EB-2017-0039

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Essex Powerlines Corporation to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1st, 2018.

BOOK OF AUTHORITIES
OF THE SCHOOL ENERGY COALITION

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Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2014-0301
EB-2014-0072

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.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

DECISION and ORDER
June 9, 2015

This is the OEB's Decision and Order in the Essex Powerlines Corporation (Essex Powerlines) combined proceeding for its final smart meter installation costs application (EB-2014-0301, the Smart Meter application) and for its annual Price Cap Incentive Rate-Setting adjustment application relating to rates for the 2015 rate year (EB-2014-0072, the Price Cap IR application)[1].

[1] The Smart Meter Application was filed on September 23, 2014 and the Price Cap IR application was filed on September 26, 2014.

Essex Powerlines last appeared before the OEB with a cost of service application for the 2010 rate year in the EB-2009-0143 proceeding. To adjust its 2015 rates, Essex Powerlines selected the Price Cap IR which provides for an adjustment to distribution rates and charges in the period between cost of service proceedings based on inflation, productivity and incentives.

Essex Powerlines' application satisfied the OEB's filing requirements[2] and, on October 20, 2014, the OEB issued notice that it would hear both applications in a combined proceeding, in writing. OEB staff participated in the proceeding. Initially, only the Vulnerable Energy Consumers Coalition (VECC) applied for, and was granted, intervenor status and cost eligibility. VECC stated that its involvement in the proceeding would be limited to Essex Powerlines' request for the recovery of costs associated with the installation of smart meters.

After the evidentiary phase of the combined proceeding, Essex Powerlines disclosed an error with the evidence filed in the Price Cap IR application. The error related to a misallocation between two Group 1 Deferral and Variance Accounts (DVA); Account 1588 – RSVA Power, and Account 1589 – RSVA Global Adjustment. In its reply submission dated January 20, 2015, Essex Powerlines submitted additional information confirming that it had incorrectly allocated costs in 2011, 2012 and 2013 between Regulated Price Plan (RPP) and non-RPP customers (i.e. those purchasing electricity from a retailer or making individual arrangements for power procurement).

The OEB reopened the record of the proceeding to enable the filing of new evidence and convened an oral hearing to consider the new evidence. Given that there would be a broader potential impact on rates than had been anticipated when the applications were first received, the OEB granted intervenor status and cost awards eligibility to all intervenors of record in Essex Powerlines' last cost of service proceeding[3].

In addition to VECC and OEB staff, Energy Probe and School Energy Coalition (SEC) also participated in the combined proceeding. These parties asked interrogatories, attended the oral hearing and made submissions.

[2] Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach (October 18, 2012); and Filing Requirements for Electricity Distribution Rate Applications (July 25, 2014)
[3] Town of Amherstburg, Town of LaSalle, Municipality of Leamington, and Town of Tecumseh ("Representatives of the Streetlight Class"); Energy Probe Research Foundation ("Energy Probe"); the School Energy Coalition ("SEC"); and the Vulnerable Energy Consumers Coalition ("VECC")

The following issues are addressed in this Decision and Order:

- Rural or Remote Electricity Rate Protection Charge
- Shared Tax Savings Adjustments
- Retail Transmission Service Rates
- Loss of Customers
- Group 1 Deferral and Variance Account Balances
- Consequences of Essex Powerlines' Regulatory Accounting Errors
- Price Cap Index Adjustment
- Debt Servicing Covenants
- Smart Meter Application
- Motion
- Implementation
- Cost Awards

Rural or Remote Electricity Rate Protection Charge

The OEB has determined that the Rural or Remote Electricity Rate Protection (RRRP) benefit and charge for 2015 shall remain at $0.0013 per kWh[4]. The draft Rate Order filed by Essex Powerlines shall reflect this RRRP charge.

Shared Tax Savings Adjustments

The OEB has determined that a 50/50 sharing of the impact of legislated tax changes between shareholders and ratepayers is appropriate and that the tax reduction will be allocated to customer rate classes on the basis of the OEB-approved distribution revenue from the applicant's last cost of service proceeding[5].

Essex Powerlines identified a total tax savings of $157,696 resulting in $78,848 to be refunded to ratepayers.

The OEB approves the disposition of the shared tax savings of $78,848 based on a

[4] Decision with Reasons and Rate Order, EB-2014-0347
[5] Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors (September 17, 2008)

volumetric rate rider using annualized consumption for all customer classes.

Retail Transmission Service Rates

Electricity distributors are charged for transmission costs at the wholesale level and then pass on these charges to their distribution customers through their Retail Transmission Service Rates (RTSRs). Variance accounts 1584 and 1586 are used to capture differences in the rate that a distributor pays for wholesale transmission service relative to the retail rate that the distributor is authorized to charge when billing its customers.

The OEB has issued guidelines[6] which outline the information that electricity distributors are to file in order to adjust their RTSRs for 2015. The guidelines require electricity distributors to adjust their RTSRs based on a comparison of historical transmission costs adjusted for the new Uniform Transmission Rates (UTR) and the revenues generated under existing RTSRs. Similarly, embedded distributors, such as Essex Powerlines, must adjust their RTSRs to reflect any changes to the applicable RTSRs of their host distributor, which in this case is Hydro One Networks Inc.

The OEB approved new rates for Hydro One's Sub-Transmission class, including the applicable RTSRs[7], as shown in the following table:

Table 1: 2015 Sub-Transmission RTSRs

Network Service Rate	$3.41 per kW
Connection Service Rates	
Line Connection Service Rate	$0.79 per kW
Transformation Connection Service Rate	$1.80 per kW

The OEB finds that these 2015 Sub-Transmission class RTSRs are to be incorporated into the filing module to adjust the RTSRs to be charged to customers.

[6] Guideline G-2008-0001 - Electricity Distribution Retail Transmission Service Rates, revision 4.0 (June 28, 2012)
[7] Rate Order, EB-2013,0416, issued April 23, 2015

Loss of Customers

Essex Powerlines proposed to remove the consumption data associated with the General Service 3,000 to 4,999 kW rate class in order to calculate the rate riders for deferral and variance accounts, tax savings and RTSR without reallocating any other costs. This rate class had only two customers - Hydro One Networks Inc. which is not charged rate riders as an embedded distributor, and Heinz Corporation which ceased to be a customer in June 2014.

Essex Powerlines analyzed the current usage compared to the latest OEB-approved volumetric forecast and noted that "while all other classes have not changed significantly, the General Service 3,000 to 4,999 kW class has decreased by 100% ... [d]ue to these facts Essex Powerlines has changed the volumetric data used for the General Service 3,000 to 4,999 kW class to ensure the allocation of the tax sharing, deferral and variance and RTSR rate riders are more accurately applied."

Essex Powerlines considered it appropriate to remove the consumption data; otherwise, a recovery could be approved for a class with no customers. Essex Powerlines indicated that the removal of the Heinz Corporation volumes from the 2013 total consumption reduces the non-RPP portion of the split from 41.23% to 41.00%[8].

In its submission, OEB staff supported the omission of the consumption data for this customer class and noted the minimal change in the overall percentage.

To calculate rate riders, the Rate Generator Model instructions state:

> If there is a material difference between the latest Board-approved volumetric forecast and the most recent 12-month actual volumetric data, use the most recent 12-month actual data.[9]

These options are available because the Rate Generator Model is applied in Price Cap IR applications in which no current consumption forecast is considered. In this Price Cap IR application, the OEB approves Essex Powerlines' proposal to use recent, known information which should reduce any true-up required in the future.

[8] Undertaking J4, Response, April 21, 2015 (EB-2014-0072/EB-2014-0301)
[9] Rate Generator Model, Tab 6 – "Billing Det. For Def-Var"

Group 1 Deferral and Variance Account Balances

The OEB's policy on DVAs provides that, during an IRM plan term, a distributor's Group 1 DVA balances will be reviewed and disposed if the preset disposition threshold of $0.001 per kWh, whether in the form of a debit or credit, is exceeded[10].

As initially filed, Essex Powerlines' 2013 actual year-end total balance of $1,522,723 for Group 1 DVAs exceeded the disposition threshold. However, when the error was disclosed, it was apparent the evidence was incorrect. Significant balances had been misallocated between the Group 1 Accounts 1588 and 1589.

Accounts 1588 and 1589 in 2011, 2012 and 2013

In its reply submission to the Price Cap IR application, Essex Powerlines included new information relating to an error that it discovered in the 2011, 2012 and 2013 rate years. The source of the error occurred in the settlement forms that Essex Powerlines submitted to the Independent Electricity System Operator's (IESO) which are used to determine the RPP and non-RPP split for the IESO's Global Adjustment and Hydro One Network Inc.'s power billings.

The forms used at that time were the IESO's, and the forms required that Essex Powerlines input an allocation formula that the IESO then used to bill the Global Adjustment. Staff at Essex Powerlines made a data input error in this formula.

The error affected RPP and non-RPP customers as follows[11]:

Table 2: Annual Breakdown of Misallocated Amounts

	Under-collected from Non-RPP	**Over-collected from RPP**
2011	$1,561,164	$1,561,164
2012	$3,617,586	$3,617,586
2013	$6,419,261	$6,419,261
Total	**$11,598,011**	**$11,598,011**

[10] Report of the Board on Electricity Distributors' Deferral and Variance Account Review Initiative (July 31, 2009)
[11] Essex Powerlines Response to Procedural Order No. 2, February 11, 2015 (EB-2014-0072/EB-2014-0301)

Essex Powerlines submitted that the error was not previously detected given the volatile nature of Accounts 1588 and 1589. In addition, other Group 1 DVAs were being monitored and, overall, the total balance had not changed significantly. To correct the error, Essex Powerlines proposed an adjustment and re-allocation between RPP and non-RPP customers of approximately $11.5 million. The proposed accounting adjustments would be a credit to Account 1588 and a debit to Account 1589.

For reasons set out in the OEB's Partial Decision and Procedural Order No. 3 (Procedural Order No. 3), the OEB rejected Essex Powerlines' proposal to correct the misallocation error for rate years 2011 and 2012 totalling $5,178,750. The OEB found that to do so would constitute retroactive ratemaking as the 2011 and 2012 Group 1 DVA balances were approved on a final basis in Essex Powerlines' 2014 IRM decision.

Despite Procedural Order No. 3, Essex Powerlines in its Argument in Chief, maintained the view that the amounts over and under-billed to customers should be corrected in full (i.e. including the already settled amounts) and submitted that the OEB could correct the error of the misallocation of the riders associated with the disposition of Group 1 DVAs in 2011 and 2012 through application of Rule 41.02 of the *Rules of Practice and Procedure*. In its reply submission, Essex Powerlines indicated that the OEB did not address this argument in Procedural Order No. 3.

This was not an oversight by the OEB in Procedural Order No. 3. The OEB's view was that the application of Rule 41.02 was not applicable in this case. The fact that Essex Powerlines has raised this issue again in its reply submission leads the OEB to question whether Essex Powerlines understands the gravity of its errors.

Rule 41.02 of the *Rules of Practice and Procedure* is used in the case of a minor administrative error. The rule specifically states "The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions". To use this rule in the case of Essex Powerlines' allocation of costs associated with Group 1 DVAs would equate the misallocation to a minor error needing correction. The errors made by Essex Powerlines were not minor and impacted its customers in a material way. This does not fall within the category of changes that can be made by the OEB without a hearing.

Accounts 1588 and 1589 Residual Amounts

The 2011 and 2012 Group 1 DVA balances were being disposed through a 2014 rate rider over the May 1, 2014 to April 30, 2015 period. When the error was identified, the OEB issued a Rate Order and ceased the 2014 rate rider, effective February 1, 2015, in order to mitigate any further impacts. Thus, during the last three months of the 2014 ride rider's term (February, March and April 2015) the rate riders were not billed or credited to customers.

With ceasing disposition of the 2014 rate riders for the 2011 and 2012 DVA balances, a residual amount remains in Account 1595 (2014). A large portion of the residual amount is the result of yet-to-be billed February, March and April 2015 consumption and includes amounts related to all Group 1 DVAs (including Accounts 1588 and 1589). In terms of the quantum, Essex Powerlines agreed with OEB staff's calculation to correct the misallocation between Accounts 1588 and 1589 on a dollar-for-dollar basis[12]. As of January 31, 2015, the remaining balances are, as corrected over the course of the proceeding and agreed to by Essex Powerlines, a debit in Account 1588 of $1,198,629 and a credit in Account 1589 of $1,089,506.

The OEB approves the disposition of the unbilled residual amounts in Account 1595 (2014) of a credit of $1,020,432 which includes a debit amount of $1,198,629 in Account 1588 and a credit of $1,089,506 in Account 1589 (applicable only to Non-RPP customers). The OEB agrees that the residual amounts should be calculated on a dollar-for-dollar basis, considering actual collections to date.

Account 1590 Approved Balance

During the course of the combined proceeding, it was discovered that Account 1590 - Recovered Regulatory Asset Balances was not included in the rate rider calculation of the approved Rate Generator Model in the 2014 IRM proceeding[13].

Account 1590 had a credit balance of approximately $1.5 million as at December 31, 2012. The $1.5 million credit balance was approved by the OEB on a final basis; however, due to a model implementation error, the credit was not included in the rate rider calculations and was not returned to customers.

[12] Oral Hearing Transcript Vol. 1, Page 70 (line 24) to Page 71 (line 7), April 14, 2015 (EB-2014-0072/EB-2014-0301)
[13] Essex Powerlines Corporation, Reply Submission, March 6, 2015, Page 4 (EB-2014-0072/EB-2014-0301)

In Procedural Order No. 3, the OEB directed the utility to bring this amount forward along with its Group 1 DVAs as at December 31, 2013 for disposition over a one-year period commencing May 1, 2015 (see OEB findings in Implementation section).

Group 1 DVA Balances as at December 31, 2013

Essex Powerlines provided an updated DVA continuity schedule for the requested disposition of its 2013 Group 1 DVAs with no adjustment to the 2011 and 2012 balances in Accounts 1588 and 1589 (as per Procedural Order No. 3) and with the correcting adjustments to the 2013 balances only to Accounts 1588 and 1589. The updated continuity schedule included Account 1590[14].

Essex Powerlines proposed the following disposition periods:

- Group 1 DVAs, excluding Accounts 1588 and 1589: one-year period commencing May 1, 2015
- Account 1588: two-year period commencing May 1, 2015
- Account 1589: four-year period commencing May 1, 2015

The OEB approves the Group 1 DVA balances as at December 31, 2013 on an interim basis. This balance excludes the 2013 balances in Accounts 1588 and 1589, and includes Account 1590 and 1595 (2014). In the Implementation section of this Decision and Order, the OEB approves a June 1, 2015 effective and implementation date for 2015 rates. As a result, the OEB approves an 11-month disposition period from June 1, 2015 to April 30, 2016.

The OEB approves the disposition of the 2013 balances in Account 1588 of a $2,151,411 credit and in Account 1589 of a $4,382,923 debit on an interim basis. The OEB approves a 23-month disposition period for the credit or refund to customers of the Account 1588 balance and a 35-month disposition period for the debit or charge to customers of the 1589 balance. The draft Rate Order should consider the revised bill impact on customers.

[14] Essex Powerlines, Updated Rate Generator Model "Essex Powerlines_2015 IRM_Rate_Generator_Appendix A Master Exhibit 1_20150407", April 7, 2015

Table 3 provides the amounts that Essex Powerlines should use in calculating the necessary rate riders and disposition periods.

Table 3: Amounts Applicable for Each Rate Rider Calculation

	$	Disposition Period
Rate Rider 1		
2013 Balances (includes 1590 and 1595 (2014) residuals for all Group 1 accounts, excluding Accounts 1588 and 1589 for the 2013 balances)	(4,400,946)	
Account 1595 (2014) - Account 1588 residual	1,198,629	
Total	(3,202,317)	11-months
Rate Rider 2 (applicable only to Non-RPP customers)		
Account 1595 (2014) - Account 1589 residual	(1,089,506)	11-months
Rate Rider 3		
Account 1588 (2013)	(2,151,441)	23-months
Rate Rider 4 (applicable only to Non-RPP customers)		
Account 1589 (2013)	4,382,923	35-months

The balance of each Group 1 DVA approved for disposition shall be transferred to the applicable principal and interest carrying charge sub-accounts of Account 1595. Such transfer shall be pursuant to the requirements specified in Article 220, Account Descriptions, of the Handbook. The date of the transfer must be the same as the effective date for the associated rates. Essex Powerlines should ensure these adjustments are included in the reporting period ending June 30, 2015 (Quarter 2).

Consequences of Essex Powerlines' Regulatory Accounting Errors

In its Procedural Order No. 3, the OEB stated that, in situations where errors are the result of a utility's negligence, the OEB could impose financial or other consequences on the utility.

OEB staff submitted that Essex Powerlines has the ultimate control over its books and is responsible for ensuring that it follows the OEB's Accounting Procedures Handbook (the Handbook)[15] and ensuring the accuracy of its filings with the OEB. OEB staff submitted that in this case, Essex Powerlines has not met its responsibility to do so. In OEB staff's view, systemic carelessness towards ensuring proper regulatory accounting should be met with serious consequences; and, the result of such consequences should benefit customers who have been materially harmed through no fault of their own. OEB staff submitted if a financial consequence is applied as a result of the errors, it should be a 300 basis point reduction in the regulatory Return on Equity (ROE) embedded in rates to 6.85%, for a two-year period commencing May 1, 2015. OEB staff used Essex Powerlines' 2013 regulatory ROE calculation to estimate the amount it would forego based on a return of 6.85%. OEB staff estimated this amount to be approximately $550,000 per year.

VECC submitted that the penalty paid by Essex Powerlines should result in Essex Powerlines' RPP customers being made whole unless there is evidence that this would have an adverse impact on the financial viability of the utility. VECC noted that extending the penalty over a number of years would mitigate the effects upon the utility.

SEC submitted that the over-collected amounts from RPP customers should be refunded and that the OEB should exercise its discretion and order Essex Powerlines to credit RPP customers.

Energy Probe submitted that an error resulting in one group of customers benefitting at the expense of another group of customers is not an appropriate outcome. However, if the OEB rejects Essex Powerlines' proposal to correct the misallocation again, Energy Probe submitted that the OEB should impose a penalty on the utility in order to compensate RPP customers. Energy Probe suggested that Essex Powerlines could finance the refund in a number of ways.

The OEB notes that parties used various terms to describe the proposed consequence that should be imposed on Essex Powerlines for its regulatory accounting errors. These

[15] Accounting Procedures Handbook for Electricity Distributors (Effective January 1, 2012)

include a penalty[16], an award of damages for negligence[17], an exercise of the OEB's discretion[18], and as a debit toward Essex Powerlines' return on equity.[19]
In its reply, Essex Powerlines submitted that the analysis of imposing a penalty is much more complex than portrayed by parties to this proceeding. The proposed payment ranged from $1.1 million (OEB staff) to $3.7 million (VECC, SEC and Energy Probe).

Essex Powerlines submitted that the OEB's only power to order penalties is in Part VII.1 of the *Ontario Energy Board Act*, *1998* which addresses compliance. Further, Essex Powerlines submitted that there is nothing in the legislation to suggest that the OEB has the power to impose penalties in any other circumstances. Essex Powerlines also submitted that there is no legal basis for the argument that the OEB has discretion to make an ROE adjustment given a utility made an error.

The OEB has considered the evidence with respect to the issue of negligence versus careless accounting and whether or not a financial consequence should be paid by the shareholder of Essex Powerlines as a result. The OEB has also considered the submissions of Essex Powerlines that the OEB's only power to order penalties is through a compliance proceeding.

The OEB finds that based on the evidentiary record, Essex Powerlines demonstrated carelessness towards ensuring proper regulatory accounting procedures and controls.

Regulatory Accounting Procedures and Controls

It is imperative that electricity distributors adhere to the Handbook. The Handbook is a fundamental pillar for regulatory accounting in Ontario, and the Uniform System of Accounts provides the structure on which the Handbook is based. With 70 electricity distributors, the Handbook and related guidance ensure consistency and comparability of accounting treatments, regulatory books and the resulting rates.

During the course of the combined proceeding, numerous examples of Essex Powerlines not adhering to the Handbook and the Uniform System of Accounts became evident. One example was the credit balance in Account 1590 that had not been

[16] Energy Probe, Submission, Page 4, April 30, 2015 (EB-2014-0072/EB-2014-0301)
[17] VECC, Submission, Pages 4-5, April 30, 2015 (EB-2014-0072/EB-2014-0301)
[18] SEC, Submission, Page 3, April 30, 2015 (EB-2014-0072/EB-2014-0301)
[19] OEB staff Submission, Pages 13-14, April 30, 2015 (EB-2014-0072/EB-2014-0301)

disposed. Evidence was filed indicating that Account 1590 should not have had any balance in 2014. In guidance issued in August 2008[20], the OEB clearly instructed distributors that post-April 30, 2008, new balances were to be brought forward to Account 1595 for approval and disposition. Essex Powerlines did not follow this instruction. This is not acceptable.

In addition, the OEB is very concerned about the regulatory accounting controls in place. The fact that Essex Powerlines is a small distributor in terms of customer numbers and staff is no excuse for not implementing all accounting practices properly with sufficient review and oversight. Regardless of size, all Ontario distributors must establish controls to mitigate the risk of error or omission. These controls include the record keeping for Group 1 DVAs.

Distributors are required to settle Group 1 DVAs, including the cost of power and Global Adjustment between the IESO and its distribution customers. The OEB expects management to provide adequate controls and oversight, commensurate with the millions of dollars that flow through Group 1 DVAs, in particular Accounts 1588 and 1589.

Unfortunately this proceeding devolved, in large part, into a forensic accounting exercise in which the OEB found it necessary to ask two sets of supplemental questions through procedural orders, in order to understand the evidence and clarify the record. Moreover, considerable resources were required by the OEB and the parties to decipher the three sets of continuity schedules filed after the interrogatory phase of the proceeding.

As a result of these concerns, the OEB orders that a complete audit of all DVA accounts, procedures and controls be undertaken. The only exceptions are the smart meter Accounts 1555 and 1556 which have undergone a final review in this proceeding. The audit will ensure all DVA entries and balances, not just those associated with Group 1 variance accounts, are accurate for 2013 and on a go forward basis.

Essex Powerlines will pay for the OEB's costs to conduct the audit of all DVA accounts.

[20] Ontario Energy Board Accounting Procedures Handbook Frequently Asked Questions, August 2008

The OEB's Audit and Performance Assessment Group conducts utility audits as part of its oversight responsibility of licensed distributors. The cost of conducting the audits are usually included and recovered with other OEB operating costs.

As part of the OEB's audit program, an audit of Essex Powerlines' Group 2 deferral and variance accounts was conducted recently. In the audit report dated March 28, 2013, Essex Powerlines had been cited for a number of incorrect regulatory accounting entries and procedures[21].

A second audit, within two years, is not normal business practice for the OEB's audit group and extends beyond the OEB's typical oversight responsibility. The need for a second audit is a result of the quality of the evidence in this proceeding.

The OEB's invoice for the audit costs will be provided to Essex Powerlines upon completion of the audit and issuance of the audit report. All audit costs are to be borne by the shareholder, none from its customers.

Price Cap Index Adjustment

The Price Cap IR option is a streamlined regulatory process. Under the Price Cap IR methodology[22], distribution base rates are adjusted by an inflation factor, less the sum of a productivity factor and a stretch factor. Based on its established method[23], the OEB has set the inflation factor for 2015 rates at 1.6% and the productivity factor at zero percent. Based on the analysis of the OEB's consultant, Pacific Economic Group (PEG), the stretch factor is assigned based on a distributor's cost evaluation ranking, and ranges from 0.0% to 0.6%. This stretch factor ranking is indicative of a distributor's cost performance relative to other distributors in Ontario. What this means is that the most efficient distributor, based on the cost evaluation ranking, would be assigned the lowest stretch factor of 0.0%.

In this case, the OEB denies this aspect of the application made by Essex Powerlines for a base rate increase based on the Price Cap IR formula. The increase would have

[21] Exhibit K2 -Audit Review of Group 2 Deferral and Variance Accounts, March 28, 2013 (EB-2014-0072/EB-2014-0301)
[22] Report on Rate Setting Parameters and Benchmarking under the Renewed Regulatory Framework for Ontario's Electricity Distributors (December 4, 2013)
[23] As outlined in the Report cited at footnote 2 above.

generated approximately $160,000 in additional revenue based on Essex Powerlines' placement in the second stretch-factor cohort.

The OEB is required to set just and reasonable rates and in doing so it must balance the interests of the utility and its customers. The Price Cap IR option is predicated on an outcomes-based approach, designed to incent the utility and provide value to customers. As evidenced in this proceeding, with the errors made, the OEB finds that Essex Powerlines has neither demonstrated the desired outcomes nor provided value to its customers. The OEB has therefore determined that maintaining base rates at the same level for 2015, with no increase, is appropriate in the circumstances. The base rates declared interim as of May 1, 2015 are now declared final, with the exception of the rate riders for the Group 1 DVAs.

Debt Servicing Covenants

In transcript undertaking response[24] and in reply submission, Essex Powerlines indicated that any financial consequence in excess of $380,000 would put Essex Powerlines off-side of its debt servicing covenants. In a Price Cap IR application, a distributor's financing structure is not in scope. However, the OEB will not ignore the evidence or submissions filed on this subject.

