**
**The Attorney General of Canada, the Consumers' Association of Canada, the Canadian Business Telecommunications Alliance, CNCP Telecommunications and the National Anti-Poverty Organization, interveners.**

[1989] 1 S.C.R. 1722

[1989] 1 R.C.S. 1722

[1989] S.C.J. No. 68

1989 CanLII 67

File No.: 20525.

Supreme Court of Canada

1989: February 21 / 1989: June 22.



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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Administrative law -- CRTC jurisdiction -- CRTC ordering Bell Canada to grant a one-time credit to its customers -- Order to remedy imposition of interim rates approved by CRTC in 1984 and 1985 and found to be excessive in 1986 -- Whether CRTC had jurisdiction to make such an order -- Whether CRTC's interim rate order may be reviewed in a retrospective manner -- Whether CRTC's power to fix "just and reasonable" rates for Bell Canada involves the regulation of its revenues -- Railway Act, R.S.C., 1985, c. R-3, ss. 335(1), (2), (3), 340(5) -- National Transportation Act, R.S.C., 1985, c. N-20,*

*52, 60, 66, 68(1).*

In March 1984, Bell Canada filed an application with the CRTC for a general rate increase. To prevent a serious deterioration in Bell Canada's financial situation while awaiting the hearing and the final decision on the merits, the CRTC granted Bell Canada an interim rate increase of 2 per cent effective January 1, 1985. The interim rate increase was calculated on the basis of financial information provided by Bell Canada. In its decision, however, the CRTC clearly expressed the intention to review this interim rate increase in its final decision on Bell Canada's application on the basis of complete financial information for the years 1985 and [page1723] 1986. In 1985, given Bell Canada's improved financial situation, the CRTC ordered Bell Canada to file revised tariffs effective as of September 1, 1985. As a result of this decision, Bell Canada was forced to charge the rates effective before its application for a rate increase filed in March 1984. These new rates too were interim in nature. In October 1986, notwithstanding Bell Canada's request to withdraw its initial application for a general rate increase, the CRTC reviewed Bell Canada's financial situation and the appropriateness of its rates. The CRTC established appropriate levels of profitability for Bell Canada on the basis of its return on equity and found that, in 1985 and 1986, it had earned excess revenues for a total of $206 million. Although Bell Canada always charged rates approved by the CRTC, the latter decided that Bell Canada could not retain these excess revenues and ordered it to distribute the excess revenues through a one-time credit to be granted to certain classes of customers. On appeal, the Federal Court of Appeal quashed the CRTC's order. This appeal is to determine (1) whether the CRTC had the legislative authority to review the revenues made by Bell Canada during the period when interim rates were in force; and (2) whether the CRTC had jurisdiction to make an order compelling Bell Canada to grant a one-time credit to its customers.

Held: The appeal should be allowed.

The CRTC's decisions are subject to appeal to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) of the National Transportation Act. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. Here, Bell Canada is challenging the CRTC's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the CRTC when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the Railway Act and the National Transportation Act. The decision impugned by Bell Canada is therefore not a decision which falls within the CRTC's area of special expertise and is pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the CRTC was not created for the purpose of interpreting the Railway Act or the National Transportation Act but [page1724] rather to ensure, amongst other duties, that telephone rates are always "just and reasonable".

The fixing of tolls and tariffs that are "just and reasonable" necessarily involves, albeit in a seemingly indirect manner, the regulation of the revenues of the regulated entity as the administrative tribunal must balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public. In fixing fair and reasonable tolls in this case, the CRTC had to take into consideration the level of revenues needed by Bell Canada.

The CRTC had the power to revisit the period during which interim rates were in force. Such power is implied in the power to make interim orders within the statutory scheme established by the Railway Act and the National Transportation Act. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. It is the interim nature of the order which makes it subject to further retrospective directions. The circumstances under which they are granted also explains and justifies their being, unlike final orders, subject to retrospective review and remedial orders. Interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are traditionally granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. To hold in this case that the interim rates could not be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the CRTC's order approving interim rates which clearly indicates its intention to review the rates charged for 1985 up to the date of the final decision.