Essex Powerlines submitted that "any impact that would knowingly and intentionally put a utility off-side of its loan agreements would be contrary to the OEB's statutory objective of maintaining a financially viable industry".

The OEB is very concerned with the apparent risks assumed by Essex Powerlines in structuring its debt arrangements and the subsequent, thin margin of risk it can absorb. Even normal business risks associated with changes in weather and customer demand could represent a high risk to Essex Powerlines and expose it to risk of default.

The OEB agrees with SEC's submissions that a distributor should not structure its debt covenants such that a reduction of 150 to 200 basis points in actual return on equity would put the distributor in a position of default. As a point of comparison, the OEB's own guideline for a financial review is triggered by a return variation of 300 basis points.

[24] Transcript Undertaking Response J3 and Supplemental Response filed by Essex Powerlines (EB-2014-0072/EB-2014-0301)

As a result, consistent with the OEB's statutory objective, the OEB recommends that at its next cost of service application, Essex Powerlines file sufficient information to enable the OEB to fully review the inherent risks of its financing arrangements.

Smart Meter Application

Costs Incurred for Smart Meter Deployment and Operation

In the Smart Meter Application, Essex Powerlines sought the following approvals:

- Smart Meter Disposition Rider (SMDR) – rate rider of ($1.15) per Residential customer per month and $10.49 per General Service less than 50kW customer per month, effective January 1, 2015.
- Smart Meter Incremental Revenue Requirement Rate Rider (SMIRR) – rate rider of $1.11 per Residential customer per month and $3.81 per General Service less than 50kW customer per month effective January 1, 2015.

Essex Powerlines requested that the SMDRs and SMIRRs be in effect for a 12-month period. In response to OEB staff interrogatories, Essex Powerlines made corrections for the following:

- Addition of capital and OM&A actual costs for 2012 and 2013 and forecasted costs for 2014 and 2015 (OEB staff IR #10b);
- Corrected tax rates (OEB staff IR #16);
- Re-submitted Smart Meter Model v.5.0 (applicable for 2015 applications). Essex Powerlines has originally submitted version 4.0, applicable for 2014 rate applications (OEB staff IR #17); and
- Revised effective dates and recovery periods for the SMDRs and SMIRRs (OEB staff IR #18), so that the effective date would be May 1, 2015, corresponding with the proposed effective date of revised base distribution rates per the Incentive Rate Regulation application, and with changed recovery periods to mitigate rate impacts, particularly for General Service<50 kW customers.

In addition, Essex Powerlines filed a revised Smart Meter Model and class-specific SMDRs and SMIRRs to reflect changes noted in OEB staff interrogatories. However, in its submission, OEB staff noted that Essex Powerlines made input errors in the revised

Smart Meter Model which corrupted some of the calculations. OEB staff attempted to correct the calculation errors, and provided a revised smart meter model for review as part of its submission.

In its reply submission, Essex Powerlines filed a further revised Smart Meter Model and proposed class-specific SMDRs and SMIRRs to reflect the corrections to the errors noted above. Essex Powerlines also noted that it corrected the percentage split error for Residential and General Service<50kW on tabs 10A and 10B of the Smart Meter Model which OEB staff referenced in its submission. OEB staff noted that the meter cost for capital allocated to the Residential rate class was 80% and the General Service rate class was 22%, totaling 102%. Essex Powerlines, in its reply submission, verified the correct percentages attributable to these rate classes, totaling 100%. The following tables reflect all relevant corrections filed on the record:

Table 4: Original and Revised SMDRs and SMIRRs for Residential Rate Class

Rate Rider	Per Original Application		Revised for Interrogatory Responses		As Per OEB staff Revised Model		As per Essex Powerlines' Reply Submission	
	Proposed Effective Date	Amount ($/month)	Proposed Effective Date	Amount ($/month)	Proposed Effective Date	Amount ($/month)	Proposed Effective Date	Amount ($/month)
SMDR	January 1, 2015	($1.15)	May 1, 2015	$(0.04)	May 1, 2015	$(0.04)	May 1, 2015	$(0.04)
SMIRR	January 1, 2015	$1.11	May 1, 2015	$1.07	May 1, 2015	$1.07	May 1, 2015	$1.07

Table 5: Original and Revised SMDRs and SMIRRs for General Service<50kW

Rate Rider	Per Original Application		Revised for Interrogatory Responses		As Per OEB staff Revised Model		As per Essex Powerlines' Reply Submission	
	Proposed Effective Date	Amount ($/month)	Proposed Effective Date	Amount ($/month)	Proposed Effective Date	Amount ($/month)	Proposed Effective Date	Amount ($/month)
SMDR	January 1, 2015	$10.49	May 1, 2015	$15.53	May 1, 2015	$9.32	May 1, 2015	$8.20
SMIRR	January 1, 2015	$3.81	May 1, 2015	$3.80	May 1, 2015	$3.80	May 1, 2015	$3.46

The following table summarizes Essex Powerlines' overall per meter costs, costs above minimum functionality and capital and OM&A expenses:

Table 6: Average Capital Cost Per Meter

Smart Meter Capital Costs, Including Costs Exceeding Minimal Functionality	$3,354,090
Remove Smart Meter Capital Costs Exceeding Minimal Functionality	**($3,791)**
Smart Meter Capital Costs, Excluding Costs Exceeding Minimal Functionality	$3,350,299
Number of Meters Installed	28,775
Average Capital Cost per Meter, Excludes Costs Exceeding Minimum Functionality	$116.43

Table 7: Average Total Cost Per Meter

Smart Meter Total Costs, Including Costs Exceeding Minimal Functionality	$3,519,105
Remove Smart Meter Total Costs Exceeding Minimal Functionality	**($34,232)**
Smart Meter Total Costs, Excluding Costs Exceeding Minimal Functionality	$3,484,873
Number of Meters Installed	28,775
Average Total Cost per Meter, Excludes Costs Exceeding Minimum Functionality	$121.11

On March 3, 2011, the OEB issued the Monitoring Report, Smart Meter Investment – September 2010 ("the Monitoring Report"). The Monitoring Report showed an average cost of $226.92 per smart meter. OEB staff submitted that Essex Powerlines' costs are below the average costs identified in the Monitoring Report and therefore, took no issue with the nature and quantum of Essex Powerlines' reported per meter costs.

VECC noted that Essex Powerlines' costs compare favourably as they are below the sector average of $186.76 capital cost per meter and $207.37 total cost per meter (based on September 2009 data)[25] and the total cost per meter of $226.92 (based on September 2010 data)[26].

[25] "Sector Smart Meter Audit Review Report", dated March 31, 2010
[26] Monitoring Report Smart Meter Investment – September 2010, March 3, 2011

Essex Powerlines' application included a request to recover $3,791 in capital costs and $30,441 in OM&A costs beyond minimum functionality, as defined in the combined proceeding related to Smart Meters (EB-2007-0063). These costs include CIS system upgrades, TOU implementation, web presentment, bill presentment and integration with MDM/R. Neither VECC nor OEB staff took issue with the nature or quanta of Essex Powerlines' documented costs for beyond minimum functionality based on the documentation and explanations provided in evidence.

The OEB notes that authorization to procure and deploy smart meters has been done in accordance with Government regulations, including successful participation in the London Hydro RFP process, overseen by the Fairness Commissioner, to select (a) vendor(s) for the procurement and/or installation of smart meters and related systems.

The OEB finds that Essex Powerlines' documented costs, as revised in response to interrogatories and in its reply submission, related to smart meter procurement, installation and operation, and including costs beyond minimum functionality, are reasonable. The OEB approves the recovery of the costs for smart meter deployment.

In granting its approval for the historically incurred costs and the incremental annual revenue requirement, the OEB considers Essex Powerlines to have completed its smart meter deployment. Going forward, Essex Powerlines is not to record any capital and operating costs for existing and new smart meters in Accounts 1555 and 1556. Instead, the costs shall be recorded in regular capital and operating expense accounts (e.g. Account 1860 for meter capital costs) as is the case with other regular distribution assets and costs.

Essex Powerlines is authorized to continue to include the gross book value and accumulated depreciation of stranded meters in the appropriate sub-account of Account 1555. The gross book value and accumulated depreciation balance for stranded conventional meters, as well as the costs currently embedded in Essex Powerlines' approved distribution rates for conventional meters, should be brought forward for disposition in Essex Powerlines' next cost of service application or in a separate application within three years of the date of this Decision and Order, whichever occurs first.

Allocation of Smart Meter Costs

Essex Powerlines applied for class-specific SMDRs and SMIRRs for the Residential and General Service<50 kW customer classes based on an allocation methodology approved in the PowerStream application, EB-2010-0209.[27] Essex Powerlines allocated costs using the following method:

- Capital costs related to smart meters is allocated on the basis of customer weighted meters;
- OM&A is allocated on the basis of the number of smart meters; and
- PILs is allocated on the basis of the revenue requirement before PILs by class.

In its submission, VECC noted the average cost of an installed smart meter for a General Service<50 kW customer is approximately three times greater than the cost to install a smart meter for a residential customer. VECC submitted that, to avoid undue cross subsidy between customer classes, Essex Powerlines should calculate class-specific rate riders that reflect the full costs for each customer class. VECC accepted that Essex Powerlines does not have the cost data by rate class to complete separate smart meter models by customer class based on full cost causality. VECC also accepted Essex Powerlines' cost allocation methodology as a proxy for revenue requirement with one exception, as explained below.

VECC submitted that Essex Powerlines collected the smart meter funding adder revenue from classes other than Residential and General Service<50 kW. VECC took issue with Essex Powerlines' approach to reallocate the costs to the residential customer class (93.5%) and General Service<50 kW customer class (6.5%). Essex Powerlines had argued that the amounts are not significant based on the overall revenues collected. VECC submitted that as a matter of principle, the SMFA revenues collected from other rate classes should be returned instead of the allocation proposed by Essex Powerlines.

Essex Powerlines did not address this matter in its reply submission.

[27] PowerStream, Application, page 16 (EB-2010-0209)

As indicated in the Waterloo North Hydro Inc.'s Smart Meter Cost Recovery Application decision (EB-2012-0266):

> The Board notes that VECC has made a similar submission in other applications for recovery of smart meter costs, beginning with PowerStream's 2010 smart meter application. In prior cases, the Board has not accepted VECC's proposal to return SMFA revenues to metered customer classes that do not receive smart meters, and will not do so with respect to this Application. As stated in prior decisions, larger demand-metered customers may benefit from the universal deployment of smart meters and implementation of TOU rates to lower consumption customers, and the Board views that the amounts are not material on per customer basis[28].

The OEB notes the concerns of VECC, and concurs that the cost differential per meter may be larger than has been experienced in many other smart meter cost recovery applications. The OEB observes that this is not surprising based on the evidence. Essex Powerlines documented that 956 General Service<50 kW customers installed 3-phase smart meters at an average installed cost of $648.96 per meter versus 1,056 General Service<50 kW customers receiving single-phase smart meters at $121.37. 26,795 Residential customers received single-phase smart meters at an average installed cost of $104.17. The OEB finds that Essex Powerlines has correctly applied the accepted cost allocation methodology based on the evidence.

The OEB finds that the allocation of costs in the Smart Meter Application is consistent with the Waterloo North and PowerStream decisions and is therefore approved. As stated in prior decisions, larger demand-metered customers may benefit from the universal deployment of smart meters and implementation of TOU rates to lower consumption customers, and the OEB views that the amounts are not material on per customer basis.

Stranded Meter Accounting

Essex Powerlines proposed not to dispose of stranded meters at this time, but to deal with disposition in its next rebasing application, scheduled for 2016 rates. The estimated net book value of the stranded meters as of December 31, 2015 is

28 EB-2012-0266, Decision and Order, Page 5

$1,567,710.[29] The stranded conventional meters continue to be amortized until disposition. Based on the number of installed smart meters, approximately 28,000, the estimated net book value per stranded conventional meter is about $55.

OEB staff submitted that Essex Powerlines' proposal is in accordance with Guideline G-2011-0001. OEB staff noted that, at the time of Essex Powerlines' next rebasing application, Essex Powerlines should make a proposal for allocating the net book value of stranded meters to the Residential and General Service<50 kW classes. OEB staff observes that a standard approach approved by the OEB in recent proceedings is to use the ratio of installed conventional meter costs by customer class from sheet I7.1 of the Cost Allocation model as found in the distributor's most recent cost of service application. Essex Powerlines should consider this, or a similar approach for requesting disposition and recovery via class-specific Stranded Meter Rate Riders in its forthcoming cost of service application.

The OEB agrees with the submission of OEB staff.

Effective Date and Duration of Smart Meter Rate Riders

Essex Powerlines' requested an effective date of May 1, 2015 and a 12-month disposition period for its SMDR and SMIRR.

In the Implementation section of this Decision and Order, the OEB approves a June 1, 2015 implementation and effective date for 2015 rates. As a result, the OEB approves an 11-month disposition period from June 1, 2015 to April 30, 2016 for the SMDR and SMIRR.

Motion

Essex Powerlines filed a motion (the Motion) to review and vary, suspend or cancel certain portions of Procedural Order No. 3[30]. The OEB issued Procedural Order No. 4, and ordered that the Motion be placed in abeyance to permit the OEB to complete the

29 Essex Powerlines, Interrogatory Responses, Board Staff IR #11 (EB-2014-0072/EB-2014-0301)
30 Essex Powerlines Corporation, Notice of Motion, April 2, 2015 (EB-2014-0072/EB-2014-0301)

record of the current proceeding and preserve Essex Powerlines' right to file a dispositive motion if it so choses[31].

Implementation

The OEB has made findings in this Decision and Order which change the 2015 distribution rates from those proposed by Essex Powerlines. The OEB expects Essex Powerlines to file a draft Rate Order, including a proposed Tariff of Rates and Charges and all relevant calculations showing the impact of this Decision and Order on Essex Powerlines' determination of the final rates. The draft Rate Order will be based on a June 1, 2015 effective and implementation date.

In its draft Rate Order, Essex Powerlines should consider the bill impacts on customers, and should address any situations that might require mitigation appropriately. Essex Powerlines should provide adequate supporting documentation in its draft Rate Order including, but not be limited to, a completed version of the 2015 IRM Rate Generator model and Smart Meter Model, and estimated bill impacts for representative customer profiles in all customer classes.

A Rate Order will be issued after the steps set out below are completed.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Essex Powerlines shall file a draft Rate Order that includes revised models in Microsoft Excel format and a proposed Tariff of Rates and Charges reflecting the OEB's findings in this Decision by June 12, 2015.

2. Any comments on the draft Rate Order including the revised models and proposed rates with the OEB and forward to Essex Powerlines by June 16, 2015.

3. Essex Powerlines shall file responses to any comments on its draft Rate Order including the revised models and proposed rates by June 18, 2015.

[31] Essex Powerlines Corporation, Procedural Order No. 4, April 10, 2015 (EB-2014-0072/EB-2014-0301)

COST AWARDS

The OEB finds that the costs of this proceeding, including OEB costs, intervenor costs and Essex Powerlines' own legal and any other external costs are to be borne by the utility's shareholder.

The OEB will issue a separate decision on cost awards once the following steps are completed:

1. Intervenors shall submit its cost claims no later than 7 days from the date of issuance of the final Rate Order.

2. Essex Powerlines shall file with the OEB and forward to intervenors any objections to the claimed costs within 17 days from the date of issuance of the final Rate Order.

3. Intervenors shall file with the OEB and forward to Essex Powerlines any responses to any objections for cost claims within 24 days from the date of issuance of the final Rate Order.

4. Essex Powerlines shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file numbers EB-2014-0301 and EB-2014-0072 and be made electronically through the OEB's web portal at www.pes.ontarioenergyboard.ca/eservice/ in searchable / unrestricted PDF format. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

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Fax: 416-440-7656

DATED at Toronto, June 9, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2014-0301
EB-2014-0072

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.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

PARTIAL DECISION and PROCEDURAL ORDER No. 3
March 25, 2015

Background

On September 23, 2014, Essex Powerlines Corporation (Essex Powerlines) filed an application seeking approval for its final smart meter installation costs and on September 26, 2014, Essex Powerlines applied for an annual Price Cap IR adjustment to rates for the 2015 rate year. The Board decided to hear these applications together.

The Board approved the Vulnerable Energy Consumers Coalition (VECC) as an intervenor and found VECC eligible to apply for an award of costs in relation to Essex Powerlines' request for smart meter cost recovery.

Board staff and VECC filed interrogatories and submissions. In its reply submission, Essex Powerlines included new information relating to an error that it claimed not to have known about before the application was filed or the interrogatory responses were provided. As framed in the Board's Procedural Order No. 2:

> The error relates to the allocation of the Independent Electricity System Operator's ("IESO") Global Adjustment and Hydro One Network Inc.'s power billings for the 2011, 2012 and 2013 rate years. The allocation affects Regulated Price Plan ("RPP") and non-RPP customers (i.e. those purchasing electricity from a retailer or making individual arrangements for power procurement). To correct the error, Essex Powerlines proposed an adjustment and re-allocation between RPP and non-RPP customers of approximately $11.5 million. The proposed accounting adjustments are a credit to Account 1588 and a debit to Account 1589, both variance accounts. As a result of these proposed adjustments, some customers would receive a credit refund and others would have a debit balance owing.

The Board stated that it generally does not accept new information provided in reply submissions and, therefore, reopened the record of this proceeding. Procedural Order No. 2 also required Essex Powerlines to file the following new evidence:

- Any relevant material from prior Board proceedings
- Details regarding the source of the error
- The process followed to determine the correcting accounting entries
- Calculations supporting the correcting accounting entries for each year separately (2011, 2012 and 2013)
- Any required changes to the Rate Generator Model
- The proposed bill impacts and rate mitigation strategy if the errors from all 3 years are corrected collectively (2011-2013)
- The proposed bill impacts and rate mitigation strategy if only the errors from 2013 were corrected

With this broader potential impact on rates than had been anticipated when the application was received, the Board granted intervenor status and cost awards eligibility to all intervenors of record in Essex Powerlines' last cost of service proceeding, EB-2009-0143. The Board invited the intervenors and Board staff to consider and provide written submissions on the following questions:

> *Should the Board consider an adjustment to the 2011 and 2012 DVA (Deferral and Variance Account) balances which were disposed of on a final basis as part of Essex Powerlines Corporation's 2014 IRM proceeding (EB-2013-0128)? Would any such adjustment violate the legal requirements concerning retroactive ratemaking?*

Finally, the Board indicated that following its determination of whether or not the 2011 and 2012 DVA balances are within the scope of this proceeding, an opportunity would be afforded to the intervenors and Board staff to examine the new evidence filed by Essex Powerlines.

On February 11, 2015, in response to Procedural Order No. 2, Essex Powerlines submitted the breakdown, per year, as follows:

	Under-collected from Non-RPP ($)	**Over-collected from RPP ($)**
2011	1,561,164	1,561,164
2012	3,617,586	3,617,586
2013	6,419,261	6,419,261
Total	**11,589,011**	**11,589,011**

Subsequently, Essex Powerlines submitted a request to cease the rate riders related to the disposition of the 2011 and 2012 DVA balances yet to be billed to customers. Although the error continued in 2013, disposition had not been ordered by the Board and no rate riders had been established. Essex Powerlines indicated that as the existing rate riders were partly based on the error, ceasing the rate riders would mitigate any further impacts of the error until the Board determined the appropriate remedy. The rate riders had been approved as part of Essex Powerlines' 2014 IRM Decision (EB-2013-0128), to commence on May 1, 2014 and terminate on April 30, 2015. The Board

accepted the request and issued an Order to stay the rate riders effective February 1, 2015.

Essex Powerlines filed the new evidence requested by the Board in Procedural Order No. 2, including six different rate models and corresponding bill impacts. Essex Powerlines adjusted its continuity schedules to account for the discontinuation of the rate riders, reduced the claimed balances in Accounts 1588 and 1589 from what was filed in February 11, 2015 and further updated its 2015 total claim. Essex Powerlines maintained its proposal to dispose of the credit in Account 1588 over a two-year period and dispose of the debit in Account 1589 over a four-year period.

Positions of the Parties

Essex Powerlines submits that correcting the error from 2011 and 2012 would not violate the rule against retroactive ratemaking as it related to a billing error, citing the Board's Brantford Power decision in EB-2009-0063 as precedent. The significance of recognizing the error as a billing error, is that the Retail Settlement Code would apply and adjustments would be permitted. According to Essex Powerlines, customers are innocent third parties that should neither be advantaged nor disadvantaged as a result of a mistake.

Essex Powerlines also indicates that the *Ontario Energy Board Act, 1998,* at s. 78(3), obligates the Board to set rates that are "just and reasonable" and because the existing rates were based upon an error, the rates should be corrected; the variance accounts in question were intended to be a "pass-through" without profit for the utility; the pass-through accounts were established to protect both the utility and the customer from variability in revenues and costs; the Retail Settlement Code permits corrections to cover a two-year period for customers; and retroactivity is ultimately a fairness issue balancing the interests of customers and the utility.

Energy Probe, the School Energy Coalition (SEC), VECC and Board staff each filed a submission in response to the Board's questions.

Energy Probe generally supports the submissions of Essex Powerlines; namely, that the error can be treated as a billing error and that the rule against retroactivity does not prevent the Board from correcting certain billing errors. Energy Probe states that the

Board should consider an adjustment to the 2011 and 2012 DVA balances as proposed by Essex Powerlines.

VECC, SEC and Board staff take the position that the Board's acceptance of Essex Powerlines' proposal would violate the rule against retroactive ratemaking.

The submissions of SEC and Board staff provide a detailed synopsis of the law on retroactivity, citing the well-established rule adopted by the Board and its underlying rationale. Both SEC and Board staff submit that while there are exceptions to the rule of retroactive ratemaking, the exceptions are not applicable to the 2011 and 2012 DVA balances. Their view is that the 2011 and 2012 DVA amounts were cleared for those years on a final basis, and they are no longer interim or encumbered. In essence, the books are closed for those years, in contrast to the 2013 DVA balances for which the rates remain interim.

SEC and Board staff both disagree with Essex Powerlines' submission that the error is akin to a billing error. In Board staff's view, short of requiring Essex Powerlines' shareholder to reimburse RPP customers who overpaid, there is nothing the Board can do in this proceeding to correct the accounting error for the 2011 and 2012 DVA balances that have been disposed. However, the option of requiring the shareholder to reimburse RPP customers would be potentially harmful to Essex Powerlines' financial position, given its materiality threshold is approximately $60,000. SEC suggests a similar potential remedy and submits that, based on the record of this proceeding and in law, the Board could reasonably exercise its discretion to order repayment by the shareholder of Essex Powerlines of the overcharged amounts to its RPP customers, even though the effect would be to create a loss that would be borne by the utility and its shareholder.

While SEC recognizes that the nature of the error does not create any windfall for Essex Powerlines, it notes that the utility is not simply an "innocent party". On the contrary, SEC submits that Essex Powerlines' wholly inadequate bookkeeping procedures caused significant harm to many of the utility's past and current customers. In SEC's view, it is not prudent management for utilities to lack the proper mechanisms to verify entries in retail settlement variance accounts, through which millions of dollars are moved annually.

VECC supports the detailed analysis on rate retroactivity provided in Board staff's submission. VECC also submits that a separate proceeding should take place to revisit the error and to arrive at a fair credit payable by Essex Powerlines' to its RPP customers without disabling the utility.

Board Findings

The first issue to deal with is to determine whether or not the error is a billing error. The Board finds that it is not. A billing error typically occurs when a utility charges a rate that is inconsistent with a rate order or, for example, if the utility fails to charge a rate at all. In this case, the Board's Rate Order disposing the 2011 and 2012 DVA balances was issued on a final basis on March 13, 2014. The evidence in this proceeding is that Essex Powerlines has complied with that Rate Order. As it is not a billing error, the Retail Settlement Code does not apply.

The Board finds that this case is not analogous to the Brant County Power dispute cited by Essex Powerlines. In the Brant County Power proceeding, the Board resolved a billing dispute regarding the rate classification of one particular customer. [1] The Board indicated that it was not varying the rate. The Board determined, among other things, that the customer, Brant County Power should have to pay RTS rates for previous periods for which it had not been billed by the utility, Brantford Power. Because of the ongoing billing dispute, the utility and the customer were aware that the issue would likely be subject to adjustment in a subsequent proceeding. The Board indicated that where there is a billing error, the Board can levy a penalty in terms of loss of interest if there is an element of negligence on the part of the utility resulting in the error.

Having found that the error by Essex Powerlines is not a billing error, the Board must now determine whether Essex Powerlines' proposal to correct the error violates the rule against retroactive ratemaking. The Board finds that it does.

The overarching principle with respect to ratemaking is that once rates are set, they are constituted to be just and reasonable. At least two key principles behind the rule against retroactive ratemaking are relevant to this proceeding. First, both distributors and consumers are entitled to rate certainty and rates should not increase or decrease

[1] EB-2009-0063, Decision and Order, August 10, 2010, see pages 17-21.

after they have already been paid. Second, there is a risk of inter-generational inequity when consumers responsible for incurring costs are not the same consumers paying the costs out of period.