There should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. The added flexibility provided by the power to make interim orders is meant to [page1725] foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the CRTC is empowered to make orders as of the date at which the initial application was made or as of the date the CRTC initiated the proceedings of its own motion. The power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, the rate review process does not begin at the date of the final hearing; instead, the rate review begins when the CRTC sets interim rates pending a final decision on the merits.



Finally, once it is decided that the CRTC has the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it follows that it has the power to make a remedial order where, in fact, these rates were not just and reasonable. In any event, s. 340(5) of the Railway Act provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers. While the one-time credit order will not necessarily benefit the customers who were actually billed excessive rates, once it is found that the CRTC has the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue.

**Cases Cited**

Approved: Re Coseka Resources Ltd. and Saratoga Processing Co. (1981), 126 D.L.R. (3d) 705; referred to: Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Douglas Aircraft Co. of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245; Alberta Union of Provincial Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923; Re Ontario Public Service Employees Union and Forer (1985), 52 O.R. (2d) 705; Re City of Ottawa and Ottawa

Professional Firefighters' [page1726] Association, Local 162 (1987), 58 O.R. (2d) 685; Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission (1987), 78 N.R. 192; Canadian Pacific Ltd. v. Canadian Transport Commission (1987), 79 N.R. 13; British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia, [1960] S.C.R. 837; Northwestern Utilities Ltd. v. City of Edmonton, [1929] S.C.R. 186; City of Calgary v. Madison Natural Gas Co. (1959), 19 D.L.R. (2d) 655; United States v. Fulton, 475 U.S. 657 (1986); Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978); Regina v. Board of Commissioners of Public Utilities (1966), 60 D.L.R. (2d) 703; Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission (1978), 87 D.L.R. (3d) 727; Nova v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437.

**Statutes and Regulations Cited**

CRTC Telecommunications Rules of Procedure, SOR/79-554, Parts III, VII.
National Energy Board Act, R.S.C., 1985, c. N-7, s. 64.
National Transportation Act, R.S.C., 1985, c. N-20, ss. 49, 52, 60(2), 61, 66, 68(1).
Railway Act, R.S.C., 1985, c. R-3, ss. 334 to 340.

APPEAL from a judgment of the Federal Court of Appeal, [1988] 1 F.C. 296, 43 D.L.R. (4th) 30, 78 N.R. 58, quashing an order of the CRTC. Appeal allowed.

Raynold Langlois, Q.C., Greg Van Koughnett, and Luc Huppé, for the appellant.
Gérald R. Tremblay, Q.C., and Michel Racicot, for the respondent.
Graham Garton, for the intervener the Attorney General of Canada.
Janet Yale, for the intervener the Consumer's Association of Canada.
Kenneth G. Engelhart, for the intervener the Canadian Business Telecommunications Alliance.
Michael Ryan, for the intervener CNCP Telecommunications.
Andrew Roman and Robert Horwood, for the intervener the National Anti-Poverty Organization.



Solicitor for the appellant: Avrum Cohen, Hull.
Solicitors for the respondent: Clarkson, Tétrault, Montréal.
Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.
Solicitor for the intervener the Consumers' Association of Canada: Janet Yale, Ottawa.
Solicitor for the intervener Canadian Business Telecommunications Alliance: Kenneth G. Engelhart, Toronto.
Solicitor for the intervener the CNCP Telecommunications: Michael Ryan, Toronto.
Solicitors for the intervener the National Anti-Poverty Organization: Andrew Roman and Glenn W. Bell, Ottawa.
[page1727]

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The judgment of the Court was delivered by

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

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

I - The facts

3 On March 28, 1984, the respondent applied for a general rate increase under Part VII of the CRTC Telecommunications Rules of Procedure, SOR/79-554, which provides for a summary public process to deal with special applications. The respondent claimed that the Canadian Government's restraint program restricting rate increases of federally regulated utilities to 5 per cent and 6 per cent was sufficient justification to dispense with the normal procedure for general rate increase applications set out in Part III of the CRTC Telecommunications Rules of Procedure. In Telecom Decision CRTC 84-15, the appellant rejected this application on the ground that the [page1728] respondent had failed to use the appropriate procedure set out in Part III of these rules. However, the appellant indicated that if the respondent was to suffer financial prejudice as a result of the delays involved in preparing for the more complex procedure set out in Part III, it could always apply for interim relief pending a hearing and a decision on the merits (at pp. 8-9):

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

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

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

> The Commission's policy concerning interim rate increases, enunciated in Decision 80-7, is as follows:
>
> > The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim [page1729] basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase. [Emphasis added.]

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

> In determining the amount of interim rate increases required under the circumstances, the Commission has taken into account the following factors:
>
> 1) While the company stated that an interest coverage ratio of 4.0 times is required, the Commission regards the maintenance of the coverage ratio of 3.8 times, projected by the Company for 1984, as sufficient for the purposes of this interim decision.
> 2) With regard to the level of ROE ["return on equity"], the Commission is of the view that, for 1985, and subject to review in the course of its consideration of the Company's general rate increase application in the fall of 1985, 13.7% is appropriate for determining the amount of rate increases to be permitted pursuant to this interim increase application.
> 3) With regard to the Company's 1985 expense forecasts, the Commission notes that the inflation factor used by the Company is higher than the current consensus forecast of the inflation rate for 1985 and considers that Bell's forecast of its 1985 Operating Expenses could be overestimated by approximately $25 million.

[page1730]

> Taking the above factors into account, the Commission has decided that an interim rate increase of 2% for all services in respect of which rate increases were requested by the Company in the interim application is appropriate at this time. This increase is expected to generate additional revenues of $65 million from 1 January 1985 to 31 December 1985. To permit the review of the Company's 1985 revenue requirement by the Commission at the fall 1985 public hearing, Bell is directed to file its 4 June 1985 general rate increase application on the basis of two test years, 1985 and 1986. [Emphasis added.]

The reasons set out in the appellant's decision indicate that the interim rate increase was calculated on the basis of financial information provided by the respondent without placing this information under the scrutiny normally associated with hearings made under Part III of the CRTC Telecommunications Rules of Procedure. Furthermore, the appellant clearly expressed the intention to review this interim rate increase in its final decision on the respondent's application for a general rate increase on the basis of financial information for the years 1985 and 1986. Given the content of the appellant's final decision, it is also important to note that the 2 per cent interim rate increase was calculated on the assumption that the respondent's return on equity for 1985 should be 13.7 per cent, subject to review in the final decision.

**5** The respondent's financial situation later improved thereby reducing the necessity to proceed with an early hearing for the purpose of obtaining a general and final rate increase. By letter dated March 20, 1985, the respondent asked for this hearing to be postponed to February 10, 1986, suggesting however that the 2 per cent interim increase be given immediate final approval. In CRTC Telecom Public Notice 1985-30 dated April 16, 1985, the appellant granted the postponement but refused to grant the final approval requested by the respondent without further investigation into this matter. The Commission added that it would monitor the respondent's [page1731] financial situation on a monthly basis and ordered the filing of monthly statements (at p. 4):

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



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

**6** After a review of the July financial information filing ordered in CRTC Telecom Public Notice 1985-30, the appellant asked the respondent to provide reasons why the interim rate increase of 2 per cent should remain in force given its improved financial situation. The respondent was unable to

convince the appellant that this interim increase remained necessary to avoid financial deterioration and was accordingly ordered to file revised tariffs effective as of September 1, 1985, at pp. 4-5 of Telecom Decision CRTC 85-18:

> In view of the improving trend in Bell's financial performance, the Commission is satisfied that the company no longer needs the 2% interim increases which were awarded in Decision 84-28 in order to avoid serious financial deterioration in 1985. Accordingly, Bell is directed to file revised tariffs forthwith, with an effective date of 1 September 1985, to suspend these increases.
>
> In arriving at its decision the Commission has estimated that, with interim rates in effect for the complete year, the company would earn an ROE ["return on equity"] of approximately 14.5% in 1985, a return well in excess of the 13.7% considered appropriate for determining the 2% interim rate increases. The Commission also projected that interest coverage would be approximately 3.9 times. This would improve on the actual 1984 coverage [page1732] of 3.8 times. These estimates are not significantly different from Bell's current expectation of its 1985 results.
>
> The Commission will make its final determination of Bell's revenue requirement for the year 1985 in the general rate proceeding currently scheduled to commence with an application to be filed on 10 February 1986. [Emphasis added.]