Essex Powerlines' proposal would require the Board to change rates that were declared final, based on an after-the-fact discovery of accounting errors embedded in those rates. To do so would constitute retroactive ratemaking. The Board therefore rejects Essex Powerlines' proposal to adjust the 2011 and 2012 DVA balances which were disposed on a final basis. The Board will not require Essex Powerlines' non-RPP customers to repay the under-collected amounts from 2011 and 2012. The non-RPP customers would have had no way of knowing that a future adjustment would be made to rates that were declared final over a year ago.

The Board recognizes that RPP customers overpaid for the disposition of the 2011 and 2012 DVA balances. RPP customers paid for the error made by Essex Powerlines. Does the rule against retroactive ratemaking prohibit the refund of money to customers because rates were declared final? RPP customers are innocent third parties. There is Board precedent for requiring a utility to repay money to customers if negligent or if the utility would profit on account of its own errors (EB-2009-0013 and EB-2014-0043). In other words, the Board is not driven by a need for symmetrical treatment of customers and utilities in final rate situations.

Utilities such as Essex Powerlines have ultimate control of their books and records and therefore bear the responsibility of ensuring that there are no mistakes in their filings with the Board. Errors crystalized in final rates can have long term adverse impacts on consumers. In situations where errors are the result of a utility's negligence, the Board could impose financial or other consequences on the utility. For example, the Board could order the utility to repay customers, deny the accrual of interest on outstanding balances or deny the inflation adjustment to base rates. In this proceeding, the Board is apprehensive that repayment, requiring the utility to bear all the cost of its errors, may have a material financial adverse effect on the viability of the utility. The Board appreciates that the DVA accounts in question were pass-through accounts for the utility and its customers. The Board also notes that while Essex Powerlines made the error, it appears that it was not enriched by it.

The Board would benefit from oral testimony from Essex Powerlines' staff in order to render a final decision. The Board will convene an oral hearing on April 14, 2015.

Overall, the Board is concerned with Essex Powerlines' bookkeeping procedures and internal controls in order to prevent and detect errors. In addition to the errors affecting DVA Accounts 1588 and1589, Essex Powerlines provided new evidence that a model implementation error affected the disposition of the balance in Account 1590. This account had an approved credit balance of approximately $1.5M to be returned to customers as part of the utility's 2014 IRM proceeding. However, due to the model error, the credit was not included in the rate rider calculations. The incorrect rate riders were prepared by Essex Powerlines and approved by the Board on a final basis.

The Board finds that the model implementation error affecting Account 1590 is akin to a calculation error and that it would benefit the utility if not corrected. In accordance with section 41.02 of the Board's *Rules of Practice and Procedure*, the Board directs the utility to bring this amount forward in its continuity schedules (with additional carrying charges) with disposition over a one-year period commencing May 1, 2015.

With the stay of the rate riders disposing the 2011 and 2012 DVA balances, a residual amount remains in Account 1595 (2014). The residual amount is the result of yet-to-be billed February, March and April 2015 consumption. The Board requires additional evidence in order to decide how this residual amount will be disposed on a go forward basis. In the interim, no further interest or carrying charges will be accrued to this residual amount.

Given the numerous changes and updates to the evidence filed in this proceeding and the findings in this Partial Decision, the Board requires a clean set of revised continuity schedules to prepare for the oral hearing. The additional evidence will be provided by Essex Powerlines in response to the questions in Appendix A.

Parties wishing to supplement Appendix A with additional questions may do so in accordance with the timelines suggested below.

THE BOARD ORDERS THAT:

1. Parties wishing to supplement Appendix A with additional questions shall do so by sending the additional questions to Essex Powerlines and copying the Board by **March 27, 2015**.

2. Essex Powerlines shall file its responses to the questions, as set out above, with the Board on or before **April 7, 2015**.

3. An oral hearing shall be convened on **April 14, 2015** starting at 9:30 a.m. The oral hearing will be held in the OEB's West Hearing Room at 2300 Yonge Street, 25th Floor, Toronto.

All filings to the Board must quote the file numbers EB-2014-0301 and EB-2014-0072 and be made electronically through the Board's web portal at www.pes.ontarioenergyboard.ca/eservice/ in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Georgette Vlahos at georgette.vlahos@ontarioenergyboard.ca and Board Counsel, Richard Lanni at richard.lanni@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, March 25, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

To

Partial Decision and Procedural Order No. 3

Essex Powerlines Corporation

EB-2014-0301
EB-2014-0072

March 25, 2015

Appendix A

With respect to the deferral and variance account (DVA) continuity schedule:

1. Please provide an updated DVA continuity schedule beginning from January 1, 2010 for the requested disposition of 2013 Group 1 DVAs reflecting this Partial Decision:
    a. With no adjustments to the 2011 and 2012 balances of Accounts 1588 and 1589;
    b. With correcting adjustments to the 2013 balances of Accounts 1588 and 1589 made in the Other Adjustment column;
    c. With the inclusion of the credit balance in Account 1590, to be disposed over a one-year period commencing May 1, 2015; and
    d. With the inclusion of any true-up of the residual balance in Account 1595 (2012) (i.e. for the rate riders which have already expired).
2. If there any differences between the 2013 RRR balances and the DVA continuity schedule balances, please explain.
3. If there are any differences between the Board approved December 31, 2012 principal and interest balances in EB-2013-0128 and the balances in the DVA continuity schedule, please explain.
4. Provide a summary consumption report by customer class supporting the correct allocation between RPP and non-RPP for 2011, 2012 and 2013.

With respect to Account 1595 (2014), which is not included in the DVA continuity schedule:

5. Please provide the residual balance in Account 1595 (2014) (i.e. the remainder after the 2014 DVA rate riders were stopped in February 2015).
6. Confirm the credit balance in Account 1590 is excluded from Account 1595 (2014) (i.e.: as it is already included in the DVA continuity schedule referenced above).
7. Provide the proposed correction of the RPP and non-RPP misallocation to the residual balance in Account 1595 (2014) and explain how the proposed correction was calculated.

With respect to the potential new rate riders and bill impacts:

8. Please provide a one-page summary of the calculated rate riders for each of the following:
    a. Disposition of the 2013 Group 1 DVA balances by customer class,

excluding Accounts 1588 and 1589. Please provide rate riders based on a one-year period effective May 1, 2015;

b. Disposition of the 2013 Account 1588 balance (only) by customer class. Please provide ride riders based on a one to four year disposition period, effective May 1, 2015;
c. Disposition of the 2013 Account 1589 balance (only) by customer class. Please provide rate riders based on a one to four year disposition period, effective May 1, 2015.

9. Please provide a summary of the overall bill impacts by customer class for the rate riders with the two and four year disposition periods proposed by Essex Powerlines for Accounts 1588 and 1589 respectively. The bill impacts must take into account the proposed price cap adjustment and the approximate SMDR and SMIRR based on what Essex Powerlines filed in its reply submission. The bill impacts should show the dollar and percentage change from rates as of January 31, 2015 to May 1, 2015 and the change from rates as of April 30, 2015 (after the rate riders were stayed) to May 1, 2015. Essex Powerlines should not make any annual adjustments to the models or DVA continuity schedule as proposed in its reply submission of January 19, 2015.

COURT OF APPEAL FOR ONTARIO

CITATION: Union Gas Limited v. Ontario Energy Board, 2015 ONCA 453
DATE: 20150622
DOCKET: C58756

Hoy A.C.J.O., and Simmons and Tulloch JJ.A.

BETWEEN

Union Gas Limited

Appellant

and

Ontario Energy Board

Respondent

Patricia D.S. Jackson, Crawford Smith and Alex Smith, for the appellant

Michael Millar, for the respondent

Heard: December 16, 2014

On appeal from the order of the Divisional Court (Justices Colin D.A. McKinnon and Susan G. Himel, Justice Herman J. Wilton-Siegel dissenting) dated December 20, 2013, with reasons reported at 2013 ONSC 7048, 316 O.A.C. 218, affirming the decision of the Ontario Energy Board, dated November 19, 2012.

Simmons J.A.:

A. INTRODUCTION

[1] Union Gas Limited appeals with leave from an order of the Divisional Court dismissing Union's appeal from a decision of the Ontario Energy Board. The

main issue on appeal is whether the Board's decision contravened the principle against retroactive ratemaking.

[2] In April 2012, Union applied to the Board for an order amending the rates it would charge to its customers for natural gas as of October 2012. A primary purpose of the application was to adjust rates as a result of allocating a portion of Union's 2011 utility earnings between Union and its ratepayers under the terms of an Earnings Sharing Mechanism ("ESM") contained in an Incentive Regulation Mechanism Settlement Agreement (the "IRM Agreement").

[3] In 2007, Union entered into the IRM Agreement with parties representing its major stakeholders and constituents (the "interveners") to provide for a five-year period of incentive regulation. By order made in January 2008, the Board approved the IRM Agreement. The IRM Agreement contained the ESM, under which Union agreed to share utility earnings greater than two per cent above its regulated rate of return with ratepayers.

[4] As part of the IRM Agreement, Union agreed to reduce its revenue requirement by $4.3 million. In exchange for this reduction, four deferral accounts previously established by the Board were eliminated.

[5] Deferral accounts allow a regulator to separately accumulate certain amounts (costs or revenues) before deciding by order, at specified intervals, to what extent, if at all, such costs or revenues will be charged to ratepayers as part

of rates. Because it is contemplated from the outset that amounts in deferral accounts will be disposed of in a manner that affects rates, deferral accounts do not offend the principle against retroactive ratemaking.

[6] At least one of the four eliminated deferral accounts tracked upstream transportation optimization revenues. Union generated upstream transportation optimization revenues through transactions with third parties in which Union disposed of upstream transportation services.

[7] In the past, the Board had directed that Union share the upstream transportation optimization revenues in the eliminated deferral accounts with ratepayers based on a 75/25 split in favour of ratepayers.

[8] As a result of the elimination of the four deferral accounts, under the IRM Agreement, Union was able to keep net revenues that would previously have been recorded in those accounts, subject to the ESM.

[9] Union's April 2012 application for a rate order included a request to share with ratepayers $22 million in 2011 revenues Union had earned using TransCanada Pipelines Limited's ("TCPL") Firm Transportation Risk Alleviation Mechanism ("FT-RAM") program under the ESM.

[10] Under the FT-RAM program, utilities earned credits for unused firm[1] transportation services, which the utilities could then use to purchase cheaper interruptible transportation services. Union was able to monetize the credits it earned under the FT-RAM program through various assignment and exchange transactions with third parties.

[11] Union classified its 2011 FT-RAM earnings as upstream transportation optimization revenues – that is, as utility earnings that would previously have been recorded in one of the eliminated deferral accounts. In a procedural order in Union's application, the Board directed that Union's classification of its 2011 FT-RAM revenues be dealt with as a preliminary issue in the proceeding.

[12] In its decision on the preliminary issue, the Board rejected Union's classification of its 2011 FT-RAM revenues as utility earnings and concluded instead that the disputed $22 million should be classified as "gas supply cost reductions". As such, the revenues would ordinarily be passed through to ratepayers, and Union would not be entitled to any portion of them.

[13] The Board found that Union had used the FT-RAM program to generate profits on its upstream transportation portfolio on a planned basis – whereas Union's past upstream transportation optimization activities had occurred on an unplanned basis. Because upstream transportation costs are passed through

[1] Firm transportation refers to the quality of upstream transportation. Firm transportation cannot be interrupted by the transportation supplier, whereas interruptible transportation can be interrupted.

entirely to ratepayers, the Board found that Union's planned profit-making on its upstream transportation portfolio was inconsistent with the IRM Agreement and the regulatory principle imbedded in it that a utility "cannot profit from the procurement of gas supply for its customers."

[14] The Board concluded that it was entitled to reclassify the FT-RAM revenues because it was part of its mandate to ensure that revenues were being properly characterized under the IRM Agreement and in a manner that resulted in just and reasonable rates.

[15] While acknowledging that gas supply costs (and gas supply cost reductions) are ordinarily passed through entirely to ratepayers, the Board directed that 90 per cent of the $22 million should be credited to ratepayers and that 10 per cent should be credited to Union as an incentive for generating the revenues. In a subsequent rate order, the Board directed that the funds should be recorded in a newly created deferral account.

[16] Union appealed the Board's decision on the preliminary issue to the Divisional Court.

[17] Before the Divisional Court, Union argued that the Board had already approved the gas supply cost reductions to be credited to ratepayers for 2011 through final rate orders made in Quarterly Rate Adjustment Mechanism ("QRAM") proceedings, which disposed of deferral accounts relating to upstream

gas and transportation costs. Accordingly, Union maintained that by reclassifying Union's 2011 FT-RAM revenues as gas supply cost reductions, the Board engaged in impermissible retroactive ratemaking.

[18] In a split decision, the Divisional Court found that the Board's reclassification of the 2011 FT-RAM revenues did not amount to impermissible retroactive ratemaking. The majority concluded that the revenues at issue were not dealt with in the 2011 QRAM proceedings. Moreover, because the revenues were brought forward as part of the ESM proceeding, they were effectively "encumbered", and therefore subject to further disposition by the Board. The majority held that the Board's statutory rate-making authority is broad and "[does not] in any manner constrain the Board from making orders respecting matters which arose in a previous year but had not been specifically dealt with as a discrete item in the rate-setting process."

[19] Union now appeals to this court with leave and argues that the Board acted unreasonably in reclassifying Union's 2011 FT-RAM revenues as gas supply cost reductions for two reasons.

[20] First, it says the reclassification was an unauthorized departure from the terms of the IRM Agreement, which the Board had approved as the mechanism for setting rates during the IRM period. Second, it says the reclassification amounted to impermissible retroactive ratemaking. This is because gas supply

cost deferral accounts had already been disposed of through final orders in the 2011 QRAM proceedings and because there was no separate deferral account for FT-RAM revenues in relation to which the Board could make a further disposition. According to Union, the Board's decision is thus a classic impermissible attempt to remedy past rates the Board later concluded were excessive.

[21] For the reasons that follow, I would dismiss Union's appeal.

B. BACKGROUND

(1) Union

[22] Union is an Ontario corporation that sells, distributes, transmits and stores natural gas. It does not produce natural gas. From its head office in Chatham, Union services approximately 1.4 million residential, commercial and industrial customers across northern, southwestern and eastern Ontario.

(2) The Board and its Authority

[23] The Board is a statutory tribunal governed by the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B. Among other powers, the Board has authority to set rates for the sale, transmission, distribution and storage of gas in the natural gas sector: s. 36(1).[2] The Board carries out its rate-setting function by

[2] The text of relevant provisions under the Act is included in Appendix "A".

issuing orders: s. 19(2). In making orders, the Board is not bound by the terms of any contract: s. 36(1).

[24] Under s. 36(2) of the Act, the Board may "make orders approving or fixing *just and reasonable rates* for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas" (emphasis added).

[25] Just and reasonable rates permit a utility to recover its prudently incurred costs and earn a fair return on invested capital: see, for example, *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario (Energy Board)*, 2013 ONCA 359, 116 O.R. (3d) 793, at paras. 13, 30-32, leave to appeal to S.C.C. granted, [2013] S.C.C.A. No. 339, appeal heard and reserved December 3, 2014; *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, pp. 192-3.

[26] Under s. 36(3) of the Act, "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate."

[27] Deferral accounts are not defined in the Act. However, under ss. 36(4.1) and (4.2), the Board must dispose of the balances in deferral accounts at specified intervals. Deferral accounts relating to the commodity of natural gas are to be reflected in rates within a maximum of three months, and deferral accounts

relating to other items, including transportation costs, are to be reflected in rates within a maximum of 12 months.

(3) The Board's Practice in Setting Union's Rates

[28] Historically, the Board set Union's natural gas rates following an annual cost of service hearing at which the Board established Union's revenue requirement, consisting of a forecast of Union's costs, including a return on equity, over a future year or test period. As part of the rate-setting process, typically the Board established various deferral accounts to allow it to defer consideration of revenues and expenses that could not be forecast with certainty.

[29] Between 2008 and 2012, Union's natural gas rates were set through a Board-approved Incentive Regulation Mechanism – the IRM Agreement.

[30] During incentive regulation, a utility's base rates are set initially through a cost of service proceeding and then adjusted annually using a pre-approved pricing mechanism intended to encourage productivity or efficiency improvements. If a utility is able to increase revenues or reduce costs during incentive regulation, it is permitted to retain its "over-earnings" in excess of its regulated return on equity – but subject to the terms of any earnings sharing mechanism under which the utility has agreed to share its earnings with its ratepayers.

[31] I will return later to the terms of the IRM Agreement.

(4) Upstream Transportation Optimization

[32] To ensure a consistent supply of gas to its customers, Union holds a portfolio of upstream transportation contracts that provide gas transportation on a firm basis from supply basins across North America to Union's storage, transmission and distribution system in Ontario.

[33] Because it is difficult to predict with accuracy how much firm transportation capacity is required in any given year, as part of maintaining a conservative gas supply plan that will ensure a consistent supply of natural gas, a utility may, from time-to-time, have excess firm transportation capacity.

[34] Traditionally, the Board has passed through the cost of upstream transportation entirely to ratepayers through the use of deferral accounts. However, where a utility was able to generate revenue by disposing of unused transportation capacity through transactions with third parties, the Board has generally permitted the utility to retain some portion of the revenues generated from these transactions to encourage the utility to dispose of the unused capacity. The transactions themselves are generally referred to as "optimization activities" or "transactional services".

[35] Prior to the IRM Agreement, revenue earned from upstream transportation optimization activities was recorded in various deferral accounts. In the past, the Board had ordered that these accounts be cleared at least annually on the basis

that ratepayers receive 75 per cent of the revenues through a rate reduction and Union retain the remaining 25 per cent of revenues.

(5) The IRM Agreement

[36] As indicated above, for the period 2008 to 2012, Union entered into the IRM Agreement with the interveners. In January 2008, the Board approved the IRM Agreement as an acceptable incentive regulation program.

[37] The following aspects of the IRM Agreement are significant for the purposes of this appeal:

- The IRM Agreement identified so-called “Y factors”, which are costs incurred by Union that would be passed through entirely to customers during the term of the IRM Agreement. Items treated as “Y factors” in the IRM Agreement included upstream gas and transportation costs.
- The IRM Agreement eliminated four deferral accounts, which had been previously maintained. In return for closing these accounts, Union increased the optimization margin built into rates from $2.6 million to $6.9 million. Put another way, Union agreed to fund a $4.3 million annual decrease in rates and assumed the risk of earning sufficient optimization revenue to offset that decrease.

- The IRM Agreement included the ESM, which initially provided that utility earnings greater than two per cent above Union's regulated rate of return would be shared 50/50 with ratepayers.
- The IRM Agreement permitted the parties to re-open it if Union's earnings exceeded its regulated return on equity by more than three per cent.

[38] When Union's earnings for 2008 did exceed three per cent, the parties to the IRM Agreement entered into a further Settlement Agreement amending the terms of the IRM Agreement (the "Amending Agreement"). Among other things, the Amending Agreement provided that earnings over three per cent of Union's regulated rate of return were to be shared 90/10 in favour of ratepayers. The Board approved this amendment by order.

(6) QRAM Proceedings

[39] As indicated above, depending on the type of deferral account, the Act requires that they be cleared at least quarterly or annually. Given the frequency with which deferral accounts must be cleared, the Board developed QRAM proceedings. They provide an abbreviated and mechanistic hearing process used to clear some, but not all, deferral accounts.

[40] In 2011, Union brought five deferral accounts forward for disposition every quarter through QRAM proceeding. Some of these accounts included gas

transportation related costs. Union did not bring the disputed $22 million in FT-RAM revenues forward for disposition in any of the 2011 QRAM proceedings.

(7) Union's April 2012 Application

[41] The application giving rise to this appeal was brought in April 2012. As indicated above, Union filed an application at that time seeking an order amending or varying the rates charged to customers as of October 2012. A key purpose of the application was to dispose of 2011 utility earnings in accordance with the ESM.

[42] In its application, Union included as utility earnings total optimization revenues for 2011 of $31.7 million, $22 million of which was attributable to FT-RAM optimization.

(8) Union's 2013 Cost of Service Proceeding

[43] On November 10, 2011, Union filed an application with the Board for an order approving or fixing its rates effective January 1, 2013. The appropriate treatment of FT-RAM revenues was an issue in that proceeding. The cost of service decision is relevant because the Board incorporated the evidentiary record from the 2013 cost of service proceeding as part of the record on the preliminary issue.

C. DECISIONS BELOW

(1) The Board's decision on the Preliminary Issue

[44] Prior to dealing with Union's application, the Board determined that it would address Union's treatment of upstream transportation optimization revenues in 2011 as a preliminary issue.

[45] The Board described the preliminary issue as follows: "Has Union treated the upstream transportation optimization revenues appropriately in 2011 in the context of Union's existing IRM framework?"

[46] In its decision on the preliminary issue, the Board accepted the argument of several interveners that TCPL's FT-RAM program allowed Union to create revenue opportunities by planning to replace higher cost firm upstream transportation services paid for by ratepayers with lower cost upstream transportation arrangements:

> The Board agrees with the submissions of parties that *the utilization of TCPL's FT-RAM program by Union allows Union to manage its upstream transportation arrangements on a planned basis* by leaving pipe empty and flowing gas on a different and cheaper path. The Board finds that *the effect of this activity is that higher upstream transportation costs that are paid for by Union's customers, have been substituted with lower cost upstream transportation arrangements*. [Emphasis added.]

[47] As noted by the Divisional Court, the Board used even stronger language in its companion decision on the related 2012 cost of service proceeding in describing Union's actions. For example, the Board said:

> The Board finds that the record in this proceeding is clear that firm assets are being made available for transactional services on a planned basis, with releases occurring prior to the commencement of the heating season and with capacity being assigned for up to a full year. …
>
> … the record in this proceeding suggests that Union's optimization activities have, in their own right, become a driver of the gas supply plan and are no longer solely a consequence of it.
>
> *The Board finds that Union's ability to "manufacture" optimization opportunities undermines the credibility of Union's gas supply planning process, the planning methodology, and the resulting gas supply plan.*
>
> As submitted by various parties to this proceeding and Board staff, *Union has had an incentive to contract excessive upstream gas transportation services to the detriment of the ratepayer. Union has not filed convincing evidence that the amount and type of upstream gas transportation contracts procured on behalf of ratepayers reflects the objective application of its gas supply planning principles.* [Emphasis added.]

[48] In the light of its finding that Union had acted on a planned basis, the Board concluded that treating FT-RAM revenues as utility earnings was "inconsistent" with the IRM Agreement – and contrary to the regulatory principle inherent in it – that the cost of upstream transportation is a pass-through item from which Union is not entitled to profit:

> The Board finds that Union has used TCPL's FT-RAM program to create a profit from the upstream transportation portfolio and has treated this profit as utility earnings, subject only to the provisions of the earnings sharing mechanism.
>
> *The Board finds that this treatment is inconsistent with the Settlement Agreement on the IRM Framework and contrary to long standing regulatory principle inherent in the IRM Framework that the cost of gas and upstream transportation are to be treated as pass-through items, and therefore that Union cannot profit from the procurement of gas supply for its customers*. [Emphasis added.]

[49] Instead, the Board determined that the monies generated from FT-RAM activities should be treated as gas supply costs savings:

> As such, the Board finds that Union's upstream transportation FT-RAM optimization revenues are gas cost reductions, and are properly considered Y factor items in accordance with Union's IRM Framework.

[50] However, although gas supply cost reductions would normally be passed through completely to ratepayers, the Board noted that "absent an incentive, [Union] may not have undertaken these [optimization] activities."

[51] Accordingly, the Board directed that ratepayers would be entitled to 90 per cent of the $22 million net revenue amount related to Union's 2011 FT-RAM activities in the form of an offset to gas supply costs and that Union would be entitled to receive a 10 per cent incentive for having generated the net revenues.

[52] In the course of its reasons, the Board rejected Union's arguments that reclassifying the FT-RAM revenues would undo the IRM Agreement and amount to retroactive ratemaking.

[53] The Board noted that it was reclassifying revenues based on evidence filed in Union's 2013 cost of service proceeding, which the Board incorporated by reference. The Board stated that the reclassification of revenues "[was] consistent with the IRM Framework".

[54] Moreover, the Board found that it had "an ongoing responsibility to determine whether activities undertaken during the IRM term [were] being characterized in accordance with the IRM Framework and have been characterized in a manner which results in just and reasonable rates."

[55] Accordingly, "the annual disposition of deferral accounts, earnings sharing, and other accounts that are part of Union's IRM Framework is not merely a mechanical exercise." Instead, "it is a process that is informed by evidence relating to the balances in those accounts and whether those balances reflect the appropriate application of the IRM Framework and the regulatory principles inherent in it."

[56] The Board also rejected Union's arguments that its FT-RAM activities were no different than optimization activities or transactional services in which Union had engaged in the past and that treating its FT-RAM activities as gas supply

cost reductions would be inconsistent with the descriptions and historical use of deferral accounts.

[57] The Board found that evidence in prior proceedings led to the conclusion that upstream optimization opportunities were generally only available on an *unplanned* basis. Further, Union had not pointed to any evidence filed prior to the concurrent cost of service proceeding that fully explained how the FT-RAM revenues were being generated.