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

7 On October 31, 1985, the respondent decided not to proceed with its application for a general rate increase and requested that its procedures be withdrawn. In CRTC Telecom Public Notice 1985-85, the appellant decided to review the respondent's financial situation and therefore the appropriateness of its rates notwithstanding its request to withdraw its initial application for a general rate increase (at pp. 3-4):

> In light of these forecasts and the degree to which the company's rate structure is expected to be considered in separate proceedings, Bell stated that it wished to refrain from proceeding with the application scheduled to be filed on 10 February 1986. Accordingly, the company requested the withdrawal of the amended Directions on Procedure issued by the Commission in Public Notice 1985-30.

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. . .

> The Commission notes that the appropriate rate of return for Bell has not been reviewed in an oral hearing since the proceeding which culminated in Bell Canada - General Increase in Rates, Telecom Decision CRTC 81-15, 20 September 1981 (Decision 81-15). The Commission considers that, given Bell's current forecasts, it would be appropriate to review the company's cost of equity for the years 1985, 1986 and 1987 in the proceeding scheduled for 1986. Such a review would allow consideration of the changing financial and economic [page1733] conditions since Decision 81-15 and the impact of Bell's corporate reorganization on its rate of return. The Commission notes that other issues arising from the reorganization would also be addressed in the 1986 proceeding. [Emphasis added.]

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

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

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



[page1734]

It is important to note that the evidence and the arguments presented by the interested parties as well as interveners were carefully scrutinized by the appellant at pp. 77 to 92 of Decision 86-17. It is for all practical purposes impossible to engage in such a meticulous and painstaking analysis of all relevant facts when faced with an application for interim relief. Finally, it is also useful to note that the permissible return on equity of 13.7 per cent allowed by the appellant in its interim decision, Decision

84-28, was increased to 13.75 per cent in Decision 86-17. Thus, the appellant realized that the interim rates approved for 1985 yielded greater rates of return than initially anticipated and that the rate of return actually recorded for that year even exceeded the greater allowable rate of return fixed in the final decision, Decision 86-17. Such differences between projected and actual rates of return are common and certainly call for a high level of flexibility in the exercise of the appellant's regulatory duties.

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

> Concerning the excess revenues for the years 1985 and 1986, the Commission directs that the required adjustments be made by means of a one-time credit to subscribers of record, as of the date of this decision, of the following local services: residence and business individual, two-party and four-party line services; PBX trunk services; centrex lines; enhanced exchange-wide dial lines; exchange radio-telephone service; service-system service and information system access line service. The Commission directs that the credit to each subscriber be determined by pro-rating the sum of the excess revenues for 1985 and 1986 of $206 million in relation to the subscriber's monthly recurring billing for the specified local services provided as of the date of this decision. The Commission further directs that the work necessary to implement the above directives be commenced immediately and that the billing adjustments be completed by no later than 31 January 1987. Finally, the Commission directs the company to file a report detailing [page1735] the implementation of the credit by no later than 16 February 1987.
>
> The Commission considers that 1987 excess revenues are best dealt with through rate reductions to be effective 1 January 1987. [Emphasis added.]

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

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

II - The Issue and the Arguments Raised by the Parties

**11** In this Court as well as in the Federal Court of Appeal, the parties have agreed that the only issue arising out of the facts of this case is whether the appellant had jurisdiction to order the respondent to grant a one-time credit to its customers. The appellant's findings of fact, its determination with respect to the respondent's revenue requirements for 1985 and 1986 and its computation of the [page1736] amount of excess revenues earned during this period are not contested by the respondent. In my opinion, this issue can be divided in two sub-questions:

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

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

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

1- the Railway Act and the National Transportation Act grant the appellant the power to review the period during which a regulated entity was allowed to charge interim rates for the purpose of comparing the revenues earned during this period to the appropriate level of revenues set in the final decision;

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

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

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

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

**14** Counsel for the National Anti-Poverty Organization ("NAPO") has also argued that the appellant's [page1737] decisions concerning the interpretation of statutes which grant them jurisdiction to deal with certain matters are entitled to curial deference and cannot be reviewed unless they are patently unreasonable. This argument raises the issue of the scope of review allowed by s. 68

(1) of the National Transportation Act, R.S.C., 1985, c. N-20, (now the National Telecommunications Powers and Procedures Act), and must be dealt with prior to any analysis of the relevant statutory provisions claimed to be the source of the appellant's jurisdiction to make the one-time credit order found in Decision 86-17.

**15** The present case raises difficult questions of statutory interpretation and it will therefore be necessary to examine the relevant provisions of the Railway Act, R.S.C., 1985, c. R-3, and the National Transportation Act before moving to a detailed analysis of the decision of the Federal Court of Appeal and the arguments raised by the parties.

III - Relevant Legislative Provisions

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

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

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[page1738]

> 335. (1) Notwithstanding anything in any other Act, all telegraph and telephone tolls to be charged by a company, other than a toll for the transmission of a message intended for reception by the general public and charged by a company licensed under the Broadcasting Act, are subject to the approval of the Commission, and may be revised by the Commission from time to time.
>
> (2) The company shall file with the Commission tariffs of any telegraph or telephone tolls to be charged, and the tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission by regulation or in any particular case prescribes.
>
> (3) Except with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in filing under subsection (2), or which is disallowed by the Commission ... [Emphasis added.]

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

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

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

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

> 340. ...
>
> (5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

Although the power granted by s. 340(5) could be construed restrictively by the application of the [page1739] ejusdem generis rule, I do not think that such an interpretation is warranted. Section 340 (5) is but one indication of the legislator's intention to give the appellant all the powers necessary to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.

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

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

> 52. The Commission may, of its own motion, or shall, on the request of the Minister, inquire into, hear and determine any matter or thing that, under this part or the Railway Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto has the same powers as, on any application or complaint, are vested in it by this Act.

Section 52 is therefore the corollary of the appellant's power to "revise [tolls] ... from time to time" found in s. 335(1) of the Railway Act. Thus, the appellant has the power to review, from time to [page1740] time, its own final decisions on a proprio motu basis. Similarly, s. 61 provides that the appellant is not bound by the wording of any complaint or application it hears and may make orders which would otherwise offend the ultra petita rule:

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

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

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

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

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

**23** It is obvious from the legislative scheme set out in the Railway Act and the National Transportation Act that the appellant has been given broad powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. The appellant may revise rates at any time, either of its own motion or in the context of an application made by an interested party. The appellant is not even bound by the relief sought by such applications and may make any order related thereto provided that the parties have received adequate notice of the issues to be dealt with at the hearing. Were it not for the fact that the appellant has the power to make interim orders, one might say that the appellant's powers in this area are limited only by the time it takes to process applications, [page1741] prepare for hearings and analyse all the evidence. However, the appellant does have the power to make interim orders and this power must be interpreted in light of the legislator's intention to provide the appellant with flexible and versatile powers for the purpose of ensuring that telephone rates are always just and reasonable.

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

retrospective manner by a final order. Hugessen J. then stated that the interim rates in force in 1985 and 1986 must not be divided into the previous rate and the interim rate increase of 2 per cent: the resulting rate must be viewed as interim in its entirety because all the rates charged after January 1, 1985 were authorized by interim orders. Finally, Hugessen J. stated that the one-time credit order was a valid exercise of the power to set just and reasonable rates as of January 1, 1985 and that the choice of the appropriate remedy was an "'administrative matter' properly left for the Commission's determination". Hugessen J. also noted that the appellant's order was in substance though not in form a "matter relating to tolls and tariffs" within the meaning of s. 340(5) of the Railway Act.

V - Analysis

(A) Curial Deference Towards the Decisions of the CRTC

**29** NAPO argues that the appellant's decisions are entitled to "curial deference" because of their national importance and that these decisions should not be overturned unless they are patently unreasonable. NAPO cites the following cases as [page1744] authority for this proposition: Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 ("CUPE"); Douglas Aircraft Co. of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245; Alberta Union of Provincial Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923; Re Ontario Public Service Employees Union and Forer (1985), 52 O.R. (2d) 705 (C.A.); Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162 (1987), 58 O.R. (2d) 685 (C.A.); Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission (1987), 78 N.R. 192 (F.C.A.); and Canadian Pacific Ltd. v. Canadian Transport Commission (1987), 79 N.R. 13 (F.C.A.) ("Canadian Pacific").