[58] In this regard, the Board noted that an "information asymmetry … exists" between Union and its ratepayers and that Union had an obligation to make "a much higher level of disclosure than was produced in prior proceedings" concerning "departures or potential departures … from regulatory principle inherent in the IRM Framework".

[59] Despite its findings concerning the 2011 FT-RAM revenues, the Board rejected submissions from some of the interveners that it should address FT-RAM revenues earned prior to 2011.

[60] The Board directed Union to advise it of the gas supply related deferral account(s) in which the reduction to ratepayers would be recorded and to file a draft accounting order for the account(s).

[61] The Board subsequently issued a decision and rate order on February 28, 2013, under which the revenues from the 2011 FT-RAM optimization activities were to be recorded in a newly created deferral account.

(2) The Divisional Court's Decision

[62] Union appealed the Board's decision on the preliminary issue to the Divisional Court. Before the Divisional Court, Union argued that all 2011 gas supply related costs had been dealt with through final orders in 2011 QRAM proceedings. Accordingly, by reclassifying the utility revenues as gas supply cost reductions to be passed through to ratepayers, the Board varied what were final rate orders and engaged in impermissible retroactive ratemaking.

[63] The majority dismissed the appeal, holding that the Board's findings were clear that the disputed $22 million had not been dealt with as part of the 2011 QRAM proceedings and that Union had not met its disclosure obligations concerning the FT-RAM revenue. Because the "true scope and nature of the FT-RAM program" was only revealed during the 2012 rate hearing, that revenue could only be properly classified following the 2012 hearing. It followed that the $22 million was "encumbered" because "Union, in accordance with the statutory framework and Board policy, was bringing forward its 2011 accounts for review and approval."

[64] During the course of their reasons, the majority stated, “the provisions of section 36 of the Act are liberal in construction and do not in any manner constrain the Board from making orders respecting matters which arose in a previous year but had not been specifically dealt with as a discrete item in the ratesetting process”.

[65] In the dissenting judge’s view, the elimination of the deferral accounts when the IRM Agreement was entered into led to the conclusion “that the intended Y factor under the [IRM Agreement] was gross transportation costs”.

[66] In other words, because the upstream transportation optimization deferral accounts were eliminated, the Y factor described as upstream transportation costs in the IRM Agreement referred to the costs associated with Union’s firm transportation contracts “without regard for any netting or pass-through of profits or losses on the sale of any such contracts.”

[67] Accordingly, under the terms of the IRM Agreement, the FT-RAM revenues were to be treated as utility revenues subject to the ESM because there was “no other account or provision that would mandate different treatment” for them.

[68] The dissenting judge also rejected the Board’s conclusion that a meaningful distinction could be made under the terms of IRM Agreement between FT-RAM revenues and other transactional services revenues. In his view, the Board’s conclusion that a distinction existed between planned and

unplanned upstream transportation optimization activities was not justified. He concluded, "[T]he concept of 'transactional services revenues' does not, by itself, provide a basis for the re-classification of FT-RAM related revenues as gas supply costs."

[69] Having concluded that the Y factor described in the IRM Agreement referred to gross transportation costs – and therefore that FT-RAM revenues were subject to the ESM – the dissenting judge turned to the question of the Board's authority to reclassify such revenues as gas supply cost reductions. He rejected the Board's submission on appeal that the amounts brought forward by Union were "encumbered" and questioned how, in the absence of an applicable deferral account, that condition could arise.

[70] The dissenting judge concluded that neither the IRM Agreement nor the Act authorized the Board to reclassify Union's FT-RAM revenues. Rather, the Board's reclassification of Union's 2011 FT-RAM related earnings for the purposes of the ESM constituted retroactive ratemaking, and was, "by definition, unreasonable".

D. ANALYSIS

(1) Standard of Review

[71] Under s. 33(2) of the Act, an appeal lies to the Divisional Court from an order of the Board "only upon a question of law or jurisdiction".

[72] The parties agree that decisions of the Board are reviewable on appeal to the Divisional Court on a standard of reasonableness. I agree. (See, for example, *Power Workers'*).

(2) Discussion

[73] Union submits that the Board's decision to reclassify the FT-RAM revenues as gas supply cost reductions is unreasonable because it is an unauthorized departure from the terms of the IRM Agreement, which the Board had approved as the mechanism for setting just and reasonable rates during the incentive regulation period, and because it constitutes impermissible retroactive ratemaking.

[74] Union points out that, under the terms of the IRM Agreement, it reduced its revenue requirement in exchange for the elimination of the upstream transportation optimization deferral accounts. Union contends that its FT-RAM optimization activities were no different than other optimization activities in which it had previously engaged and that it is undisputed that, absent the IRM Agreement, such revenues would have fallen within the one of the eliminated upstream transportation optimization deferral accounts. By reclassifying FT-RAM revenues as gas supply cost reductions, the Board effectively unwound the IRM Agreement. Moreover, the reclassification is inconsistent with the Board's past treatment of such revenues.

[75] In any event, all permissible 2011 rate adjustments based on gas supply cost reductions had already been made through final orders in the QRAM proceedings. In the absence of a deferral account that segregated specified amounts for future disposition, reclassifying the FT-RAM revenues from utility earnings to gas supply cost reductions was nothing more than an impermissible attempt to adjust rates that had been previously set based on unanticipated circumstances – namely, the unanticipated amount of revenue Union was able to generate by using the FT-RAM program. By definition, the Board's decision constitutes impermissible retroactive ratemaking.

[76] I would not accept these submissions.

[77] As a starting point, contrary to Union's position, the Board made an explicit finding that monies generated by Union's 2011 FT-RAM activities would not have fallen into one of the deferral accounts eliminated under the IRM Agreement. In the Board's view, this was because Union was using the program to create optimization opportunities on a planned basis, whereas the deferral accounts recorded optimization activities carried out on an unplanned basis:

> The Board notes that *Union has classified the revenues generated from its upstream transportation FT-RAM optimization activities as transactional service revenues because it believes that these activities are no different than its traditional transactional service activities.* However, *the Board finds that a review of the evidence* filed by Union in previous proceedings to answer the

> question: "what are transactional services" *does not lead to this conclusion*.
>
> …
>
> The Board finds that *Union's evidence* in the RP-2003-0063 / EB-2003-0087 proceeding, when taken as whole, *does not support the conclusion that the planned optimization of gas supply related assets would be considered a transactional service. The evidence* in the above noted proceeding *explicitly speaks to the fact that with a balanced gas supply portfolio there will be few, if any, firm assets available to support transactional services on a future planned basis. In the Board's view, this statement speaks to the fact that the portion of utility gas supply assets that is available to support transactional service activities is only the portion of those assets that is temporarily surplus to the gas supply plan as a result of factors beyond Union's control. Therefore, a clear distinction can be made between Union's transactional services (including exchanges) and Union's FT-RAM related activities*. [Emphasis added.]

[78] In my view, the Board's findings that monies generated by Union's 2011 FT-RAM activities were generated on a planned basis, and were thus distinguishable from upstream transportation optimization revenues that would have fallen within the eliminated deferral accounts, are findings of fact that were not subject to review on appeal to the Divisional Court.

[79] In the result, rather than being a departure from the IRM Agreement that had the effect of unwinding the IRM Agreement, the Board's decision was nothing more than a review of the nature of the revenues brought forward for sharing under the ESM and a determination that some of such revenues did not

qualify for that treatment. Accordingly, in my view, the Board's decision cannot be seen as unreasonable on the basis that it was a departure from the IRM Agreement. Nor was its conclusion that the FT-RAM revenues did not qualify for sharing under the ESM unreasonable.

[80] Moreover, I am not convinced that the fact that the FT-RAM revenues were not segregated in a special deferral account relating specifically to gas supply cost reductions means that the Board engaged in impermissible retroactive ratemaking by reclassifying them as gas supply cost reductions. Rather, I conclude that the FT-RAM revenues brought forward by Union for disposition as part of the ESM proceeding were effectively "encumbered" and subject to further disposition by the Board.

[81] This issue requires a discussion of the principle against retroactive ratemaking.

[82] It is well established that an economic regulatory tribunal, such as the Board, operating under a positive approval scheme of ratemaking must exercise its rate-making authority on a prospective basis. Generally speaking, absent express statutory authorization, such a regulator may not exercise its rate-making authority retroactively or retrospectively.

[83] As noted by the Divisional Court majority, the classic explanation for the general presumption against the retroactive operation of statutes is set out in *Young v. Adams*, [1898] A.C. 469, at p. 476:

> [I]t manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

[84] In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, ("*Bell Canada 1989*"), at p. 1749, Gonthier J. writing for the court, characterized retroactive ratemaking as ratemaking the purpose of which "is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive."

[85] At p. 1759 of the same case, Gonthier J. explained that "the power to review its own previous final decision on the fairness and reasonableness of rates would threaten the stability of the regulated entity's financial situation."

[86] From the ratepayers' perspective, retroactive ratemaking may create unfairness because it "redistributes the cost of utility service by asking today's customers to pay for the expenses incurred by yesterday's customers": *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323, at para. 51.

[87] Nonetheless, courts have recognized qualifications on the principle against retroactive ratemaking.

[88] In *Bell Canada 1989*, at pp. 1752-1761, the Supreme Court concluded that the power to make interim orders necessarily implies the power to modify, by final order, the rates created under an interim order.

[89] In *Bell Canada v. Bell Alliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, ("*Bell Alliant*"), the Supreme Court noted, at para. 54, that deferral accounts are "accepted regulatory tools" that "'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year'".

[90] Although *Bell Alliant* involved the disposition of funds in a deferral account, at paras. 61 and 63, Abella J. also used the term "encumbered" to explain why the disposition of funds in a deferral account for one-time credits to ratepayers did not constitute impermissible retroactive ratemaking. A key feature of her reasoning was that it was known from the beginning that funds accumulated in the deferral accounts at issue were subject to further disposition by the regulator in the form of credits to ratepayers. She said:

> [61] In my view, because this case concerns encumbered revenues in deferral accounts … we are not dealing with the variation of final rates. As Sharlow J.A. pointed out, [the principle from] *Bell Canada 1989* [that retroactive or retrospective ratesetting is impermissible] is inapplicable because *it was known from the outset in the case before us that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction*.

…

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

[91] More recently in *Atco Gas,* the Alberta Court of Appeal explained that "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments" in a proper case: at para. 62. Moreover, "[s]imply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision": at para. 56. Rather, "[t]he critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge [that the rates were subject to change]": at para. 56.

[92] In that case, the regulator directed Atco to remove certain surplus assets from its rate base and revenue requirement, and backdated the effective date of the removal to an earlier date. The earlier date was the day after the Alberta

Court of Appeal issued a decision indicating that Atco did not require the regulator's consent to remove the asset from its rate base. Removal of the assets from the rate base and revenue requirement caused a decrease in rates, and since the regulator backdated the effective date of the removal, rates were decreased after the fact.

[93] On appeal to the Alberta Court of Appeal, Atco argued that the regulator could only change the rates by using an interim order or deferral account. The Alberta Court of Appeal rejected that argument. The court found, at para. 53, that "the utility must also be taken to know that the rates will be subject to change as a result of the non-inclusion of those assets in the rate base."

[94] In this case, Union does not dispute that, under the terms of the IRM Agreement, following its year-end, it was obliged to bring forward for the Board's review and approval amounts it classified as utility earnings that were subject to sharing under the ESM. Union also knew, from the outset of the IRM Agreement, that the Board's ESM determination would impact rates. The ESM determination under the IRM Agreement was thus inherently retrospective – and Union always knew that.

[95] Further, on the Board's findings, the manner in which Union generated its 2011 FT-RAM revenues and its classification of those revenues as utility earnings was inconsistent with the IRM Agreement and violated the regulatory

principle inherent in the IRM Agreement that the cost of upstream transportation is a pass-through item and that a utility "cannot profit from the procurement of gas supply for its customers."

[96] Although Union argued that its 2011 FT-RAM activities were no different than its previous upstream optimization activities, the Board made a specific finding that "a clear distinction can be made between Union's [unplanned] transactional services … and Union's [planned] FT-RAM activities."

[97] Significantly, prior to the 2012 hearings, the fact that the 2011 FT-RAM revenues were generated on a planned basis – and thus in a fashion inconsistent with regulatory principle and the IRM Agreement – was uniquely within Union's knowledge.

[98] In this regard, the Board found that Union had an obligation to "be mindful of the information asymmetry that exists between it and [its] ratepayers" and "to disclose departures or potential departures that it intends to make from regulatory principle inherent in the IRM Framework."

[99] In circumstances where Union knew that it was generating its 2011 FT-RAM revenues on a planned basis, Union must be fixed with knowledge, as of the date it generated those revenues, that the Board would be obliged to characterize them as a Y factor, or pass-through item, under the IRM Agreement.

[100] Although the Board had permitted profit-taking on optimization activities in the past, on the Board's findings, the prior optimization activities involved disposing of unplanned surpluses of firm transportation. The 2011 FT-RAM activities were qualitatively different because they involved disposing of planned surpluses of firm transportation. Prior to the 2012 hearings, Union was the only party in a position to know that – and must also be taken to have known that – its actions were inconsistent with the regulatory principle inherent in the IRM Agreement.

[101] In these circumstances, where the ESM determination was inherently retrospective, and where Union failed to disclose in advance the true nature of its intended 2011 FT-RAM activities, it was not unreasonable for the Board to treat Union's 2011 FT-RAM revenues as encumbered and therefore subject to further disposition by the Board in the form of a credit to ratepayers.

[102] Union argues that the Board never made an express finding that Union was acquiring excess firm transportation during 2011. While the Board may not have said so expressly, on a fair reading of their decision on the preliminary issue in combination with their decision on the 2012 cost of service proceeding, in my view, that message is very clear.

[103] Having regard to all the circumstances, I am not persuaded that the majority of the Divisional Court erred in characterizing the 2011 FT-RAM

revenues that Union brought forward in its 2012 application as encumbered or that the Board's decision to reclassify those revenues as gas supply cost reductions was unreasonable.

E. DISPOSITION

[104] Based on the foregoing reasons, the appeal is dismissed.

[105] Neither party requested costs and none are awarded.

Released:

"AH"
"JUN 22 2015"

"Janet Simmons J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree M. Tulloch J.A."

Appendix “A”

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

19. (2) The Board shall make any determination in a proceeding by order.

33. (1) An appeal lies to the Divisional Court from,

(a) an order of the Board …

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

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

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

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

…

(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.

(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.

Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2005-0013
EB-2005-0031

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

AND IN THE MATTER OF an Application by Great Lakes Power Limited for an order or orders approving or fixing just and reasonable rates.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair and Member

Paul Vlahos
Member

DECISION AND ORDER

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Board Findings

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

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

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

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

Establishing a single customer class is unusual, and there must be sufficient evidence to demonstrate why it is appropriate for a particular customer to have a unique rate. Although the Board had enough evidence before it to review the rate classification dispute between the two parties, this proceeding was not the forum to specifically address the Navigant study's rationale and methodology. The Board determined that it would review evidence on the issues raised by Boniferro in its intervention of GLP's application, within the context of the 2005

rate adjustment process. The generic Notice issued by the Board for the 2005 rates proceeding limited the scope of the proceeding to a rate adjustment based on changes reflecting (in GLP's case) the next interim instalment of the four year recovery of distributors' regulatory assets.

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

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

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

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

received authority from the Minister to deal with this matter. Therefore, the Board was not able to review the reasonableness of GLP's rate classification prior to this proceeding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is reasonable to expect that GLP would treat Boniferro the same as the previous owner of the site. It was the same property as Domtar's, the same distribution assets, and essentially the same business as Domtar's, served under the same meter. When Boniferro acquired certain assets from Domtar in 2003 and Boniferro replaced Domtar as the customer of GLP, Boniferro was properly assigned in our view the rate classification that applied to Domtar. The fact that the hardwood sawmill operations ceased for a period of two months does not

alter the fact that without experience as to what the changes, if any, would be to the monthly peak demand level of electricity, it would not be reasonable to expect GLP to assign Boniferro to a different classification at that time.

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

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

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

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

compliance with its rate order but rather as to what is an appropriate rate for Boniferro going forward."

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

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

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

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

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

Therefore, the Board orders that:

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

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

DATED at Toronto, February 24, 2006

Original signed by

Pamela Nowina
Vice Chair and Member

Original signed by

Paul Vlahos
Member

MINORITY REASONS

These are the minority reasons of Vice Chair Kaiser.

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

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

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

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

was based on the analysis performed by Navagant Consulting in a detailed cost allocation study.

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

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

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

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

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

than the 1,831 kW that was used for the purpose of creating a Large Customer A class in the first place.

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

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

Retroactivity

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

Second, even if the rate did not disappear, it was not meant to apply to Boniferro and should not have been applied to Boniferro. Boniferro should not have been put in that rate class; rather, it should have been put in the General Service > 50

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How is the deficiency recovered?

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

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

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

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

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

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

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

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

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

Boniferro's remedy

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

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

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

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

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

DATED at Toronto, February 24, 2006

Original signed by

Gordon Kaiser
Vice Chair and Presiding Member

Indexed as:

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.

[1979] 1 S.C.R. 684

[1979] 1 R.C.S. 684

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.

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.

** Preliminary Version **

Case Name:

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

City of Calgary, appellant/respondent on cross-appeal;
v.
ATCO Gas and Pipelines Ltd., respondent/appellant on cross-appeal, and
Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited, interveners.

[2006] S.C.J. No. 4

[2006] A.C.S. no 4

2006 SCC 4

2006 CSC 4

[2006] 1 S.C.R. 140

[2006] 1 R.C.S. 140

263 D.L.R. (4th) 193

344 N.R. 293

[2006] 5 W.W.R. 1

J.E. 2006-358

54 Alta. L.R. (4th) 1

380 A.R. 1

39 Admin. L.R. (4th) 159

145 A.C.W.S. (3d) 725

EYB 2006-100901

2006 CarswellAlta 139

File No.: 30247.

Supreme Court of Canada

Heard: May 11, 2005;
Judgment: February 9, 2006.

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

(149 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Catchwords:

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

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

Summary:

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the

sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

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

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

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

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

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price -- nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact

that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [para. 7] [paras. 54-69]

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

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

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

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

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

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By Bastarache J.

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By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29; TransAlta Utilities Corp. v. Public Utilities Board (Alta.) (1986), 68 A.R. 171; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Calgary Power Ltd. v. Copithorne, [1959] S.C.R. 24; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.,

[1993] 2 S.C.R. 316; Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co., [1958] S.C.R. 353; Union Gas Co. of Canada v. Sydenham Gas and Petroleum Co., [1957] S.C.R. 185; Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission (1987), 59 O.R. (2d) 79; Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132, 2001 SCC 37; Re Consumer's Gas Co. (1976), E.B.R.O. 341-I; Re Boston Gas Co. (1982), 49 P.U.R. 4th 1; Re Consumer's Gas Co. (1991), E.B.R.O. 465; Re Natural Resource Gas Ltd., RP-2002-0147, EB-2002-0446; Yukon Energy Corp. v. Utilities Board (1996), 74 B.C.A.C. 58, 121 W.A.C. 58; Re Arizona Public Service Co. (1988), 91 P.U.R. 4th 337, 1988 WL 391394; Re Southern California Water Co. (1992), 43 C.P.U.C. 2d 596, 1992 WL 584058; Re Southern California Gas Co. (1990), 39 C.P.U.C. 2d 166, 118 P.U.R. 4th 81, 1990 WL 488654; Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission, 485 F.2d 786 (1973); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926); Northwestern Utilities Ltd. v. City of Edmonton, [1979] 1 S.C.R. 684; New York Water Service Corp. v. Public Service Commission, 208 N.Y.S.2d 587 (1960); Re Compliance with the Energy Policy Act of 1992 (1995), 62 C.P.U.C. 2d 517; Re California Water Service Co. (1996), 66 C.P.U.C. 2d 100, 1996 WL 293205; TransAlta Utilities Corp. (1984), Alta. P.U.B. Decision No. E84116; Alberta Government Telephones (1984), Alta. P.U.B. Decision No. E84081; TransAlta Utilities Corp. (1984), Alta. P.U.B. Decision No. E84115; Re Gas Utilities Act and Public Utilities Board Act (1984), Alta. P.U.B. Decision No. E84113.

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (ad hoc)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250; 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, Decision No. 2002-037, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Counsel:

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

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

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

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

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

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

[Editor's note: A corrigendum was published by the Court April 24, 2006. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

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

BASTARACHE J.:--

1. Introduction

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

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

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

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

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying

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

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

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

1.1 *Overview of the Facts*

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

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

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

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

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

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

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

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

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

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

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

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.
>
> The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that

> the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset.

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

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

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

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

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

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

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

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta

agreed with ATCO, allowing the appeal and setting aside the Board's decision. The matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

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

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

2.2 *Standard of Review*

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

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

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

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

> **26(1)** Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.
>
> **(2)** Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
>
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

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

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

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL), (Div. Ct.), at para. 2 ; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

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

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

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

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

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the

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

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

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

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

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

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

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

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

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

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

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

> GUA
>
> **26.** ...
>
> **(2)** No owner of a gas utility designated under subsection (1) shall
>
> ...
>
> (d) without the approval of the Board,

> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them
>
> ...
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

> **15(1)** For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.
>
> ...
>
> **(3)** Without restricting subsection (1), the Board may do all or any of the following:
>
> ...
>
> (d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
>
> ...

PUBA

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

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

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

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions,

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

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

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

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

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

2.3.3 Implicit Powers: Entire Context

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

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

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

"[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

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

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

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

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

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

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

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

2.3.3.1 *Historical Background and Broader Context*

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

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

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

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

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b))
2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a)); PUBA, s. 101(2)(a));
3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));
4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and
5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility (GUA, 27(1); PUBA, s. 102(1)).

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

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

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

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and

> facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board [Emphasis added.]

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

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

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

2.3.3.2 *Rate Setting*

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

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

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

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

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

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

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

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

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

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

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

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

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

> ordered by the Board is confiscatory ...

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

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

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 US 548 (1945).

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

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

2.3.3.3 *The Power to Attach Conditions*

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

any condition to an order it makes approving such a sale. I disagree.

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

1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
4. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
5. when the legislature did not address its mind to the issue and decide against conferring the power to the Board. (See also Brown, at p. 2-16.3.)

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

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

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

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

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;
2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and
3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the

appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

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

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

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

2.4 *Other Considerations*

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

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

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

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset.

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

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation (Decision 2002-037; para. 54):

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

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

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

3. Conclusion

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

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

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

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

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

I. Analysis

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

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

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

A. *The Board's Statutory Authority*

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

on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions) (Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), para. 47).

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

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

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

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

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

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

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

B. *The Board's Decision*

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

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

(Respondent's factum, para. 98)

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

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

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

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

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

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

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

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

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

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company

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

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

C. *Standard of Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109 "Patent unreasonableness" is a highly deferential standard:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *ATCO's Arguments*

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

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

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

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

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

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

1. The Confiscation Issue

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

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

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an

amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

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

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

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

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

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

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

> whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in New York Telephone does not address that issue. [Emphasis added.]

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

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

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

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

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

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

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

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

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

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in

the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals as follows (at p. 806):

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

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

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

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S. 2d 587 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p. 864):

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

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

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

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

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

3. Land as a Non-Depreciable Asset

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

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

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

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

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

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

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

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

4. Lack of Reciprocity

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

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

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

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

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

what is fair and reasonable rests on the merits or facts of each case.

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

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

II. Conclusion

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

III. Disposition

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

* * * * *

APPENDIX

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

[Jurisdiction]

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

[Powers of the Board]

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

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

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

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

enactment;

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

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

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

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

[Appeals]

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

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

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

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

[Exclusion of prerogative writs]

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

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

[Supervision]

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

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

[Investigation of gas utility]

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

[Designated gas utilities]

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

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

(a) issue any

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

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

(b) capitalize

(i) its right to exist as a corporation,
(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or
(iii) a contract for consolidation, amalgamation or merger,

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

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

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

[Prohibited share transactions]

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

[Powers of Board]

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

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

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

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

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

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

[Rate base]

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

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

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

(b) to necessary working capital.

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

[Excess revenues or losses]

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

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

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

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

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

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

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

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

(d) the Board shall by order approve

(i) the method by which, and

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

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

[General powers of Board]

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

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

[Jurisdiction and powers]

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

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

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

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

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

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

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

[General power]

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

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

[Investigation of utilities and rates]

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

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,
(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and
(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

[Supervision by Board]

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

[Investigation of public utility]

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

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

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

[Fixing of rates]

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

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

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

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

(d) repealed;

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

[Determining rate base]

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

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

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

(b) to necessary working capital.

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

[Revenue and costs considered]

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

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

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

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

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

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

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

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

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

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

[Designated public utilities]

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

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

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

[Prohibited share transaction]

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

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

[Enactments remedial]

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

Solicitors:

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

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

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

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

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

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

* * * * *

Corrigendum, released April 24, 2006

Please note also the following change in *Atco Gas & Pipelines Ltd. v. Alberta (Energy Utilities Board)*, 2006 SCC 4, released February 9, 2006. In para. 8, line 3 of the English version, "s. 25.1(1)" should read "s. 25.1(2)".