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

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations [page1745] legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada,

whether this power is derived by necessary implication from the regulatory schemes set out in these statutes.

IV - The Decision of the Court Below

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

**26** Marceau J. held that the appellant in this Court only had the power to fix telephone tolls and tariffs and that it has no statutory authority to deal with excess revenues or deficiencies in revenues arising as a result of a discrepancy between the rate of return yielded from the interim rates in force prior to the final decision and the permissible rate of return fixed by this final decision. Marceau J. was of the opinion that the wording of s. 66 of the National Transportation Act is neutral with [page1742] respect to retroactivity and that the presumption against retroactivity should therefore operate. Marceau J. added that the power to make interim orders does not carry with it the power to remedy any discrepancy between interim and final orders because the respondent could not be forced to reimburse revenues earned by charging rates approved by the appellant. Thus, according to Marceau J., the regulatory scheme set out in the Railway Act and the National Transportation Act is prospective in nature and, in the context of such a scheme, the power to make interim orders only involves the power to make orders "for the time being".

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

**28** Hugessen J. dissented on the basis that, within the statutory framework set out in the Railway Act and the National Transportation Act, all [page1743] orders whether final or interim can, by virtue of ss. 60(2) and 66 of the National Transportation Act, be modified by a further prospective order; thus, the proposed rule that interim orders can only be modified by a further prospective order would, in Hugessen J.'s opinion, effectively eliminate any distinction between final and interim orders and defeat the legislator's intention to provide the appellant with a distinct and independent power to make interim orders. In order to differentiate interim orders from final orders, Hugessen J. was of the opinion that the appellant in this Court must have the power to fix just and reasonable rates as of the date at which interim rates came into effect. Thus, only interim rates can be modified in a

> and its labour relations sense acquired from accumulated experience in the area.

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

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

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

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is [page1746] entitled, on appeal, to disagree with the reasoning of the lower tribunal.

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

> On the appeal from that decision to this court, the appellant advanced essentially the same grounds and arguments which it had submitted to the RTC. As to the first ground, I am of the opinion that the RTC correctly interpreted the two items from the tariff and since its view was confirmed by the Review Committee, that committee did not commit an error in construction. No useful purpose would be served by my restating the reasons of the R.T.C. for interpreting the items as they did and I respectfully adopt them as my own. This Court should not interfere with an interpretation made by bodies having the expertise of the R.T.C. and the Review Committee in an area within their jurisdiction, unless their interpretation is not reasonable

> or is clearly wrong. Neither situation prevails in this case. [Emphasis added.]

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

[page1747]

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

**34** Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise and is therefore pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the appellant was not created for the purpose of interpreting the Railway Act or the National Transportation Act but rather to ensure, amongst other duties, that telephone rates are always just and reasonable.



(B) The Power to Regulate Bell Canada's Revenues

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

**36** The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity. This has been recognized by this Court interpreting provisions similar to s. 340(1) of the Railway Act which prescribe that "[a]ll tolls shall be just and reasonable". In British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia, [1960] S.C.R. 837, Locke J. said the following about para. 16(1)(b) of the Public Utilities Act, R.S.B.C. 1948, c. 277, which provided that in [page1748] fixing a rate the Public Utility Commission of British Columbia should take into consideration the "fair and reasonable return upon the appraised value of the property of the public utility used ... to enable the public utility to furnish the service" (at p. 848):

> I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its

> properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered. Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask. [Emphasis added.]

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

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

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



[page1749]

**37** Thus, it is trite to say that in fixing fair and reasonable tolls the appellant must take into consideration the level of revenues needed by the respondent. In fact, the respondent would be the first to complain if its financial situation was not taken into consideration when tolls are fixed. By so doing, the appellant regulates the respondent's revenues albeit in a seemingly indirect manner. I would therefore dismiss this argument.

(C) The Power to Revisit the Period During Which Interim Rates Were in Force

(i) Introduction

**38** As indicated above, the appellant has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The

one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

**39** This question involves a determination of whether rates approved by interim order are inherently contingent as well as provisional or whether the statutory scheme established by the Railway Act and the National Transportation Act is so prospective in nature that it precludes such a retrospective review of interim rates approved by the appellant. Finally, it is also necessary to determine whether the appellant has jurisdiction to order the reimbursement of amounts which exceed the revenues [page1750] actually collected as a direct result of the interim rates.

(ii) The Distinction Between Interim and Final Orders

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

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

**42** Both the appellant and Hugessen J. rely heavily on Re Coseka Resources Ltd. and Saratoga Processing Co. (1981), 126 D.L.R. (3d) 705 (Alta. [page1751] C.A.) for the proposition that interim decisions must be distinguished from final decisions in that they may be reviewed in a retrospective manner. This distinction is based on the fact that interim decisions are made subject to "further direction" as prescribed by s. 60(2) of the National Transportation Act which, for convenience, I cite again:

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

jurisdiction to revisit periods during which rates approved in a final decision were in force. This decision was confirmed by the Court of Appeal on the basis that, contrary to arguments made by the City of Calgary, orders 34 and 41 were final orders not governed by s. 35a(3) of the Natural Gas Utilities Act, which read as follows:

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

Order 34 provided that the price was set at 9 cents per mcf and that "if it should turn out that there is a surplus, it can be dealt with when the time arrives" which led to the argument that this order was in fact an interim order. Johnson J.A. dismissed this argument in the following terms, at pp. 662-63:

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

It is useful to note that the respondent relies heavily on the Madison case for the proposition that a regulated entity cannot be forced to disgorge [page1754] profits legally earned by charging rates approved by the relevant regulatory authority on the basis that they are just and reasonable. Since the City of Calgary sought to obtain the reimbursement of profits earned by charging rates approved by final order, this case does not support the respondent's position.

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

**46** Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious

The statutory scheme analysed by the Alberta Court of Appeal in Re Coseka is substantially similar to though more clearly prospective than the statutory scheme established by the Railway Act and the National Transportation Act. Furthermore, s. 52(2) of the Public Utilities Board Act, R.S.A. 1970, c. 302, is identical in wording to s. 60(2) of the National Transportation Act. Laycraft J.A., as he then was, cited with approval by Hugessen J., wrote the following with respect to the possibility of revisiting the period during which interim rates were in force for the purpose of deciding whether those interim rates were in fact just and reasonable, at pp. 717-18:

> In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the Board from s. 52 beyond those already contained in either the Gas Utilities Act or the Public Utilities Board Act to make final orders. The Board is by other provisions of the statute empowered by order to fix rates either on application or on its own motion. An interim order would be the same, and have the same effect, as a final order unless the "further direction" which the statute contemplates includes the power to change the interim order. On that construction of the section the interim order would be a "final" order in all but name. The Board would need no further legislative authority to issue a further "final" order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to [page1752] correction to be made when the hearing is subsequently completed.
>
> It was urged during argument that s. 52(2) was merely intended to enable the Board to achieve "rough justice" during the period of its operation until a final order is issued. However, the Board is required to fix "just and reasonable rates" not "roughly just and reasonable rates". The words "reserve for further direction", in my view, contemplate changes as soon as the Board is able to determine those just and reasonable rates. [Emphasis added.]

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

**44** The importance of distinguishing final orders from interim orders is illustrated by the case of City of Calgary v. Madison Natural Gas Co. (1959), 19 D.L.R. (2d) 655 (Alta. C.A.). In Madison, the Public Utility Board (the "Board") was faced with an application by the City of Calgary for the reimbursement of amounts earned in excess of the rates of return allowed in orders 34 and 41 for the sale of natural gas. The Board had allowed a rate of return of 7 per cent but, due to its lack of useful information to predict the effect of rates on [page1753] the actual financial performance of the regulated entity, the rates per volume fixed by the Board actually yielded greater profits than anticipated. The Board refused to grant the demands made in the application because it felt it had no

these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the Railway Act and the National Transportation Act, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.

**51** I am bolstered in my opinion by the fact that the regulatory scheme established by the Railway Act and the National Transportation Act gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power to make appropriate orders for the purpose of [page1757] remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.