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0119

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 Chapleau Public Utilities Corporation for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

DECISION and RATE ORDER

March 13, 2014

Chapleau Public Utilities Corporation ("Chapleau PUC") filed an application with the Ontario Energy Board (the "Board") on September 10, 2013 under section 78 of the Act, seeking approval for changes to the rates that Chapleau PUC charges for electricity distribution, effective May 1, 2014 (the "Application").

The Application met the Board's requirements as detailed in the *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (the "RRFE Report") dated October 18, 2012 and the *Filing Requirements for Electricity Distribution Rate Applications* dated July 17, 2013. Chapleau PUC selected the Price Cap Incentive Rate-Setting ("Price Cap IR") option to adjust its 2014 rates. The Price Cap IR methodology provides for a mechanistic and formulaic adjustment to distribution rates and charges in the period between cost of service applications. Chapleau PUC last appeared before the Board with a full cost of service application for the 2012 rate year in the EB-2011-0322 proceeding. In this proceeding, Chapleau PUC

also seeks approval for its request to recover amounts related to a billing error from Hydro One Networks Inc. ("Hydro One") for Low Voltage Service and adjustments to its Low Voltage Service rates.

The Board conducted a written hearing and Board staff participated in the proceeding. The Vulnerable Energy Consumers Coalition ("VECC") applied for and was granted intervenor status and cost eligibility with respect to the proposals regarding Low Voltage Service. No letters of comment were received.

While the Board has considered the entire record in this proceeding, it has made reference only to such evidence as is necessary to provide context to its findings. The following issues are addressed in this Decision and Rate Order:

- Price Cap Index Adjustment;
- Rural or Remote Electricity Rate Protection Charge;
- Revenue-to-Cost Ratio Adjustments;
- Retail Transmission Service Rates;
- Review and Disposition of Group 1 Deferral and Variance Account Balances;
- Hydro One Billing Error for Low Voltage Service; and
- Proposed Adjustments to Low Voltage Service Rates.

Price Cap Index Adjustment

The Board issued the *Report on Rate Setting Parameters and Benchmarking under the Renewed Regulatory Framework for Ontario's Electricity Distributors* (the "Price Cap IR Report") which provides the 2014 rate adjustment parameters for distribution companies selecting either the Price Cap IR or Annual IR Index option.

Distribution rates under the Price Cap IR option are adjusted by an inflation factor, less a productivity factor and a stretch factor. The inflation factor for 2014 rates is 1.7%. Based on the total cost benchmarking model developed by Pacific Economics Group Research, LLC, the Board determined that the appropriate value for the productivity factor is zero percent. The Board also determined that the stretch factor can range from 0.0% to 0.6% for distributors selecting the Price Cap IR option, assigned based on a distributor's cost evaluation ranking. In the Price Cap IR Report, the Board assigned Chapleau PUC a stretch factor of 0.45%.

As a result, the net price cap index adjustment for Chapleau PUC is 1.25% (i.e. 1.7% - (0% + 0.45%)). The price cap index adjustment applies to distribution rates (fixed and variable charges) uniformly across all customer classes. The price cap index adjustment does not apply to the components of delivery rates set out in the list below.

- Rate Riders;
- Rate Adders;
- Low Voltage Service Charges;
- Retail Transmission Service Rates;
- Wholesale Market Service Rate;
- Rural or Remote Electricity Rate Protection Charge;
- Standard Supply Service – Administrative Charge;
- Transformation and Primary Metering Allowances;
- Loss Factors;
- Specific Service Charges;
- MicroFit Charge; and
- Retail Service Charges.

Rural or Remote Electricity Rate Protection Charge

The Board issued a Decision and Rate Order (EB-2013-0396) establishing the Rural or Remote Electricity Rate Protection ("RRRP") benefit and charge for 2014. The Board determined that the RRRP charge to be paid by all rate-regulated distributors and collected by the Independent Electricity System Operator shall be increased to $0.0013 per kWh effective May 1, 2014, from the current $0.0012 per kWh. The draft Tariff of Rates and Charges flowing from this Decision and Rate Order reflects the new RRRP charge.

Revenue-to-Cost Ratio Adjustments

Revenue-to-cost ratios measure the relationship between the revenues expected from a class of customers and the level of costs allocated to that class. The Board has established target ratio ranges for electricity distributors in its report *Application of Cost Allocation for Electricity Distributors*, dated November 28, 2007 and in its updated report *Review of Electricity Distribution Cost Allocation Policy,* dated March 31, 2011. Pursuant to the Board's Decision in its 2012 cost of service application EB-2011-0322,

Chapleau PUC proposed to increase the revenue-to-cost ratio for its Sentinel Lighting and Street Lighting classes, offset by a reduction in that of the GS >50 kW class.

The table below outlines the proposed revenue-to-cost ratios.

Current and Proposed Revenue-to-Cost Ratios

Rate Class	Current 2013 Ratio	Proposed 2014 Ratio
Residential	0.97	0.97
General Service Less Than 50 kW	1.04	1.04
General Service 50 to 4,999 kW	1.23	1.22
Street Lighting	0.78	0.80
Sentinel Lighting	0.61	0.68
Unmetered Scattered Load	1.19	1.19

Board staff submitted that the proposed revenue-to-cost ratio adjustments were in accordance with the Board's decision in Chapleau PUC's 2012 cost of service proceeding.

The Board agrees that the proposed revenue-to-cost ratios are consistent with the decision arising from the 2012 cost of service proceeding and therefore approves the revenue-to-cost ratios as filed.

Retail Transmission Service Rates

Electricity distributors are charged for transmission costs at the wholesale level and then pass on these charges to their distribution customers through the Retail Transmission Service Rates ("RTSRs"). Variance accounts are used to capture differences in the rate that a distributor pays for wholesale transmission service compared to the retail rate that the distributor is authorized to charge when billing its customers (i.e. variance Accounts 1584 and 1586).

The Board issued revision 3.0 of the *Guideline G-2008-0001 - Electricity Distribution Retail Transmission Service Rates* (the "RTSR Guideline") which outlines the information that the Board requires electricity distributors to file to adjust their RTSRs for 2014. The RTSR Guideline requires electricity distributors to adjust their RTSRs based on a comparison of historical transmission costs adjusted for the new Uniform Transmission Rates ("UTR") levels and the revenues generated under existing RTSRs. Similarly, embedded distributors must adjust their RTSRs to reflect any changes to the applicable Sub-Transmission RTSRs of their host distributor(s), e.g. Hydro One Networks Inc.

Chapleau PUC is a partially embedded distributor whose host is Hydro One Networks Inc.

The Board issued its Rate Order for Hydro One Transmission (EB-2012-0031) which adjusted the UTRs effective January 1, 2014, as shown in the following table:

2014 Uniform Transmission Rates

Network Service Rate	$3.82 per kW
Connection Service Rates	
Line Connection Service Rate	$0.82 per kW
Transformation Connection Service Rate	$1.98 per kW

The Board also approved new rates for Hydro One Networks' Sub-Transmission class, including the applicable RTSRs, effective January 1, 2014 (EB-2013-0141), as shown in the following table.

2014 Sub-Transmission RTSRs

Network Service Rate	$3.23 per kW
Connection Service Rates	
Line Connection Service Rate	$0.65 per kW
Transformation Connection Service Rate	$1.62 per kW

The Board finds that these 2014 UTRs and Sub-Transmission class RTSRs are to be incorporated into the filing module.

Review and Disposition of Group 1 Deferral and Variance Account Balances

The *Report of the Board on Electricity Distributors' Deferral and Variance Account Review Initiative* provides that, during the IRM plan term, the distributor's Group 1 account balances will be reviewed and disposed if the preset disposition threshold of $0.001 per kWh (debit or credit) is exceeded. The onus is on the distributor to justify why any account balance in excess of the threshold should not be disposed.

Chapleau PUC's 2012 actual year-end total balance for Group 1 accounts including interest projected to April 30, 2014 is a credit of $108,948. This amount results in a total credit claim of $0.0041 per kWh, which exceeds the preset disposition threshold.

Low Voltage Billing Error

Chapleau PUC recorded a principal debit balance of $93,387 and interest of $1,831 in Account 1550 and proposed recovery within its 2012 Group 1 balances to reflect adjusted low voltage charges resulting from a billing error by Hydro One. Chapleau PUC received an invoice for $93,387 from Hydro One in September 2013, which adjusted the billed demand quantity (kW) from January 28, 2009 to April 3, 2013. Chapleau PUC proposed to recover the debit balance with its 2012 deferral and variance account balances to offset the credit balance of $108,948, reducing the total credit balance for disposition to $13,730. This would result in a total credit claim of $0.0005, which does not meet the preset disposition threshold.

Chapleau PUC confirmed that the $93,387 consists of two components:

- $34,296 related to transactions subsequent to December 31, 2011, where the account balance has not yet been disposed on a final basis; and
- $59,091 related to transactions prior to December 31, 2011, where the account balance was approved by the Board and disposed on a final basis in Chapleau PUC's 2013 IRM rate proceeding EB-2012-0114.

Chapleau indicated that it had an internal process for checking the accuracy of amounts payable and that it had questioned Hydro One's billed amounts on three occasions since 2009. Hydro One assured Chapleau PUC that the invoiced amounts were correct. In early 2013, Chapleau PUC again questioned the invoice received and was informed by Hydro One that there was indeed an error.

Board staff submitted that Chapleau PUC's 2011 deferral and variance account balances had been disposed of on a final basis in Chapleau PUC's 2013 IRM decision, and that the proposal to recover the adjustment of $59,091 relating to this period from Chapleau PUC's customers would result in retroactive ratemaking[1].

Board staff submitted that both the Retail Settlement Code and Hydro One's Conditions of Service addressed under-billing situations, limiting the amount of time over which a distributor must be repaid. Specifically, Board staff noted that Section 7.7.7 states the following:

> Where the distributor has under billed a customer or retailer, the maximum period of under billing for which the distributor is entitled to be paid is 2 years. Where the distributor has over billed a customer or retailer, the maximum period of over billing for which the customer or retailer is entitled to be repaid is 2 years.

Board staff also noted in its submission that Hydro One's Conditions of Service provide for recovery of billing errors, as follows:

> Where a billing error, from any cause, has resulted in a Customer or Retailer being under-billed, and where Measurement Canada has not become involved in the dispute, the Customer or Retailer shall pay to Hydro One the amount that was not previously billed. In the case of an individual Customer who is not responsible for the error, the allowable period of time for which the Customer may be charged is two (2) years for residential customers, including seasonal and farm residence, and all other customers[2].

Board staff submitted that Chapleau PUC may choose to consider the Retail Settlement Code and Hydro One's Conditions of Service as a basis by which to pursue further discussions with Hydro One.

VECC submitted that, based on past Board decisions, it would be inappropriate for Chapleau PUC to include an out-of-period adjustment and that the Board should not approve Chapleau PUC's request.

Chapleau PUC included Hydro One's comments in its reply submission. Therein, Hydro

[1] EB-2013-0022, Decision and Order, Veridian Motion to Review, April 25 2013, p. 10

[2] Hydro One Networks Inc. Conditions of Service, May 21, 2013, s. G. Billing Errors, p. 71c

One indicated that its settlement practices with its embedded distributors are consistent with the approach used by the Independent Electricity System Operator with market participants, which incorporates the correction of billing errors without regard to any time limitation. Failure to mirror this approach would result in cross-subsidization and improper allocation of costs among the parties involved.

Chapleau PUC submitted that the disputed amount of $59,091 represents 7.3% of its distribution revenue, and that failure to recover this amount from customers would create a serious cash flow risk. Chapleau PUC submitted that it should not be penalized for Hydro One's error. Chapleau PUC requested that the Board allow it to recover the full amount of $93,387, or the Board should not allow Hydro One to pass on its billing errors, if a distributor is unable to recover those costs from its customers.

The Board cannot approve the proposal to recover the adjustment of $59,091 relating to Chapleau PUC's 2011 deferral and variance account balances. The 2011 account balances were disposed on a final basis in Chapleau PUC's 2013 IRM decision. To subsequently adjust the balances would result in retroactive ratemaking. The courts have made it very clear that retroactive rate-making, the adjustment to rates after a final rate order has been issued, is not allowed. Rather, the principles of certainty and finality are a necessary component of effective rate regulation.

The Board approves the disposition of a debit amount of $34,296 as the account balance has not yet been disposed on a final basis.

Chapleau did not ask for disposition of its Group 1 balances in this proceeding. However, with the exclusion of the $59,091 the disposition threshold is met. In making this decision, the Board is mindful of the efforts made by Chapleau PUC to rectify the Hydro One billing error beginning in 2009. It is through no fault on the part of Chapleau PUC that it is faced with a significant adjustment to its past low voltage payments that cannot be recovered by way of a rate application to the Board.

The Board notes that both the Retail Settlement Code and Hydro One's Conditions of Service in effect during the period of overbilling, and when the invoice was dated, appear to provide some remedy for this situation; however, the onus is on Chapleau to pursue these options. The Board's opinion is that neither Chapleau PUC nor its current customers should pay for costs that go back as far as 2009, given it was solely the result of Hydro One's billing error.

The Board approves the disposition of a credit balance of $73,980 as of December 31, 2012, including interest as of April 30, 2014 for Group 1 accounts. This credit balance includes the additional debit amount of $34,295 in Account 1550 as discussed above. Under normal circumstances, the default period for the disposition of deferral and variance account balances is one year. In this case, in order to mitigate the impact on Chapleau's cash flow, these balances are to be disposed over a two-year period from May 1, 2014 to April 30, 2016.

The table below identifies the principal and interest amounts approved for disposition for Group 1 accounts.

Group 1 Deferral and Variance Account Balances

Account Name	Account Number	Principal Balance A	Interest Balance B	Total Claim C = A + B
LV Variance Account	1550	$19,399	($41)	$19,358
RSVA - Wholesale Market Service Charge	1580	($36,071)	($1,512)	($37,583)
RSVA - Retail Transmission Network Charge	1584	$7,449	$507	$7,956
RSVA - Retail Transmission Connection Charge	1586	$635	$413	$1,048
RSVA - Power	1588	($6,511)	($2,766)	($9,277)
RSVA - Global Adjustment	1589	$34,451	$950	$35,401
Recovery of Regulatory Asset Balances	1590	0	0	0
Disposition and Recovery of Regulatory Balances (2008)	1595	0	$135	$135
Disposition and Recovery of Regulatory Balances (2010)	1595	0	($3)	($3)
Disposition and Recovery of Regulatory Balances (2011)	1595	($88,552)	($2,462)	($91,014)
Total Group 1 Excluding Global Adjustment – Account 1589		**($103,651)**	**($5,729)**	**($109,381)**
Total Group 1		**(69,200)**	**($4,779)**	**($73,980)**

The balance of each Group 1 account approved for disposition shall be transferred to the applicable principal and interest carrying charge sub-accounts of Account 1595 pursuant to the requirements specified in Article 220, Account Descriptions, of the *Accounting Procedures Handbook for Electricity Distributors*. The date of the transfer must be the same as the effective date for the associated rates, generally, the start of

the rate year. Chapleau PUC should ensure these adjustments are included in the reporting period ending June 30, 2014 (Quarter 2).

Low Voltage Rates

Chapleau PUC withdrew its request to change its low voltage rates, and stated that it would address these changes in its next cost of service application.

Rate Model

With this Decision and Rate Order, the Board is providing Chapleau PUC with a rate model, applicable supporting models and a draft Tariff of Rates and Charges (Appendix A). The Board also reviewed the entries in the rate model to ensure that they were in accordance with the 2013 Board-approved Tariff of Rates and Charges and the rate model was adjusted, where applicable, to correct any discrepancies.

THE BOARD ORDERS THAT:

1. Chapleau PUC's new distribution rates shall be effective May 1, 2014.

2. Chapleau PUC shall review the draft Tariff of Rates and Charges set out in Appendix A and shall file with the Board, as applicable, a written confirmation of its completeness and accuracy, or provide a detailed explanation of any inaccuracies or missing information, within **7 days** of the date of issuance of this Decision and Rate Order.

3. If the Board does not receive a submission from Chapleau PUC to the effect that inaccuracies were found or information was missing pursuant to item 2 of this Decision and Rate Order, the draft Tariff of Rates and Charges set out in Appendix A of this Decision and Rate Order will become final. Chapleau PUC shall notify its customers of the rate changes no later than the delivery of the first bill reflecting the new rates.

4. If the Board receives a submission from Chapleau PUC to the effect that inaccuracies were found or information was missing pursuant to item 2 of this Decision and Rate Order, the Board will consider the submission of Chapleau PUC prior to issuing a final Tariff of Rates and Charges.

5. Chapleau PUC shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit its cost claims no later than **7 days** from the date of issuance of the final Rate Order.

2. Chapleau PUC shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of the final Rate Order.

3. VECC shall file with the Board and forward to Chapleau PUC any responses to any objections for cost claims within **28 days** from the date of issuance of the final Rate Order.

4. Chapleau PUC shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2013-0119,** be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/ and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax

number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available parties may email their document to BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 2 paper copies.

DATED at Toronto, March 13, 2014
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0022

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 Veridian Connections Inc. for an order or orders approving or fixing just and reasonable distribution rates related to Smart Meter deployment, to be effective November 1, 2012.

AND IN THE MATTER OF a Motion to Review and Vary by Veridian Connections Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review by the Board's Decision and Order in proceeding EB-2012-0247.

BEFORE: Marika Hare
Presiding Member

DECISION AND ORDER ON MOTION TO REVIEW April 25, 2013

INTRODUCTION

On January 23, 2013, Veridian Connections Inc. ("Veridian") filed with the Ontario Energy Board (the "Board") a motion for request to review and vary (the "Motion") the Board's Decision and Order dated October 25, 2012 (the "Decision") in respect of Veridian's smart meter application (EB-2012-0247) (the "Final Disposition Proceeding"). The Board assigned the Motion file number EB-2013-0022.

The Motion sought to extend the time for filing the Motion with the Board and vary the

Board's EB-2012-0247 Decision to permit Veridian to recover an additional $478,224 in revenue requirement related to 2009 amortization expenses associated with smart meter capital expenditures made in 2006, 2007, and 2008. The recovery is to be made through amendment of the existing Smart Meter Disposition Riders ("SMDRs") commencing on May 1, 2013 and continuing until April 30, 2014.

The Board issued its Notice of Motion to Vary and Procedural Order No. 1 on March 6, 2013. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition ("VECC"), as it was the only intervenor in Veridian's smart meter rate proceeding under EB-2012-0247. The Board also determined that the most expeditious way of dealing with the Motion was to consider concurrently the threshold question of whether the matter should be reviewed, as contemplated in the Board's *Rules of Practice and Procedure* (the "Rules"), and the merits of the Motion.

The Board established a timetable for Veridian to file any additional material in support of the Motion, followed by written submissions by VECC and Board staff, and a reply submission by Veridian.

Veridian submitted additional material in support of its Motion on March 13, 2013. Board staff filed its submission on March 22, 2013. Veridian filed its reply submission on April 3, 2013. VECC did not file any submission.

For the reasons that follow the Board grants the extension of time for filing the Motion and finds that the threshold test has been met. The Board has reviewed the Motion materials and the Decision, and for the reasons set out below has determined that it will not grant the relief requested.

BACKGROUND

On October 2, 2009 Veridian applied to the Board for approval of 2010 rates on a Cost of Service basis (EB-2009-0140) (the "Interim Disposition Proceeding"), within which Veridian applied for interim disposition of smart meter-related revenue requirement amounts. As part of the Interim Disposition Proceeding, the capital expenditures associated with smart meter investments up to December 31, 2008 were included in Veridian's rate base effective January 1, 2010. Accordingly, going forward from January 1, 2010, the revenue requirement associated with smart meter capital expenditures up to December 31, 2008 was included in base rates.

Even after taking into account the interim clearance of smart meter amounts as approved by the Board in the Interim Disposition Proceeding, the 2009 amortization amounts related to smart meter capital investments made prior to January 1, 2009 were neither: a) included in base rates; nor b) recovered as part of the interim clearance.[1]

The Smart Meter Model (the "Model") issued by the Board along with Guideline G-2011-0001: Smart Meter Meter Funding and Cost Recovery – Final Disposition, issued December 15, 2011, and used by Veridian in its smart meter application EB-2012-0247 did not specifically address the fact that the 2009 amortization related to the pre-2009 smart meter capital expenditures remained outstanding and unrecovered either through an earlier rate rider or through approved distribution rates.

On May 31, 2012, Veridian applied for final disposition of smart meter-related amounts under Board file number EB-2012-0247. As part of that proceeding Veridian used the Board's Model to calculate the revenue requirement to be cleared.

The application sought approval for the final disposition of Account 1555 and 1556 related to smart meter expenditures. Veridian requested SMDRs and Smart Meter Incremental Revenue Requirement Rate Riders ("SMIRRs") effective November 1, 2012.

On October 25, 2012, the Board issued its Decision in the EB-2012-0247 proceeding and found that Veridian's documented costs, as revised in responses to interrogatories, related to smart meter procurement, installation and operation were reasonable. The Board approved the recovery of the costs for smart meter deployment and operation as of December 31, 2011. The Board directed Veridian to establish the SMDRs based on an 18-month recovery period to April 30, 2014, and to accommodate within the SMDR the applicable SMIRR amount related to the period from May 1, 2012 to October 31, 2012.

Veridian filed its Draft Rate Order and provided the following summary table outlining the SMDR and SMIRR rate riders as originally filed, as revised as per interrogatories and as recalculated pursant to the Board's Decision.

[1] Motion for Request for Review and Variance filed by Veridian, January 23, 2013, paragraphs 5 & 6

Class	SMDR ($/month for 18 months)			SMIRR ($/month until new rates set under rebasing)		
	As Filed	Update-Board Staff IR#13	Update - Board Decision	As Filed	Update-Board Staff IR#13	Update - Board Decision
Residential	$0.97	$0.83	$0.55	$0.98	No Change	$ 1.25
GS < 50 kW	$2.45	$4.15	$3.45	$2.46	No Change	$ 3.17

Board staff filed comments on the draft Rate Order on November 5, 2012 and agreed that Veridian had appropriately reflected the Board's findings in its draft Rate Order and proposed Tariff of Rates and Charges.

The Board issued Veridian's final Rate Order on November 15, 2012.

Veridian is now asking the Board through its Motion to allow for recovery of smart meter capital expenditures in the amount of $478,224, inclusive of Payment In Lieu of Taxes ("PILs") impacts, through the amendment of the existing SMDR. The amended SMDR is proposed to commence on May 1, 2013 and to continue until April 30, 2014.

Issues Before the Board

1. Extension of time

As noted by Veridian in its Motion materials, Veridian discovered the gap in recovery of smart meter expenses on January 9, 2013 during preparation of its regular year-end accounting working papers. It was during this process that Veridian realized that, with respect to the costs incurred by Veridian in relation to smart meter implementation it had not yet recovered the 2009 amortization expense related to pre-2009 smart meter capital expenditures, totalling $528,859 (before accounting for PILs impacts) and recorded in Account 1556.

As a result of the timing of Veridian's discovery of this amount for which it had not sought recovery it was not in a position to file its Motion within the prescribed 20 days specified in the Rules, which expired on or about November 14, 2012. Accordingly, Veridian asks that the Board use its discretion to extend the time period for filing a request for review.

The Board notes that parties are expected to respect the Board's deadlines and comply with the Rules, however the Board understands that the error was not identified by Veridian until after the 20 day period had expired and Veridain filed its motion immediately after becoming aware of the error. The Board therefore will use its discretion to hear the Motion, despite the timelines being exceeded.

2. Motion to Review and Vary

Veridian's Motion seeks to vary the Decision so that Veridian may recover an additional $478,224 in revenue requirement related to 2009 amortization expense of $528,859 associated with smart meter capital expenditures made in 2006, 2007, and 2008, less a credit to Grossed-up Taxes/PILs of $50,635.

Veridian requests revisions to its SMDR as outlined below.

Rate Class	Currently Approved Rate Rider	Requested Revision to Rate Rider effective May 1, 2013
Residential	$0.55	$0.83
Residential – Urban Year Round	$0.55	$0.83
Residential – Suburban Year Round	$0.55	$0.83
General Service Less Than 50 kW	$3.45	$4.59

Veridian bases its Motion on the following grounds:

1. There is an identifiable error in the Decision and that there are inconsistent findings in the Decision. The error is material and relevant to the outcome of the Decision. The omission of the 2009 amortization is a calculation error that should be remedied through a variance of the original Decision.

2. Veridian also notes that as part of the EB-2012-0247 proceeding, Veridian completed the Board's Model to calculate the revenue requirement to be recovered. However, the Model, in its design, did not anticipate any gap (i.e., unrecovered amounts from a reviewed and approved interim recovery, and final disposition of smart meter-related amounts in relation to amortization expense of installed smart meters.

The Threshold Test

The application of the threshold test was considered by the Board in its Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision"). The Board, in the NGEIR Review Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling, or suspending the decision. Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an “identifiable error” in the decision for which review is sought and that “the review is not an opportunity for a party to reargue the case”.

In addition to the test set out in the NGEIR Review Decision, Rule 45.01of the Board’s Rules provides that, with respect to a motion for review the Board may determine, with or without a hearing, a threshold question whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01(a) sets out some of the grounds upon which a motion may be raised with the Board:

> Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> i. error in fact;
>
> ii. change in circumstances;
>
> iii. new facts that have arisen;
>
> iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The Board also notes that in the NGEIR Review Decision it was established that the Board has the necessary discretion to supplement the above list of grounds upon which a motion to review and vary may be raised in an appropriate case.[2]

[2] EB-2006-0322/EB-2006-0338/EB-2006-0340, Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, page 15

The Board received submissions from Veridian and Board staff. Board staff submitted that the threshold test has not been met arguing that none of the grounds listed in Rule 44.01 had been established. Veridian argued that the threshold had been met and that the Motion had merit.

The Board discusses each of the grounds set out in Rule 44.01 below with respect to the facts as presented in this Motion.

i. Error in fact

Veridian argued that a combination of what it would characterize as unusual circumstances relating to the multi-proceeding approach to the recovery of its smart meter-related revenue requirement led to an error in the calculation of the rider that was intended to fully compensate Veridian for costs incurred in the deployment and operation of smart meters. Veridian also submitted that the error related to the failure of the SMDR to compensate Veridian for 2009 Amortization Expenses related to 2006, 2007, and 2008 smart meter Capital Expenses in the amount of $478,223.79.

Veridian stated that the error it is seeking to have corrected is not related to the omission of evidence that, had it been before the Board prior to the Decision may or may not have influenced the exercise of the Board's discretion or judgment with respect to the prudence of Veridian's smart meter-related expenditures. Veridian noted that it is asking the Board to correct a clear error in the calculation of the recovery that necessarily follows from the Board's analysis of the prudence of Veridian's spending.

Board staff submitted that in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. Board staff submitted that the Board's Decision is consistent with the evidence provided by Veridian.

Veridian argued in its reply submission that Board staff has admitted that there is an error in the Decision when it accepted that the $478,223.79 amount should have been factored into the SMDR calculation as it is an outcome of the smart meter capital expenditures approved by the Board.

The Board finds that Veridian has failed to demonstrate that the findings are contrary to

the evidence that was before the Panel, that the Panel failed to address a material issue or that the Panel made inconsistent findings. The Board finds that the Decision was correct based on the evidence presented by Veridian in its pre-filed materials and during the proceeding.

ii. Change in circumstances

The Board finds no change in circumstances and notes that neither Veridian nor Board staff made any submissions with respect to this aspect of the threshold test.

iii. New facts that have arisen

Both Board staff and Veridian acknowledged that the review of accounting year-end working papers did result in the discovery of the amount of $478,224 now claimed by Veridian. The amortization expenses claimed in this Motion are for the previously installed and approved smart meters for the discrete time period of 2009. The Board notes that these amounts were at the time both unaudited and outside of the test year for 2010 rates.

In its submission Board staff noted that Veridian is asking the Board to address a calculation error that was made when implementing the Board's approval of Veridian's smart meter capital expenditures through an SMDR.

Board staff acknowledged that the Model did not explicitly contemplate Veridian's circumstances, but submitted that the use of the Model does not preclude the need for other calculations to accommodate the special circumstances of any particular distributor or its application. Further, Board staff submitted that Veridian should have been aware that there was an amount missing prior to filing its application, as the expenses documented in the Model would have been diferent than the principal balances in Account 1556 for OM&A, and specifically, depreciation. Veridian was in the best position to identify the missing depreciation expense during that proceeding and it should not be incumbent on the Board, Board staff, or VECC as the intervenor to recognize this oversight.

Veridian stated that it only discovered the gap in recovery of smart meter expenses on January 9, 2013 during preparation of its regular year-end accounting working papers. It was during this process that Veridian realized that, with respect to the costs incurred

by Veridian in relation to smart meter implementation it had not yet recovered the 2009 amortization expense related to pre-2009 smart meter capital expenditures, totalling $528,859 (before accounting for PILs impacts) and recorded in Account 1556.

Veridain submitted that the omission of the 2009 amortization is a calculation error that constitutes a new fact and that the omission of the $478,224 should be remedied through a variance of the original Decision.

The Board finds that this is a new fact for the purpose of the threshold test. This amount was not previously in evidence, nor was the fact that amortization for 2009 had never been addressed nor that the total amount in the account was not cleared. The Board therefore finds that the threshold test for reviewing the Decision has been met.

The Merits of the Motion

Both Board staff and Veridian agree that the amount of $478,224 that Veridian is now seeking recovery of in its Motion is both material and is not in dispute. It is also submitted by Veridian and agreed to by Board staff that the amount should have been factored into the SMDR calculation as it is an outcome of the smart meter capital expenditures approved by the Board.

The Board notes that it has been consistent in allowing for the full recovery of the prudently incurred revenue requirement for approved smart meters deployed in accordance with the Government's regulations.[3] However, the Board finds that the failure to include the $478,224 for recovery in the EB-2012-0247 proceeding was an error on the part of Veridian. Veridian itself submitted that it was an omission to not include the 2009 amortization expenses.

Previous decisions of the Board when dealing with distributors' errors in calculations have resulted in disallowance of the correction, when in the distributor's favour. For example, in the North Bay Hydro decision[4] the Board found that "[t]he utility has control of its books and records and has the responsibility to ensure mistakes do not occur." As a result, the Board in that decision denied the application of North Bay Hydro.

The Board finds some parallels in this situation. Veridian should have been aware of

[3] EB-2012-0081, Cambridge and North Dumfries Hydro Inc., July 26, 2012, page 9
[4] EB-2009-0113, North Bay Distribution Ltd., September 8, 2009

the correct amount of the smart meter expenditures, including amortization expenses. The Board's Guideline G-2011-0001 and Smart Meter Model make it clear that it is the responsibility of the distributor to amend the models as appropriate.[5] The Board expects a utility to provide the Board with accurate accounting for rate setting purposes. Veridian has control of its books and records and has the responsibility to ensure mistakes do not occur. The Board will not adjust for this error.

A second very important factor is with respect to retroactive rate-making. If the Board were to allow recovery this would result in retroactive ratemaking in that Veridian is asking to recover an additional $478,224 in revenue requirement related to 2009 amortization expense through revisions to the SMDR which were established in a Final Rate Order. The courts have made it very clear that retroactive rate-making, the adjustment to rates after a final rate order has been issued, is not allowed. Rather, the principles of certainty and finality are a necessary component of effective rate regulation. To allow Veridian to correct a calculation error after a final rate order was issued would require the Board to engage in retroactive ratemaking, which is contrary to the legal principles upon which the Board performs its legislated mandate.

DATED at Toronto, April 25, 2013
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

[5] Guideline G-2011-0001 and the associated Board-issued models contemplate that a smart meter cost recovery application will cover all costs up to and including the prospective test year to appropriate calculate the SMDR and SMIRR to recover all historical and prospective costs until the distributor's next cost of service application. This thus consists of both audited and unaudited actuals historically and to the bridge year, and forecasts for part of the bridge and test years. This avoids the need for a further application to review audited stub period costs.

Case Name:

REGINA v. BOARD OF COMMISSIONERS OF PUBLIC UTILITIES (N.B.), Ex parte MONCTON UTILITY GAS LTD.

[1966] N.B.J. No. 10

60 D.L.R. (2d) 703

New Brunswick Supreme Court, Appeal Division

Bridges, C.J.N.B., Ritchie, West, JJ.A.

Judgment: December 30, 1966

(125 paras.)

Counsel:

J. F. H. Teed, Q.C., for applicant, appellant.

Henry E. Ryan, Q.C., for respondent.

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1 BRIDGES, C.J.N.B.:--This is an appeal by the Moncton Utility Gas Limited, hereinafter referred to as the distributor, from an order made on February 19, 1966, by the Board of Commissioners of Public Utilities, hereinafter referred to as the Board, setting the rates to be charged it by the New Brunswick Oilfields Limited, hereinafter referred to as the producer, for natural gas. The appeal comes before us by way of a writ of *certiorari* as provided by s. 25(1) of the *Public Utilities Act*, R.S.N.B. 1952, c. 186, but we have under the section power to decide any question of fact upon the evidence taken before the Board and to confirm, modify, vary or reverse any order made by it.

2 In its application to the Board the distributor sought to have the rates for natural gas charged it by the producer, which were fixed in 1962, as follows:

> 1.10 per m.c.f. (thousand cubic feet) for the first 5,000 m.c.f. per month, $1.00 for the next 7,500 c.f. per month and $4.00 per m.c.f. for gas in excess of 12,500 c.f. per month.

reduced to

> 25 cents per m.c.f. for the first 3,000 m.c.f. per month, 40 cents per m.c.f. for the next 6,000 m.c.f. per month and 45 cents per m.c.f. for any gas in excess of 9,000 m.c.f. per month, the same to be retroactive to January 1, 1962.

3 After hearing the application, the Board made an order fixing the rates as follows:

> 90 cents per m.c.f. for the first 5,000 m.c.f. per month, 80 cents per m.c.f. for the next 7,500 m.c.f. per month and $4.00 per m.c.f. for any gas in excess of 12,500 m.c.f. per month.

for a period of one year, at the termination of which it was directed they would be reviewed.

4 The distributor is on this appeal asking that we further reduce the rates to those sought in its application to the Board.

5 The area from which the natural gas is produced is in Albert County and known as the Stoney Creek field. It has only an area of approximately three square miles. It is a very small field and the only location east of Ontario where natural gas is obtained in commercial quantities. The gas is delivered to the distributor about 50 ft. from the well head. It is sold to consumers in and outside the City of Moncton and the Village of Hillsboro. Moncton is some eight miles distant from the field and Hillsboro about five or six miles. The number of m.c.f. delivered by the producer in 1965 to the distributor was 102,055.

6 The field, from which oil is also obtained, was held for many years by the New Brunswick Gas & Oilfields Ltd. which had a lease of 10,000 square miles in New Brunswick from the Province. In 1947 this company disposed of its assets to the producer for $1,250,000. At that time there were in operation in the field 33 wells producing gas, 22 wells both gas and oil and six wells only oil. Except for natural gas used by the producer, the Moncton Electricity and Gas Company Limited was then, as is the distributor, purchasing all the output of gas for delivery to consumers, of whom there were in 1947 over 6,000. The price paid the New Brunswick Gas & Oilfields Ltd. by the Moncton Electricity & Gas Co. Ltd. was then 20[cent] per m.c.f. for gas delivered for domestic customers and slightly less for commercial. This had been fixed by an agreement, which was excepted by statute from the jurisdiction of the Board and had been in effect for many years.

7 In 1947 the rate for natural gas was raised to 40[cent] per m.c.f. by the Board, that body having been given jurisdiction in that year. I think the order specified 20[cent] of the 40[cent] was to be used for exploration, in any event it was understood that the increase was for such purpose as there was then at times a considerable shortage of gas for consumers. More wells were sunk with no material improvement in the supply of gas. Since 1947 there has been a decrease each year in the number of consumers. At the present time it is estimated the present supply in the field will last only 12 years though if compressors are used it may be extended to 22 years.

8 In 1957 the rate was increased by the Board to $1.50 per m.c.f. with a penalty of $4 for over 12,500 m.c.f. received by the distributor in any month. This increase was apparently not opposed. At the same time the Moncton Electricity & Gas Ltd. was granted permission to increase its rate to consumers from $1.30 to $2.70 m.c.f. The increase to $1.50 per m.c.f. was undoubtedly made to discourage the use of natural gas.

9 In 1959 the distributor was incorporated and purchased from the Moncton Electricity & Gas Co. Ltd. its natural gas distributing system for $25,000. I think it significant from the amount paid that the natural gas operation of that company was far from profitable. There is evidence that it would be a waste of money to drill further wells in the Stoney Creek field. In view of the definite limit to the amount of natural gas remaining in the field, which is generally known, it will, I think, be difficult for the distributor to obtain more consumers.

10 In 1960 the distributor built a propane gas plant in the City of Moncton and with cost of repairs and renewing old pipes etc., has spent over $300,000. It is undoubtedly the intention of the distributor to deliver propane gas through its system to consumers when the supply of natural gas terminates. I believe that the distributor has on occasions in servicing consumers used propane gas with the natural gas, but this is not now being done.

11 On November 14, 1962, the price of natural gas to the distributor was reduced to the rates in effect when the present application came before the Board. They are set out in the first page of this judgment. The order made by the

Board in 1962 fixing these rates was made with the consent of the distributor.

12 The purchase of the assets of the New Brunswick Gas & Oilfields Ltd. in 1947 was undoubtedly made by the producer with some expectation that more gas and oil would be found in and near the Stoney Creek area and elsewhere in the 10,000 miles under lease from the Province. For exploration and drilling rights the producer has received from Shell Oil and Imperial Oil the sums of $300,000 and $150,000 respectively, but after extensive drilling by these companies, Shell Oil spending upwards of $2,000,000 and Imperial Oil about $1,250,000, of which the producer contributed $237,000, no gas or oil was discovered in commercial quantities. In addition, one Orville Parker under an arrangement with the producer spent about $750,000 in drilling on the lands under lease but with the exception of a few wells in the Stoney Creek area none was productive.

13 The lease held by the producer has been reduced to include only 7,000 square miles. No exploration or drilling operations are at the present time being carried on by the producer or others under arrangements with it. It would seem that the producer is satisfied that no further natural gas or oil is to be obtained in New Brunswick in commercial quantities.

14 In 1962 West Decalta Petroleums Limited, a western Canadian company, obtained control of the stock of the producer. The latter has participated the last few years in the acquisition of areas in Alberta, British Columbia and Saskatchewan in which it is believed gas and oil may be obtained. After it obtained control West Decalta imposed a management fee of $30,000 per annum on the producer. This has been reduced to $20,000 chargeable to the Stoney Creek field. Prior to West Decalta obtaining control, large amounts were also paid out in management fees.

15 The natural gas business of the distributor, which also sells appliances, has not been successful. In 1960 it had 3,033 customers whereas in 1965 the number was 2,318. The number of m.c.f. which it sold to users in 1960 was 77,309. This has fallen to 65,485 in 1965. In 1942 when production was at its peak over 600,000 m.c.f. were sold by the Moncton Electricity & Gas Co. Ltd. and since then the quantity has gradually decreased to the present level. A net loss has been suffered by the distributor each year since it commenced business, such annual losses running from $15,000 to $26,000. At the present time it owes the producer over $148,000. It was contended on the argument that if the price of natural gas to the distributor was substantially reduced, it would pass some of such reductions in its rates to users, and, as a result, additional users would be obtained. This I greatly doubt. The situation appears to be approaching hopelessness.

16 There is a marked difference in the amount of natural gas purchased by the distributor and that delivered by it to customers. While 65,485 m.c.f. were sold by the distributor to users in the year ending March 31, 1965, the producer actually delivered 102,055 m.c.f. to it. While I think the difference has been to some extent due to leaks in the pipes and obsolete meters which do not register properly, I cannot but feel that it is also caused by the water vapour content of the gas. In October, 1962, the producer commenced injecting water into the wells for the purpose of improving the production of oil and I think it has had some effect. The distributor has installed two dehydrators and conditions may improve. There is a loss of approximately 35% whereas in some systems it is as low as 71/2%

17 The grounds of appeal are that the Board erred:

1. In not fixing the rates upon the principle applied and accepted as correct in the *Phillips Rate Case* (1960), 35 P.U.R. (3rd) 199 later approved of by the Supreme Court of the United States.

2. In not fixing rates in line with the well head rates for natural gas paid to producers elsewhere in Canada and United States, the highest of such rates being according to the evidence 33[cent] per m.c.f.

3. If the principle in the *Phillips Rate Case* is not applicable, in fixing rates (90 and 80[cent] per

m.c.f.), higher than those which the justice of the case required.

4. In fixing a penal rate of $4 per m.c.f. on gas in excess of 12,500 m.c.f. per month.

5. In holding that it had no jurisdiction to make the rates fixed by its order retroactive to January 1, 1962, or to some appropriate date.

6. In not reducing the rates to such a level that the distributor would be financially able to pass part of such reduction to its customers and provide a new schedule to such effect.

7. In not ordering the producer to deliver clear gas.

18 I can see no reason why there should be a penal rate of $4 per m.c.f. for gas in excess of 12,500 m.c.f. per month. This is, in my opinion, discriminatory. Nor do I think we should consider the seventh ground, which is already the subject of a counterclaim in an action between the producer and distributor. This disposes of these grounds. The first and second may be considered together as also I think the third and sixth.

19 In the *Phillips Rate Case*, on which the first and second grounds are based, it was held that the appropriate method for determining natural gas rates was an area pricing method which would fix such rates as nearly as might be reasonable with the market rates established by bargaining between producers and purchasers in an area where many producers were competing for business. The producer in the case at bar has no competitor and there are in fact no other producers in New Brunswick nor within approximately 1,000 miles from here. I think it would be unfair to fix the rates on what other producers are receiving in other parts of Canada as contended on behalf of the distributor. It would be taking the entire country as one area. In my opinion the *Phillips Rate Case* should not be applied.

20 I come to the fifth ground that the Board has power when fixing a rate to order that it be made retroactive. Section 6(1) of the *Public Utilities Act*, reads:

> 6(1) Upon complaint made in writing to the Board that any rates, tolls, charges or schedules of any public utility are in any respect unreasonable, insufficient or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the operation of any public utility is in any respect unreasonable, insufficient or unjustly discriminatory, or that the service of any public utility is inadequate or unobtainable, or that any public utility should extend its services to any district without such services, the Board shall proceed, with or without notice, to make such investigation as it deems necessary or expedient, and may order such rates, tolls, charges or schedules reduced, modified or altered, and may make such other order as to the modification or change or such regulation, measurement, practice or act as the justice of the case may require, and may order, on such terms and subject to such conditions as are just, that the public utility furnish reasonably adequate service and facilities, and may order that the public utility shall extend its services to a district without such services, upon such terms and subject to such conditions as the Board may deem just.

21 In *Bakery & Confectionery Workers International Union of America, Local 4.68 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 was relied upon by counsel for the distributor, the Supreme Court of Canada held that the Labour Relations Board of British Columbia could by its order vary a certification order, which it had made, by changing the name of the employer and make such change in the certification order retroactive to the day it was made. Section 65(3) [enacted 1961, c. 31, s. 37(c)] of the *Labour Relations Act*, R.S.B.C. 1960, c. 205 of that Province reads:

> 65(3) The Board may, upon the petition of any employer, employers' organization, trade-union, or other person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or cancel any such decision or order, and for the purposes of the Act the certification of a trade-union is a decision of the Board.

22 The order in the *Bakery & Confectionery Workers'* case for the change in the certification order did not rescind the latter which still stood as a valid order after the alteration had been made. In the case before us the order made by the Board in 1962 fixing rates was not altered but completely superseded by the order of February 19, 1966, which fixed new rates. Such order contained no reference to the order of 1962, but it cannot be questioned that it had this effect. Section 6(1) of our *Public Utilities Act* does not specifically provide for the alteration of an order of the Board, but for the reduction or alteration of rates. Section 65(3) of the *Labour Relations Act* of British Columbia provides very definitely for the variation of an order.

23 Section 14 of the *Public Utilities Act* provides that until new schedules are filed all rates in force at the passing of the Act "shall be lawful rates ... until the same are altered, reduced or modified as herein provided". It could not have been the intention of the Legislature that after it had declared a rate lawful, the Board could render such declaration as of no effect as would be the case if a few months after the passing of the Act the Board ordered a reduction in a rate and made it retroactive to the date of the Act.

24 In the *Bakery & Confectionery Workers'* case, Hall, J., in referring to what Bull, J.A., stated in the Court below [51 D.L.R. (2d) 72], said at p. 204:

> However, he limited the effect of s. 65(3) by holding that the word "vary" in the section "cannot be used as an excuse for bringing retroactively into being a new unit of employees for which the Union stands certified ..." I cannot read the section as narrowing the plain meaning of the word "vary". It is defined in the Shorter Oxford English Dictionary as: "To cause to change or alter; to adapt to certain circumstances or requirements by appropriate modifications" nor do I accept the view that the word "vary" cannot apply retroactively. It has not such a limited meaning and circumstances will frequently arise where it must have a retroactive effect. The present case is a classical example.

25 It is to be noted that Hall, J., does not say that the word "alter", which means the same as "vary" and includes "reduce" in respect to a rate should in all cases have the meaning he gave it. I do not think, to use his language, that circumstances have arisen for the words "reduce" or "alter" to be given the interpretation sought by the distributor. If the Board has power to make retroactive rates in the present case, it has, because of the wording of the section, likewise authority to do so when ordering an increase in rates to consumers upon application of a distributor. In such a case there would be hundreds of users called upon to pay the difference between the old and new rates. This would be most unreasonable. I cannot give such an interpretation to the section. It is my opinion that neither the word "reduce" or "alter" in s. 6(1) of our *Public Utilities Act* should be interpreted as giving the Board the authority when fixing a rate to direct that it be retroactive. Even if I am wrong in my view, I would have no hesitation in holding that any new rates set in this case should not be made retroactive as the distributor consented to the order in 1962 fixing the rates which it now seeks to have further reduced.

26 I come to the third and sixth grounds of appeal. Subsection (3) of s. 6 of the Act reads:

> 6(3) In making an order under this section the Board shall take into consideration the reasonableness of the rate of return to the public utility upon its investment.

27 Section 10 of the Act is as follows:

> 10. Every public utility shall furnish reasonably adequate service and facilities, and all charges made by a public utility shall be reasonable and just, and every unjust or unreasonable charge is

prohibited and declared unlawful.

28 It was contended on behalf of the distributor that under s. 10 the Board was not obligated to fix a rate that would yield a reasonable return to the public utility on its investment. With this I cannot agree. This would not be fair. Persons would be loathe to operate a public utility under such circumstances. While there may be occasions, when owing to special circumstances, a rate not yielding a reasonable return may be fixed, it cannot, in my opinion, be allowed to stand indefinitely. A public utility is entitled to a reasonable rate of return on its investment.

29 It was argued on behalf of the distributor that the producer was engaged in three lines of business, (1) the exploration of 9,997 square miles of the 10,000 square miles in the Province of New Brunswick for gas and oil, (2) the production of oil in the Stoney Creek field and (3) the production of gas in the same field and that each should stand on its own footing.

30 It is my opinion that in 1947 the producer became engaged in only two lines of business or ventures. The first was the production of gas and oil in the Stoney Creek field and the further exploration of that field and vicinity for more gas which could be supplied in the system in use for consumers in the City of Moncton and outside its limits. The increase of 20[cent] per m.c.f. allowed in 1947 was, I think, for only such exploration. The second venture was the exploration for gas and oil in the remainder of the 10,000 acres.

31 In 1950 the Board made an order establishing a rate base of $770,427 which I gather was arrived at by taking the purchase price of $1,250,000 and deducting therefrom moneys received for exploration rights, depreciation and depletion. This rate base was not questioned until 1962. I am not prepared to hold the Board was in error in establishing it. In their 1962 report, Reevey, Blackmore, Burnham & Laws, a firm of chartered accountants, stated the rate base was then either $254,943 or $403,092.

32 There has been a reduction in the management fee of $30,000 charged soon after West Decalta obtained control to $20,000. Even this I consider excessive. The gross revenue of the entire undertaking is less than $150,000. To me, unless good reason to the contrary is shown, $5,000 to $7,500 would be an appropriate fee.

33 I think the oil should be regarded as a by-product of the gas. The producer would in all probability not be engaged in the production of oil were it not for the gas. I think some consideration should be given to the extent the gas should pay for the oil. A number of expenditures relate to both but there are some which concern only oil. In 1964 the expenditures relating to oil alone exceeded the revenue from oil by nearly $5,500.

34 There is evidence that an engineer is no longer employed at the Stoney Creek field. His salary was approximately $10,000 per annum. The operation apparently does not require a full-time engineer and there should be a considerable saving in this connection.

35 In fixing the rates for only one year the Board was strongly influenced by the fact there might in the meantime be a considerable reduction in the unaccounted for gas of about 36,000 m.c.f. I do not think this was an unreasonable view to take. The financial statement of the producer for the year 1964 showed receipts of $120,683 and expenditures of $121,389, the result of which was a net loss of $706. Included in the expenditures were allowances of over $7,000 for depreciation, approximately the same amount for depletion and $27,000 for doubtful accounts. The last amount was for a portion of what was owing to the producer by the distributor for gas for which the latter had not paid. The Board was of the opinion that this was not a normal expenditure. I do not think it should be considered in fixing rates. It arose because the rates were too high for the distributor to be able to pay them. If lower rates are reasonable, I think they should be set although the distributor is in debt to the producer.

36 The Board was of the opinion that the producer and distributor should each have an equitable share of what profits were available and that for this to result the cost of the gas to the distributor should be reduced by $20,000 per annum. As it refused to recognize as a debit in the expenditures of the producer the allowance of $27,000 for doubtful debts, it therefore regarded the producer as having a profit of $26,294 in 1964. I am not certain how the Board arrived at the

amount of $20,000 as it is not stated in the reasons. It would seem to me that it was probably due to the fact that such amount deducted from $26,294 would leave the producer a profit of over $6,000 in 1964 and a reduction of the expenditures of the distributor by $20,000 would turn the loss of $13,515 shown for the year ending March 31, 1965, on its natural gas operation into also a profit of over $6,000. In addition, however, to the loss of $13,515 shown on the 1965 statement of the distributor there also appears a debit separate therefrom of $14,627 which was the difference between interest charges of $20,535 and $5,908, the profit from the non-utility business of the distributor. I expect these interest charges relate for the most part to the propane gas plant of the distributor.