**52** It is interesting to note that, in the context of statutory schemes which did not provide any power to set interim rates, the United States Supreme Court has held that regulatory agencies have both the power to impose interim rates and the power to make reimbursement orders where the interim rates are found to be excessive in the final order: United States v. Fulton, 475 U.S. 657 (1986), at pp. 669-71; Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978), where Brennan J. wrote the following comments at pp. 654-56:

> Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such a period.... In response, we note first that we have already recognized in Chessie that the Commission does have powers "ancillary" to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in Chessie to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a "direc(t) relat(ionship)" between the power asserted and the Commission's "mandate to assess the reasonableness of ... rates and to suspend them pending investigation if there is a question as to their legality." 426 U.S., at 514.
>
> . . .
>
> Thus, here as in Chessie, the Commission's refund conditions are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe(r) an alternative tailored far more precisely to the particular circumstances" of these cases. Since, again as in Chessie, the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the Interstate Commerce Act should be construed to confer on the Commission the [page1758] authority to enter on this course unless language in the Act plainly requires a contrary result.

manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

**47** In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of [page1755] the following criteria which, for convenience, I cite again (at p. 9):

> The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of [page1756] an applicant absent a general interim increase.

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

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

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



**50** The respondent argues that the power to revisit the period during which interim rates were in force cannot exist within the statutory scheme established by the Railway Act and the National Transportation Act because these statutes do not grant such a power explicitly, unlike s. 64 of the National Energy Board Act, R.S.C., 1985, c. N-7. The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing

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

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

(iii) The Relevance of the Distinction Between Positive Approval and Negative Disallowance Schemes of Rate Regulation

**54** Much was said in argument about the difference between positive approval schemes and negative disallowance schemes with respect to the power to act retrospectively. The first category includes schemes which provide that the administrative agency is the only body having statutory authority to approve or fix tolls payable to utility companies; these schemes generally stipulate that tolls shall be "just and reasonable" and that the administrative agency has the power to review these tolls on a proprio motu basis or upon application by an interested party. The second category includes schemes which grant utility companies the right to fix tolls as they wish but also grant users the right to complain before an administrative agency which has the power to vary those tolls if it finds that they are not "just and reasonable". It has generally been found that negative disallowance schemes provide the power to make orders which are retroactive to the date of the application by the ratepayer who claims that the rates are not "just and reasonable". On the other hand, positive approval schemes have been found to be exclusively prospective in nature and not to allow orders [page1759] applicable to periods prior to the final decision itself. A full discussion of this issue was made by Estey J. in Nova v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437, at pp. 450-51, and I do not propose to repeat or to criticize what was said in that case with respect to the power to review rates approved by a previous final order. I am of the opinion that the regulatory scheme established by the Railway Act and the National Transportation Act is a positive approval scheme inasmuch as the respondent's rates are subject to approval by the appellant. However, the Nova case only dealt with the power to review rates approved in a previous final decision and, as I have said before, entirely different considerations apply when interim rates are reviewed.

**55** It has often been said that the power to review its own previous final decision on the fairness and the reasonableness of rates would threaten the stability of the regulated entity's financial situation. In Regina v. Board of Commissioners of Public Utilities (1966), 60 D.L.R. (2d) 703, Ritchie J.A., wrote the following comments on this issue, at p. 729:

> The distributor contends that in the absence of any express limitation or restriction or an express provision as to the effective date of any order made by the board, the jurisdiction conferred on the board by the Legislature includes jurisdiction to make orders with retrospective effect. Reliance is placed on Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129 which it is contended must be applied when interpreting s. 6(1) of the Act.

> The clear object of the Act is to ensure stability in the operation of public utilities and the maintenance of just, reasonable and non-discriminatory rates. That object would be defeated if the board having, on November 14, 1962, made an order fixing the rates to be paid by the distributor for natural gas purchased from the producer, reduced those rates on February 19, 1966, more than three years later, and directed the reduced rates be [page1760] effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

and further at p. 732:

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

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

**56** However, there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may [page1761] cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.



**57** Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review

process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in obiter in Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.

[page1762]

(iv) The Power to Make a One-time Credit Order

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

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

**60** Finally, it is true that the one-time credit ordered by the appellant will not necessarily benefit the customers who were actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in [page1763] weighing the many factors involved in apportioning respondent's revenue requirement amongst its several classes of customers to determine just and reasonable rates, the appellant's decision was eminently reasonable and I agree with Hugessen J. that it should not be overturned.

VI - Conclusion

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

**62** I would allow the appeal and confirm the appellant's decision, with costs in all courts.