37 The Board does not mention the excessive management fee paid and the fact a full-time engineer is no longer necessary. I think these matters should be given careful consideration when the rates are reviewed as well as the loss on oil. Because of them I have given some thought to reducing the rates set by the Board, but am of the opinion we should not interfere.

38 I would allow the appeal but only to the extent of varying the order of the Board by deleting the charge of $4 per m.c.f. for gas in excess of 12,500 m.c.f. per month. The provision for a review after one year is to stand. There will be no costs.

39 RITCHIE, J.A.:--This appeal from an order of the Board of Commissioners of Public Utilities of the Province of New Brunswick comes before us by way of *certiorari* pursuant to s. 25 of the *Public Utilities Act*, R.S.N.B. 1952, c. 186. The order fixed the rates to be paid by Moncton Utility Gas Ltd. for natural gas purchased by it from New Brunswick Oilfields Ltd. I adopt the statement of relevant facts set out in the reasons for judgment of my Lord the Chief Justice. Any additions I may make to that statement will be for a special purpose.

40 For convenience of reference sometimes hereinafter the Board of Commissioners of Public Utilities will be referred to as "the board", Moncton Utility Gas Limited as "the distributor", New Brunswick Oilfields Limited as "the producer" and the *Public Utilities Act* as "the Act".

41 The order of February 9, 1966, the subject of the appeal now before us, is based on a unanimous decision of the board set out in "Reasons For Order" bearing the same date. The board found that:

(a) under current operating conditions, there were insufficient earnings available to provide an adequate return to either the producer or the distributor;

(b) it was necessary to adjust the well head prices in order to

(i) continue the supply of natural gas to the ultimate consumer,

(ii) provide each company with sufficient income to cover its operating expenses and, to the extent available, its depletion and depreciation charges;

(iii) provide, to the extent available, both companies with income sufficient to produce an adequate return on the capital investment of each of them; and

(c) in order to provide each company with an equitable share of the total profits available, it was necessary to reduce the "transfer cost" of natural gas by approximately $20,000.

42 For those express purposes the board fixed new well head prices payable by the distributor of:

0.90 per m.c.f. for the first 5,000 m.c.f. per month;

0.80 per m.c.f. for the next 7,500 m.c.f. per month;

4.00 per m.c.f. for any gas in excess of 12,500 m.c.f. per month.

43 Based on the sales volume of the distributor for its fiscal year ending March 31, 1965, but not allowing for any contraction or expansion thereof, the 1966 operating expenses being the same as in 1965 and the 1965 loss of $28,000, the rate reduction should reduce the 1966 loss of the distributor to an amount approximating $5,000. The new rates and the elimination of a provision for doubtful accounts, regarded by the board as improper, will produce a small theoretical profit for the producer. Comparison of the operating results of the two companies is complicated by the difference in their fiscal periods. The fiscal year of the producer ends on December 31st. Exercise of the supervisory jurisdiction of the board would be facilitated if the fiscal periods of the two companies coincided with the calendar year.

44 The application for an order directing the producer to deliver clean dry gas to the distributor was dismissed. The reasons supporting the order state the new rates had been fixed on the basis the distributor must accept gas from the producer in the same condition as it emerged at the well head.

45 The board also directed a further review of the rate schedule be conducted at the expiration of one year. Uncertainty as to the extent it was possible to eliminate the loss resulting from unaccounted for gas delivered to the distributor's distribution system appears to have been the principal reason motivating the direction there be a further rate review at the expiration of one year.

46 Western Decalta Petroleums Ltd. acquired voting control of the producer in 1962. The following year the producer's operations were extended to Western Canada. A loss of $51,844 was incurred in respect of the 1963 operations of the producer in that area. The operating loss in New Brunswick was $11,986. Interest and other income of $19,736, however, reduced to $44,094 the 1963 total loss in both New Brunswick and Western Canada. The 1964 operating loss in New Brunswick was $706 and in Western Canada $12,907. Interest and other income of $15,987 reduced the net 1964 loss in the two areas to $2,374.

47 Operating expenses shown on the producer's profit and loss statements include provision for doubtful accounts of $6,528 in 1962 and $27,000 in the year 1964. In regard to the provision for doubtful accounts in those two years, Messrs. Clark-son, Gordon & Co., the auditors of the producer, state:

> These provisions relate to the outstanding account receivable from Moncton Utility Gas Limited which at December 31, 1964 amounted to $94,737 and which has since increased to $148,138 at October 31, 1965.

48 We do not have before us any financial statement of the producer as of December 31, 1965.

49 The m.c.f. volume of gas sold by the producer to the distributor in the 1961-1965 period and the gross revenue resulting therefrom have been:

Year ended May 31, 1961	101,663 m.c.f.	$152,495.00
Year ended May 31, 1962	83,960 m.c.f.	125,940.00
Seven months ended December 31, 1962	53,313 m.c.f.	71,990.00
Year ended December 31, 1963	102,114 m.c.f.	108,114.00
Year ended December 31, 1964	105,428 m.c.f.	111,428.00
Ten months ended October 31, 1965	83,582 m.c.f.	88,582.00

50 For the seven months ended December 31, 1962, and the fiscal years ending December 31, 1963, and 1964, the profit and loss results from the New Brunswick operations of the producer have been:

	1962	*1963*	*1964*
Loss	($6,063.00)	($11,986.00)	($706.00)

51 "Interest and other income" of $20,010, however, converted the 1962 operating loss of $6,063 on the New Brunswick operations into a net profit of $13,947. It was not until 1963 that the producer extended its field of endeavour to Western Canada.

52 A submission by Messrs. Clarkson, Gordon & Co., to the board, made under date of December 11, 1965, is of interest. One passage reads:

> The Board appears to have agreed in the past that oil production in New Brunswick is essentially a by product of the gas operations. This is the opinion expressed in the report of Messrs. Reevey, Blackmore, Burnham, Laws and Page dated August 9, 1962. We concur with this opinion. In our view also, it would not be feasible to segregate all expenses between oil and gas, even if it were considered proper to do so, and that the present volume of business activity would not justify the maintenance of the detailed records necessary for more detailed cost allocations. The company's records therefore segregate costs only to the extent of the directly identifiable production expenses as shown in Schedule V. This is consistent with the basis used in the 1962 report to which we have previously referred.

53 Schedule V lists the following figures in respect of oil operations:

	For Seven Months Ended Dec. 31, 1962	For Year Ended Dec. 31, 1963	For Year Ended Dec. 31, 1964
Sales	$23,155.00	$28,495.00	$13,077.00
Less Royalties	407.00	529.00	326.00
	$22,748.00	$27,966.00	$12,751.00
Less production expenses	17,395.00	23,361.00	18,236.00
Operating revenue or (loss)	$ 5,353.00	$ 4,605.00	$(5,485.00)

54 If the year end figures for 1965 and 1966 also show a loss on oil production it would seem the board should review the policy of regarding oil production as a by-product of the gas operations and not segregating expenses between oil and gas.

55 Depreciation and depletion write-offs by the producer in the 1962-1964 period were:

	1962	*1963*	
1964			
Depreciation	$ 5,873.00	$ 9,800.00	$
7,227.00			
Depletion	4,122.00	6,948.00	
7,243.00			
	$ 9,995.00	$16,748.00	
$14,470.00			

56 Over the years the producer has spent $697,216 on exploration and development work.

57 There has been a steady decline in the business of the distributor. In no year have its operations produced a profit. For the six full fiscal years since its incorporation, the distributor's volume of sales, number of customers and operating results have been:

	Number of Customers	
Year	*at End of Year M.C.F.*	
Loss		
1960	3,033 77,309	
$26,649		
1961	2,948 74,624	
17,575		
1962	2,904 74,576	
27,944		
1963	2,719 72,806	
15,177		
1964	2,507 67,918	
25,181		
1965	2,318 (not audited) 65,485	
28,000		
	Total loss (amount of deficit account)	
$140,526		

58 The number of customers and the quantity of gas sold were less and the amount of the loss greater in 1965 than in any of the five preceding years. As of March 3, 1965, the distributor's current liabilities exceeded current assets by

$84,392.20.

59 The depreciation write-offs by the distributor in the 1962-1965 period have been:

1962	--	$ 5,105.00
1963	--	$ 2,908.00
1964	--	$ 9,314.00
1965	--	$12,402.00

60 The appeal is based on seven grounds. The first and second grounds may be dealt with together. They are:

1. The board erred in not fixing the rates in accordance with the principles discussed and accepted as correct in the "Phillips Rate Case" decided by the United States Federal Power Commission in 1960, affirmed by the District of Columbia Court of Appeal and later (1963) by the Supreme Court of the United States.

2. The board erred in not fixing the rates "in line" with the well head rates for natural gas paid producers elsewhere in Canada and the United States.

61 The distributor concedes the only production of natural gas in New Brunswick is in the Stoney Creek Field but contends an "area price" may be obtained by examination of the well head prices prevailing throughout Canada or even throughout North America. No pipeline carries gas into New Brunswick from any other Province of Canada or the United States. There is one small producing field in Ontario, almost 1,000 miles distant.

62 Phillips Petroleum Company, the company from which the *Phillips Rate Case* derived its name, is a large integrated oil company which also produces natural gas. It is known as an "independent" producer of gas and is not affiliated with any interstate gas pipeline company. It owns gathering systems and holds leases in Kansas, Oklahoma, New Mexico, along the Gulf Coast of Texas and in other scattered localities. In 1954, the test year selected to determine its cost of service, Phillips expended more than $47,474,039 in exploration and development expenses. Exploration costs of the producer in New Brunswick have been

1963	--	$25,142.00
1964	--	$17,894.00

63 Much of the gas sold by Phillips in interstate commerce was purchased from thousands of other independent producers. In 1960 it was selling more natural gas in the United States than any other oil and gas producer. In addition to the production of oil, gasoline and natural gas, the company carried on other operations. It was then the largest producer of liquids condensed from natural gas. The Phillips sale of natural gas in 1954 were 688,811,312 m.c.f. The distributor sold 65,485 m.c.f. in 1965.

64 *Re Phillips Petroleum Co.* (1960), 35 P.U.R. (3d) 199 was a rate proceeding before the Federal Power Commission of the United States of America. At p. 208 of the Commission decision the following passage appears:

> Experience of the commission in this case, as well as in many other producer rate cases during the last five years, has shown, beyond any doubt, that the traditional original cost, prudent investment rate base method of regulating utilities is not a sensible, or even a workable, method of fixing the rates of independent producers of natural gas.

65 On the same page, the Commission expressed the opinion that

> Producers of natural gas cannot, by any stretch of the imagination, be properly classified as traditional public utilities.

66 The basic conclusion of the Commission was that the "ultimate solution" for determining the rates to be charged by independent producers of natural gas lay in what had come to be known as

> the area rate approach: the determination of fair prices for gas, based on reasonable financial requirements of the industry for each of the various producing areas of the country.

67 Such determination is made on an area, rather than on an individual company, basis. See *Wisconsin et al. v. Federal Power Commission* (1963), 48 P.U.R. (3d) 273 (U.S.S.C.). The Supreme Court of the United States approved the Commission finding that the individual company cost-of-service method is not a feasible or suitable one for regulating the rates of independent producers of natural gas and expressed the hope the area approach might prove to be the ultimate solution.

68 The definition of public utility, found in s. 1(c) of the Act, includes

> a person owning, operating, managing or controlling ... any plant or equipment ... for the production, transmission, delivery or furnishing of ... gas ... either directly or indirectly, to or for the public.

69 Under that statutory definition, both the producer and the distributor are public utilities. The Federal Power Commission declaration that producers of natural gas should not be classified as *traditional* public utilities has, therefore, little, if any, application to the status of either the producer or distributor. Subsections (1) and (3) of s. 6 of the Act confer on the board jurisdiction to fix the rates public utilities may charge. Those two subsections are:

> 6(1) Upon complaint made in writing to the Board that any rates, tolls, charges or schedules of any public utility are in any respect unreasonable, insufficient or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the operation of any public utility is in any respect unreasonable, insufficient or unjustly discriminatory, or that the service of any public utility is inadequate or unobtainable, or that any public utility should extend its services to any district without such services, the Board shall proceed, with or without notice, to make such investigation as it deems necessary or expedient, and may order such rates, tolls, charges or schedules reduced, modified or altered, and may make such other order as to the modification or change of such regulation, measurement, practice or act as the justice of the case may require, and may order, on such terms and subject to such conditions as are just, that the public utility furnish reasonably adequate service and facilities, and may order that the public utility shall extend its services to a district without such services, upon such terms and subject to such conditions as the Board may deem just.
>
> (3) In making an order under this section the Board *shall take into consideration the reasonableness of the rate of return to the public utility upon its investment*. [Italics added.]

70 Subsection (3) of s. 6 was introduced in 1935 [c. 29, s. 1], following the 1934 judgment in *The King v. Board of Commissioners of Public Utilities, Ex p. Maritime Electric Co.*, [1935] 1 D.L.R. 456, 9 M.P.R. 1 (N.B.C.A.). There it was held this Court was bound by the decision of the Privy Council in *Canada, Southern R. Co. v. International Bridge Co.* (1883), 8 App. Cas. 723 and could not consider the reasonableness of the rate on the basis of the return to the company upon its investment. Baxter, J., as he then was, had said [p. 461]:

> It has been said that the modern theory of rate making is that rates should be based upon cost to the producer rather than upon the value of the service to the consumer, the cost including the return which the owners receive for the use of capital and for the management of the business. It is with regret that I come to the conclusion that the Public Utilities Act, R.S.N.B. 1927, c. 127, does not displace the common law rule that the reasonableness of rates is to be determined by the value of the service to the consumer and not by the return to the person or company supplying the service. If the Act permitted the Commission to hear an application against an unreasonable return as well as against an unreasonable rate they would have complete jurisdiction, but that is not the language of the statute and we are absolutely bound by the decision of the Privy Council in the *Canada Southern R. Co. v. Intel-national Bridge Co.*, 8 App. Cas. 723 followed and applied in *Rickett, Smith & Co. v. Midland R. Co.*, [1896] 1 Q.B. 260 and *Ex p. Moncton T.E. & G. Co.*, [1927] 3 D.L.R. 1112.

71 The wording of s-s. (3) is clearly ambiguous and mandatory. The board now must consider "the reasonableness of the rate of return to the public utility upon its investment". The price for gas sold by the producer to the distributor is to be determined by the circumstances and local considerations pertaining to the volume, quality and production cost of natural gas at Stoney Creek together with, as required by s. 6(3), the return on the investment, or rate base, of the producer. We are not now bound by *The King v. Board of Commissioners of Public Utilities, Ex p. Maritime Electric Co., supra*.

72 The area rate principle, as enunciated in the *Phillips Rate Case*, can have no application to the determination of rates for the purchase of gas produced in the Stoney Creek Field, an isolated pocket producing only a small volume of gas.

73 The third and fourth grounds of appeal also may be dealt with together. They are:

> 3. If such principle (I assume the "in line" with the rates of other producers principle) is not applicable, the board erred in fixing the new basic rates (90[cent] and 80[cent] per m.c.f.) higher than those which the "justice of the case required".
>
> 4. The board erred in fixng any penal rate, or alternatively, a penal rate of $4.00 per m.c.f. (almost five times the basic rate for any gas taken in excess of 12,500 m.c.f. per month).

74 Section 6(1) provides the board

> may make such other order as to the modification or change of such regulation, measurement, practice or act as the justice of the case may require ...

75 The record does not disclose what return on the recognized investment of the producer (its rate base) the board considered the rates set by the February 19, 1966, order would produce. Also lacking is a precise statement of the amount the board accepted as the correct rate base of the company as of the date of that order. A rate base means the value of the property used and useful in furnishing the service, including necessary working capital. *The King v. Rideout et al., Ex p. Moncton Electricity & Gas Co. Ltd.*, [1949] 4 D.L.R. 612, 65 C.R.T.C. 217, 24 M.P.R. 303 *sub nom. The King v. Board of Commissioners of Public Utilities, Ex p. Moncton Electricity & Gas Co. Ltd.*

76 In the course of argument it was stated to us that in 1950, during the hearing of an application of the producer for an increase in the rates chargeable by it to Moncton Electricity & Gas Company Limited, the then distributor, hereinafter sometimes referred to as "Moncton Electricity", but at which, for some reason which does not appear, Moncton Electricity was not represented, the board made an order establishing a rate base for the producer of $770,427. The increase in rates granted to the producer at that time was estimated to produce a return of 5.87% on the $770,427 investment. No objection to the establishment of that rate base was taken by Moncton Electricity or by the present

distributor until 1962, 12 years after it had been determined. The objection then was advanced by the distributor in the course of the hearing which resulted in the November 14, 1962 consent order. When, in 1959, it bought the distribution system of Moncton Electricity, the distributor was aware, or should have been aware, of the existence and amount of the producer's rate base as determined by the board.

77 In a report prepared for the board dated August 9, 1962, Messrs. Reevey, Blackmore, Burnham, Laws & Page, chartered accountants, discuss the rate base of the producer, which they state was *established in 1957*, and provide data relevant to an application then before the board seeking approval of a new rate schedule for the sale of natural gas to the distributor by the producer. For convenience of reference, this report sometimes hereinafter will be referred to as "the Reevey report". It states the value, as of May 31, 1962, of the leases and rights held by the company to be $277,120 computed as follows:

Amount paid by the company		
for assets -- 1947	$1,250,000.00	
Less		
Appraised values		
Land and plant	$206,041.00	
Inventories	92,853.00	298,894.00
	$ 951,106.00	
Less		
Amounts received from Shell		
Exploration New Brunswick		
Limited for sub-lease	$305,000.00	
Amounts received from Imperial		
Oil Limited for sub-lease	150,000.00	455,000.00
	$ 496,106.00	
This leaves the following		
position:		
Residual cost of leaseholds	$ 496,106.00	
Less: Depletion charged to	218,986.00	
31 May 1962	$ 277,120.00	

78 Because they believed little justification had been established for the estimate of *probable* reserves of gas and oil within the area of the producer's lease, the authors of the Reevey report recommended a change in the method of computing depletion rates for determination of the rate base. They also recommended depreciation of fixed assets be recomputed on a straight-line method. Using the revised methods of computation so recommended, the Reevey report determines the rate base as at May 31, 1962 to be $254,943. That amount is made up of:

Investment in leases	$496,106.00	
Less: Amount amortised	367,033.00	$129,073.00
Fixed assets	308,293.00	
Less: Accumulated		

depreciation	261,423.00	46,870.00
Provision for stores and supplies		63,000.00
Provision for working capital		16,000.00
		$254,943.00

79 The Reevey report concedes however, that had depletion of the leases been computed on the basis formerly used, they would have determined the rate base, as of May 31, 1962, to be $403,092. The Reevey recommendations, so far as the record discloses, were not accepted by the board.

80 The Clarkson, Gordon & Co. submission (*supra*) asserts adoption of the lower ($254,943) base would effectively deny to the shareholders of the producer any return on the difference between $403,092 and $254,943. The Clarkson firm maintains $403,092 was the correct rate base as of May 31, 1962.

81 Before this Court, counsel for the distributor pressed the submission there was not in New Brunswick, or in any other Canadian jurisdiction, legislation declaring that, in fixing rates to be charged by a public utility and particularly in fixing rates to be charged by a producer of natural gas, regard should be had to a rate base. In support of that submission, decisions of the Supreme Court of the United States and the Federal (U.S.) Power Commission were cited.

82 Section 6(1) of the Act enables the board to order that the rates, tolls, charges or schedules of any public utility be reduced, modified or altered. Reference already has been made to s-s. (3) which expressly requires the board to consider the reasonableness of the rate of return to a public utility upon its investment. The probable return on the investment to be produced by any alteration of the rate schedule of a public utility may not be the controlling factor in determining a new rate schedule but such return cannot be excluded from the consideration of the board. A rate schedule which is not sufficient to provide any return is, in my opinion, unreasonable.

83 Counsel for the distributor further submitted that

> (a) while s. 6(3) gives the board jurisdiction to take into consideration the fact that existing rates gave a public utility an unreasonable return on its investment, it did not obligate, or even authorize the board to fix a rate which would yield a reasonable, or any, return on such investment; and
>
> (b) s-s. (3) did not alter the principle stated in s. 10 that all rates shall be "reasonable and just", meaning reasonable and just to the purchaser.

84 Section 10 of the Act is:

> 10. Every public utility shall furnish reasonably adequate service and facilities, and all charges made by a public utility shall be reasonable and just, and every unjust or unreasonable charge is prohibited and declared unlawful.

85 The definition of public utility contained in s. 1 (*c*) includes a person owning, operating, managing or controlling any plant or equipment for the production, transmission, delivery or furnishing of gas, either directly or indirectly to the public.

86 I entertain no doubt that, whenever reducing, modifying or altering the rates to be charged by the producer for gas delivered to the distributor, the board should take into consideration the reasonableness of the rate of return upon the

investment of the producer. To maintain stability in its operations, a public utility must operate at a profit. In examining the probable rate of return on the existing rate base of the producer, the board should have regard to the reasonableness of all the operating costs charged by the producer to gas production in the Stoney Creek Field. Unfortunately, we do not know the amount the board regarded as the proper rate base on February 19, 1966.

87 In regard to the rate of return earned by the producer on the rate base as computed by them, the Clarkson, Gordon submission (*supra*) states:

> The statement of profit and loss for the periods ended December 31, 1962 and 1964 include provisions for doubtful accounts receivable of $6,528 and $27,000 respectively. These provisions relate to the outstanding account receivable from Moncton Utility Gas Limited which at December 31, 1964 amounted to $94,737 and which has since increased to $148,138 at October 31, 1965. For purposes of calculating the rate of return theoretically earned by New Brunswick Oilfields, Limited, these charges have been removed from the operating expenses.

The adjusted earnings will then be as follows:

	Seven Months Ended December 31, 1962	Year Ended December 31, 1963	Year Ended December 31, 1964
Operating Loss--New Brunswick	$ (6,063)	$ (11,986)	$ (706)
Plus exploration costs capitalized			(17,894)
Plus adjustment of depreciation to straight line rates	(681)	(402)	(2,551)
Less provision for doubtful accounts	6,528		27,000
	$ (216)	$ (12,388)	$ 5,849

Rate Base

The Reevey Report (page 7) determines the rate base at May 31, 1962 at either $254,943 or $403,092. The lower base resulted from re-calculating the depletion rate and would have effectively denied any return to the shareholders on the difference between the two amounts. In our present calculations, we have used $403,092 as the correct rate base at May 31, 1962 and have adjusted this amount for subsequent changes in investment. The year-end balance are as shown below.

	December 31,	December 31,

December 31,			
	1962	1963	1964
Investment in oil and gas properties	$498,020	$507,353	$512,121
Less amount amortized	223,108	230,056	237,299
	274,912	277,297	274,822
Fixed assets	316,622	301,171	291,799
Less accumulated depreciation	266,970	259,175	262,969
	49,652	41,996	28,830
Provision for stores and supplies	62,000	50,000	42,000
Provision for working capital	16,000	16,000	16,000
Rate Base	$402,564	$385,293	$361,652

Rate of Return

Based on the adjusted earnings and the rate at the end of each year as shown above, the theoretical rate of return for the periods under review have been as follows:

Seven months ended December 31, 1962	(0.1)%
Year ended December 31, 1963	(3.2)%
Year ended December 31, 1964	1.6%

It must be recognized that the above rates do not reflect the fact that the substantial account receivable from Moncton Utility Gas Limited has not been paid.

The rates as determined above are significantly lower than rates normally earned by gas utility companies in Canada and the United States.

88 The return of 1.6% shown as earned on the rate base in 1964 is a theoretical, not a cash, return. The account of the distributor had not been paid.

89 In *The King v. Rideout et al., Ex p. Moncton Electricity & Gas Co. Ltd.* (*supra*), this Court increased the rate of

yield to 7% upon the rate base. At pp. 622-3, Harrison, J., said:

> The principles upon which the rate of return should be fixed are well stated in the judgment of the Supreme Court of the United States in the case of *Bluefield Water Works & Improvement Co. v. Public Service Com'n* (1923), 262 U.S. 679 at p. 692: "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunity for investment, the money market and business conditions generally".
>
> The above judgment was also quoted with approval by the Board of Transport Commissioners in *Ottawa v. Ottawa Electric R. Co.* (1946), 59 C.R.T.C. 136 at p. 168.

90 Also at pp. 623-4:

> While I realize that upon questions of fact the findings of the Board should be treated like those of a trial Judge in accordance with the decision in *Ruddy v. Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 21 C.R.C. 377, 38 O.L.R. 356, and *Toronto Suburban R. Co. v. Everson* (1917), 34 D.L.R. 421, 54 S.C.R. 395, yet the matter of return is not a finding upon facts but a conclusion from facts, and a matter of opinion as to which this Court is in as good a position as the Board to give a decision.
>
> The Board do not mention the high profits made by the company in preceding years as a ground for their decision, but do not state that these profits have not been considered. They also rely upon what they term "the rather secure position of the company". Inasmuch as the company's contract with the City of Moncton for supply of electrical power terminates on March 26, 1950, when the company may be taken over by the city, I cannot regard the company as being in a stable position. I would increase the rate of yield to 7% upon the rate base.

91 In their "reasons" for the February 19, 1966, order the board state:

> The financial statement of the distributor for the year ended March 31, 1965 indicates that it operated at a loss of some $13,000.00 after providing some $15,000.00 for depreciation.
>
> The financial statement of the producer for the year ended December 31, 1964 shows a loss of $706.00 after making a provision of $27,000.00 for doubtful accounts and approximately $15,000.00 for depreciation and depletion. In my view, the provision for doubtful accounts of $27,000.00 is not a normal operating expense. Therefore, the result for the year was actually a $26,000.00 operating profit.

> Upon analyzing the financial statements of both the producer and the distributor, I find that there are insufficient profits available under current operating conditions to provide an adequate return to both companies. To continue the supply of natural gas to the ultimate consumers, it becomes necessary to adjust the wellhead price of gas to ensure that each company shall receive firstly sufficient income to cover its necessary cash operating expenses, secondly, to the extent available, income to meet its depletion and depreciation costs and finally, to the extent available, income to provide an adequate return on capital investment.
>
> I further find that for the year ended March 31, 1965, 102,000 m.c.f. were transferred at the wellhead at an approximate cost of $107,000.00. In order to provide each company with an equitable share of the total profits available to the two companies for return on capital, it is necessary to reduce the transfer cost of natural gas by approximately $20,000.00.

92 I take the last sentence to mean that by so reducing the "transfer cost" both the producer and distributor would have income available to apply on "return of capital". Income of that nature must be actual income, not theoretical income.

93 For the fiscal year ended December 31, 1964, the net receipts (gross sales less royalties) of the producer from the sale of 105,428 m.c.f. of gas and 4,857 barrels of oil amounted to $120,063. The "transfer cost" of the gas at well head was $111,428. Operating costs, as charged to the New Brunswick operation by the producer, including the $27,000 provision for doubtful accounts, totalled $121,389. Through the disallowance of the $27,000 write-off, the board converted the operating loss of $706 shown in respect of the New Brunswick operations into a theoretical, or paper, profit, of $26,294.

94 I presume it was on the basis of an *actual operating profit* of $26,294 being substituted for the 1964 operating loss of $706 shown on the company books that the board determined the transfer cost of natural gas should be reduced by approximately $20,000. The board appears to have brushed aside as of no consequence the alarming state of the account owing by the distributor to the producer. Nothing in the record suggests the new rates will enable the distributor to pay that account in the foreseeable future.

95 With respect, I cannot accept the view of the board that the 1964 provision of $27,000 for bad and doubtful accounts was not a proper charge against revenue. The account receivable from the distributor was increasing at an alarming rate. As of December 31, 1964, the amount alleged owing was $94,737. The account remained unpaid. It continued to increase at a rate averaging $5,400 per month.

96 The producer, however, appears to have accepted the disallowance of the provision for doubtful accounts. Its factum states, "The respondent agrees with the board order and the reasons for the order". The views I now express apply, therefore, to the propriety of this Court directing a further reduction in the rates fixed by the board.

97 If the 1966 m.c.f. sales volume of gas is the same as in 1964 and the transfer cost of gas at well head is $20,000 less, the net dollar salus volume of the producer for gas and oil will be $100,683. If the $27,000 write-off for doubtful accounts is eliminate d but all other 1966 operating expenses are the same as in 1364, total operating costs will be $94,389. The result will be a theoretical profit of $6,294. That is equivalent to a return of 1.7% on $361,652, the amount the Clark-son submission states was the correct rate base on December 31, 1964. While the yield would, of course, be larger on the lower 1966 rate base it still would be inadequate and, in my view, unreasonable.

98 Even without any provision whatsoever for doubtful accounts, it is obvious the producer cannot reduce its rates by any amount approximating $20,000 and obtain a reasonable return on its investment. A reasonable return must be predicated on a reasonable profit. The content of the third paragraph quoted from the "reasons" of the board indicate they realized the new rates would not realize revenue sufficient for the producer to earn a reasonable profit. A public

utility producing natura gas should not be required to operate on an estimated revenue not sufficient to permit reasonable provisions for depletion, depreciation and doubtful accounts. The rates fixed in 19 50 were estimated to produce a return of 5.87% upon the rate base of the producer.

99 As I read the financial statements, they provide no support for the view of the board that the reduced rates would provide each company with "an equitable share of the total profits available to the two companies for return of capital". The producer already has an accrued operating deficit of $9,628. It will be interesting to see what that figure will be as of December 31, 1966.

100 The rate of $4 per m.c.f. applicable to any gas delivered in excess of 12,500 m.c.f. per month is a penal rate designed to discourage any increased use of domestic gas from the Stoney Creek Field. Section 10 states, "every unjust or unreasonable charge is prohibited and declared unlawful". The board has no authority to fix a penal rate. It cannot be classified as "reasonable and just". The consent of the parties to a penal rate being fixed by the board did not render it lawful. The $4 rate for any gas delivered in excess of 12,500 m.c.f. per month should be set aside.

101 While it is my opinion the new rates are confiscatory in their impact on the producer, it has accepted them. On the further review of the rate schedule which will commence in February, 1967, the board will have before them the operating results of both companies for 1965 and 1966. In such circumstances, I would not now interfere further with the existing schedule. I will content myself with offering suggestions as to some items of operating expense I believe should be scrutinized in the course of the 1967 review.

102 The fifth ground of appeal is that

> the board erred in holding it had no jurisdiction to make the new rates retrospective to a date prior to the order and in not ordering they be effective either as from January 1, 1962 or as from some other appropriate date prior to February 19, 1966.

103 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.

104 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 effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

105 Assuming the Act does confer on the board jurisdiction to direct that rates fixed by any order be retrospective to a date prior to the date of the order, the consent of the distributor to the November 14, 1962, order constituted, in my opinion, a compelling reason for the board not to direct the rate reduction have any retroactive effect.

106 It follows I would not interfere with the effective date of the order appealed from. In such circumstances, the question raised by the fifth ground of appeal becomes academic. It has been raised, however, and is certain to be raised again in the not too distant future, perhaps at the February, 1967, review of the rates chargeable by the producer. I, therefore, deem it fitting that I express my opinion on the question of the jurisdiction of the board to make retrospective orders.

107 The cardinal rule for the construction of a statute is that it should be construed according to the intention expressed in the statute itself. The duty of the Court is to interpret the words the Legislature has used. When interpreting

the language of any enactment it is natural to enquire what is the subject-matter with respect of which the language is used. The object of the legislation must be considered from a common-sense viewpoint. If the words of the statute are themselves precise and unambiguous, then no more is necessary than to expound those words in their ordinary and natural sense. Speculation should not be indulged in: *Crates on Statute Law*, 6th ed., p. 66; *Maxwell on Interpretation of Statutes*, 10th ed., p. 2.

108 In view of the stress placed by the distributor on *Bakery & Confectionery Workers International Union of America, Local 468 v. Salmi (supra)*, I will refer to it in some detail. That appeal concerned a variation made in an order certifying a bargaining agent to represent a bargaining unit of employees. The Labour Relations Board of British Columbia had reconsidered a certification order made by them and varied it by substituting another company for that named as the employer in the original certification order. The shares of the two companies were owned by the same individuals. They had the same general manager and the same president. Their operations were interrelated. Shortly after the original certification order was made, steps were taken to wind up the company named as the employer therein. The trade union which had been certified as the bargaining agent then, relying on s. 65(3) [enacted 1961, c. 31, s. 37(*c*)] of the *Labour Relations Act*, R.S.B.C. 1960, c. 205, applied to the board to have the certification order varied by substituting the second company as the employer. That section of the *Labour Relations Act* read:

> 65(3) The Board may, upon the petition of any employer, employers' organization, trade-union, or other person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or cancel any such decision or order, and for the purposes of the Act the certification of a trade-union is a decision of the Board.

109 The Labour Relations Board ruled the section conferred authority on it to make the variation sought and granted the application. The company, seeking to have the order quashed, instituted *certiorari* proceedings. The Judge [42 D.L.R. (2d) 364] to whom the application was made quashed the Labour Relations Board order. The appeal of the trade union to the British Columbia Court of Appeal [51 D.L.R. (2d) 72] was dismissed. A further appeal to the Supreme Court of Canada was, however, allowed. The basis on which the Supreme Court of Canada interpreted s. 65(3) is set out at pp. 201-2 of the D.L.R. volume. There Hall, J., delivering the judgment of the Court, says:

> The respondent's main contention is that s. 65(3) does not give the Board jurisdiction to amend the orders previously made in the manner done on February 13, 1962. Counsel for the respondent, citing well-known authorities, emphasized that the provisions of the *Labour Relations Act* being in derogation of common law rights should be strictly construed. On the other hand, counsel for the appellants urged that the *Labour Relations Act* was remedial legislation and should be liberally construed.
>
> Whatever merit the arguments of the respondent had at the beginning of labour relations legislation, it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of Legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century.

110 The Court declined to interpret the section so as to narrow the plain meaning of the word "vary", declined to adopt the view that the word "vary" could not apply retroactively; held the decision of the board was, by statute, final and conclusive; and ruled the Court would not and must not interfere in what had been done within the board's jurisdiction. In support of that ruling, reference was made to the statement of Lord Sumner in *R. v. Nat Bell Liquors Ltd.*

, 65 D.L.R. 1 at pp. 22-3, 37 C.C.C. 129, [1922] 2 A.C. 128, [1922] 2 W.W.R. 30, in which:

> ... it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

111 The *Bakery & Confectionery Workers'* case is, in my opinion, readily distinguishable. The order we are dealing with is not an alteration or variation of an already existing order. It is a new order made in substitution for a previous order. A *Public Utilities Act* and a *Labour Relations Act* are two entirely different types of legislation. The Supreme Court held s. 63(3) clearly conferred on the Labour Relations Board jurisdiction to vary the certification order; that they had decided to vary it; and that, in *certiorari* proceedings, there could be no interference with their decision as to the nature of the variation. A decision of the New Brunswick Board of Commissioners of Public Utilities is not final. It is subject to appeal, by way of *certiorari*. We have jurisdiction to decide, upon the evidence before the board, any question of fact and to confirm, modify, vary or reverse the order made by the board.

112 The precise and unambiguous words comprising the language of the Act should be interpreted in their ordinary and natural sense. There are no gaps in the language of the Act which require filling in. 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.

113 I do not find it necessary to discuss the sixth ground of appeal which is:

> the board erred in not reducing the rates to be paid by the appellant for natural gas to such a level that the appellant would be financially able to pass part of such reduction on to its customers and present a new schedule of rates to be paid to it by its customers for gas as prayed for in item 4(1)(b) of the petition.

114 The seventh ground of appeal is that

> the board erred in not ordering the producer to deliver clean dry gas to the distributor.

115 Since 1962 or 1963 the producer has been experimenting with injecting, under high pressure, large quantities of water into the Stoney Creek wells. The object of such injection is to increase the oil production. What success the experiment has attained has yet to be determined. It did, however, impose on the distributor the problem of dealing with the "wet gas" which was a direct result of the experiment. To combat the wet gas, the distributor, at its own expense, has installed two dehydrators at the points where the gas is delivered to it.

116 As the quality of the gas delivered by the producer to the distributor is one of the issues between the parties in the Queen's Bench Division action, I refrain from expressing any opinion as to whether the rates fixed by the board apply only to gas in its natural state; or whether the rates also apply to gas which the producer has diluted by the injection of water.

117 My examination of the financial statements of the producer indicates that included in its operating costs are some items the board should submit to close scrutiny on the 1967 rate review. While I propose referring to them, the reference is only intended as a suggestion they be considered carefully. I have no thought of attempting to impose my views on the board.

118 The $20,000 management fee charged the producer by its controlling shareholder appears to be unreasonable. The producer should be required to justify a management fee of $20,000 or any other amount.

119 During the 1964 fiscal period the producer lost $5,485 in producing and marketing lubricating oil. I doubt if, in a situation such as exists in the Stoney Creek Field, the producer should be permitted to charge that loss as an operating expense in the production of natural gas. It may be the 80-20 cost allocation is outdated.

120 Another operating charge which should, I suggest, be reviewed is the $10,000 item covering the salary of an engineer. It is doubtful if the scope and nature of the operations the producer presently is engaged in require employment of a full-time engineer.

121 I would allow the appeal but only to the extent of eliminating the penal rate for $4 per m.c.f. fixed by the order of the board for all gas in excess of 12,500 m.c.f. delivered in any one month.

122 I would make no order as to costs.

123 WEST, J.A.:--I have read the reasons for judgment of the other members of the Court, and agree that the appeal should be allowed only to the extent of eliminating the penal rate of $4 per m.c.f. for all gas in excess of 12,500 m.c.f. delivered in any one month.

124 I refrain from expressing any opinion on the fifth ground of the appeal. The consent of the appellant to the order of November 14, 1962, is a sufficient reason for not giving retroactive effect to the order of the Board of February 19, 1966. It is unnecessary to decide in this case whether or not an order of the Board may be made retroactive.

125 I would allow the appeal to the extent I have indicated above. I would make no order for costs.

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2017-0056

KITCHENER-WILMOT HYDRO INC.

Application for rates and other charges to be effective January 1, 2018

BEFORE: Lynne Anderson
Presiding Member

Allison Duff
Member

Susan Frank
Member

March 1, 2018

1 INTRODUCTION AND SUMMARY

Kitchener-Wilmot Hydro Inc. (Kitchener-Wilmot Hydro) filed an incentive rate-setting mechanism (IRM) application with the Ontario Energy Board (OEB) on August 14, 2017. On December 6, 2017, Kitchener-Wilmot Hydro filed a letter requesting that the OEB hear its application in two parts. The first being the price cap adjustment to allow any changes to base rates from this application to coincide with Kitchener-Wilmot Hydro's January 1, 2018 rate year, as well as changes to retail transmission service rates (RTSRs). The second part was the disposition of group 1 deferral and variance accounts.

The OEB accepted Kitchener-Wilmot Hydro's request and issued a Partial Decision and Rate Order on December 20, 2017. The OEB indicated that it will address Kitchener-Wilmot Hydro's proposal for disposition of its group 1 deferral and variance account balances separately due to the complexity of the issues relating to those accounts.

Through this Decision and Order (Decision) addressing the disposition of Kitchener-Wilmot Hydro's deferral and variance accounts, the OEB denies Kitchener-Wilmot Hydro's proposal to correct certain group 1 accounts, namely the Retail Settlement Variance Account (RSVA) balances that were previously approved by the OEB. These accounts were disposed on a final basis. To correct the balances would result in retroactive rate-making. While the OEB has determined that this Decision is appropriate for these circumstances, taking into consideration past rulings in the courts, the OEB also recognizes the current approach to group 1 accounts does not recognize the potential for ongoing adjustments. The OEB will be reviewing its directions for the RSVAs to determine if it is appropriate to recognize the potential for ongoing adjustments even if a particular balance has been disposed.

The OEB approves disposition of the group 1 deferral and variance balances as at December 31, 2016, without the adjustments proposed by Kitchener-Wilmot Hydro. The total group 1 balance is a credit of $5,297,381 plus interest. The disposition of these balances will result in a credit refunded to all customer classes.

2 THE PROCESS

Kitchener-Wilmot Hydro filed its application on August 14, 2017, under section 78 of the *Ontario Energy Board Act, 1998* (OEB Act) and in accordance with the Filing Requirements.

Notice of Kitchener-Wilmot Hydro's application was issued on October 12, 2017. The School Energy Coalition (SEC), and the Vulnerable Energy Consumers Coalition (VECC) responded to the Notice and became parties to the proceeding. OEB staff also participated in the proceeding. Cost awards were allowed only in relation to Kitchener-Wilmot Hydro's proposal to correct balances previously approved by the OEB in Kitchener-Wilmot Hydro's affected RSVAs.

Procedural Order No.1, issued November 1, 2017, set out dates for various procedural steps in this proceeding.

During the course of the proceeding, the applicant responded to interrogatories and, where required, updated and clarified the evidence. SEC, VECC and OEB staff provided submissions on the disposition of the group 1 deferral and variance accounts that were considered for this Decision.

Kitchener-Wilmot Hydro's reply submission was filed on January 12, 2018 in accordance with Procedural Order No. 1.

3 ORGANIZATION OF THE DECISION

In this Decision, the OEB addresses the group 1 deferral and variance accounts, and provides reasons for denying Kitchener-Wilmot Hydro's proposal.

In the Order section, the OEB addresses the steps to establish the rates that flow from this Decision.

4 GROUP 1 DEFERRAL AND VARIANCE ACCOUNTS

In each year of an IRM term, the OEB reviews a distributor's group 1 deferral and variance accounts in order to determine whether their total balance should be disposed.[1] OEB policy requires that group 1 accounts be disposed if they exceed (as a debit or credit) a pre-set disposition threshold of $0.001 per kWh, unless a distributor justifies why balances should not be disposed.[2] If the balance does not exceed the threshold, a distributor may elect to request disposition.

The 2016 actual year-end total balance for Kitchener-Wilmot Hydro's group 1 accounts including interest projected to December 31, 2017 was a credit of ($5,297,381) plus interest. This total balance is not affected by the adjustment proposed by Kitchener-Wilmot Hydro, except for the calculation of interest. This amount represents a total credit claim of $0.0030 per kWh, which exceeds the disposition threshold. Kitchener-Wilmot Hydro proposes the disposition of this credit amount back to customers over a one-year period.

Included in the balance of the group 1 accounts is the Global Adjustment (GA) account balance of a debit of $417,070 plus interest, including the adjustment proposed by Kitchener-Wilmot Hydro. A customer's costs for the commodity portion of its electricity service reflects the sum of two charges: the price of electricity established by the operation of the Independent Electricity System Operator (IESO) administered wholesale market, and the GA.[3]

The GA is paid by consumers in several different ways:

- For Regulated Price Plan (RPP) customers, the GA is incorporated into the standard commodity rates, therefore there is no variance account for the GA.

- Customers who participate in the Ontario Industrial Conservation Initiative program are referred to as "Class A" customers. These customers are assessed GA costs through a peak demand factor that is based on the percentage their

[1] Group 1 accounts track the differences between the costs that a distributor is billed for certain IESO and host distributor services (including the cost of power) and the associated revenues that the distributor receives from its customers for these services. The total net difference between these costs and revenues is disposed to customers through a charge or credit known as a rate rider.

[2] Report of the OEB – "Electricity Distributors' Deferral and Variance Account Review Initiative (EDDVAR)." EB-2008-0046, July 31, 2009

[3] The GA is established monthly, by the IESO, and varies in accordance with market conditions. It is the difference between the market price and the sum of the rates paid to regulated and contracted generators and conservation and demand management (demand response) program costs.

demand contributes to the top five Ontario system peaks. This factor determines a Class A customer's allocation for a year-long billing period that starts in July every year. As distributors settle with Class A customers based on the actual GA costs there is no resulting variance.

- "Class B" non-RPP customers pay the GA charge based on the amount of electricity they consume in a month (kWh). Class B non-RPP customers are billed GA based on an IESO published GA price. For Class B non-RPP customers, distributors track any difference between the billed amounts and actual costs in the GA variance account for disposal, once audited.

Kitchener-Wilmot Hydro proposed the recovery of its GA variance account balance as at December 31, 2016 from customers who were Class B for the entire period from January 2014 to December 2016. The balance of the group 1 accounts includes $387,750 plus interest for the recovery of Capacity Based Recovery (CBR) charges for Class B customers related to the IESO's wholesale energy market Demand Response 3 program. Distributors paid CBR charges to the IESO in 2016 and recorded these to a dedicated sub-account. The disposition of this sub-account is impacted by whether or not a distributor had any customers who were part of Class A during the period from January 2015 to December 2016.

Kitchener-Wilmot Hydro had Class A customers during the period from January 2014 to December 2016 so it applied to have the balance of this account disposed through a separate kWh rate rider for Class B customers in order to ensure proper allocation between Class A and Class B customers.

The remaining group 1 accounts being sought for disposition, through the general Deferral and Variance Account rate rider, include the following flow through variance accounts: Smart Meter Entity Charges, Wholesale Market Service Charges, Retail Transmission Service Charges, Commodity (Power) Charges, and Account 1595 residual balances.

Account 1595 (2014) Error

Kitchener-Wilmot Hydro is requesting disposition of a residual amount in Account 1595 (2014) of a debit of $917,990 plus interest. In response to an OEB staff interrogatory[4] questioning the large balance remaining, Kitchener-Wilmot Hydro indicated that the remaining balance is high because the GA rate rider was calculated incorrectly in its previous cost of service application[5]. In that application, incorrect billing determinants

[4] EB-2017-0056, Interrogatory Responses, Staff-4, November 29, 2017
[5] EB-2013-0147

were used to calculate the GA rate rider and therefore, Kitchener-Wilmot Hydro under-collected from non-RPP customers for GA costs attributable to that customer base.

OEB staff submitted that although some intergenerational inequity may exist should the OEB approve the disposition of this residual amount, this error can be corrected as part of the residual balance disposition given that the purpose of Account 1595 is to true-up approved balances.

OEB staff also submitted that should the OEB approve the disposition of this residual amount, it may choose to direct Kitchener-Wilmot Hydro to separate the GA residual amount applicable to non-RPP customers remaining in this sub-account from the overall remaining balances. The GA residual amount should be allocated only to non-RPP customers, while the remaining amount would be recovered from all customers. OEB staff invited Kitchener-Wilmot Hydro to comment on its billing system capabilities in doing this separation in its reply submission.

In its reply submission, Kitchener-Wilmot Hydro commented that it currently does not have the billing system capabilities of doing this separation.

Findings

The OEB approves the disposition of the balance in Account 1595 (2014). The purpose of Account 1595 is to true-up between amounts approved for disposition and the amount actually disposed. The OEB approved an amount to be collected that was not collected due to the error in the rate rider calculation. Disposing of Account 1595 (2014) addresses this issue.

Given this error was for the GA rate rider, the residual balance is expected to be predominately related to non-RPP customers. As part of the rate order process, Kitchener-Wilmot Hydro is expected to develop an approach for separating the non-RPP and RPP components of Account 1595 (2014).

Accounts 1588-Power and 1589-Global Adjustment Errors

In the current proceeding, Kitchener-Wilmot Hydro summarized the findings of an audit completed by the OEB's Audit and Performance Assessment unit during October 2016 to March 2017. The audit was in response to an error Kitchener-Wilmot Hydro discovered in its 2016 rate application[6]. Kitchener-Wilmot Hydro discovered that in

[6] EB-2015-0084

December 2013, a manual recording error (error 1) was made affecting Account 1588 - Power and Account 1589 – GA. In that decision, the OEB did not approve the disposition of any balances for the 2014 period and ordered the above noted audit. The OEB also noted that adjusting the 2013 balances in the 2016 rate proceeding could have raised questions of potential retroactive rate-making that went beyond the scope of that proceeding[7].

Prior to the commencement of the audit, Kitchener-Wilmot Hydro discovered another error (error 2) also relating to the December 31, 2013 balances of the same accounts. Error 2 relates to a misallocation of the December 31, 2013 unbilled revenue as Kitchener-Wilmot Hydro did not have separate 1588/1589 Accounts when the entry was made, and it mistakenly put the entire unbilled revenue amount into Account 1588. As per Kitchener-Wilmot Hydro's response to OEB staff interrogatory #10, an unbilled revenue correction was made as of December 2014 relating to December 31, 2013 and was built into the 2014 and 2015 closing balances (which are being requested for disposition in the current 2018 proceeding along with the 2016 balances).

During the audit, audit staff found a third error that resulted in an immaterial impact to the 2013 balances as well. Audit staff examined entries in Kitchener-Wilmot Hydro's deferral and variance accounts from January 1, 2013 to December 31, 2015. Audit staff made no other findings with respect to Kitchener-Wilmot Hydro's Account 1588 and1589 balances or processes.

In the current proceeding, Kitchener-Wilmot Hydro summarized the findings of the now completed audit and requests to clear balances for the period 2014 to 2016. The audit confirmed three errors related to previously disposed (i.e. 2013) balances:

1. A manual adjustment error
2. Misallocation of unbilled revenues as at December 31, 2013 – Kitchener-Wilmot Hydro did not separate the Power expense into its components of GA and Power until December 2014
3. Kitchener-Wilmot Hydro used the final settlement amount instead of the actual IESO bill to record the GA variance

Table 4.1 depicts the quantum of each error. The net impact is $2.2M and represents an overall allocation error between RPP and non-RPP customers. RPP customers have underpaid by $2.2M and non-RPP customers have overpaid by this amount for the 2013 period.

[7] Ibid

Table 4.1: Summary of Account 1588 and 1589 Errors

	Error 1: Manual Adjustment Error ($)	Error 2: Misallocation of Unbilled Revenues as at December 31, 2013 ($)	Error 3: Final Settlement vs. Power Bill ($)	Net Impact ($)	
Account 1588 – Principle	(3,443,918)	5,637,187	(83)	2,193,186	
Account 1588 – Interest	(3,217)	5,131	4	1,918	
Sub-Total	**(3,447,135)**	**5,642,318**	**(79)**	**2,195,104**	
Account 1589 – Principle	3,443,918	(5,637,187)	83	(2,193,186)	
Account 1589 – Interest	3,217	(5,131)	(4)	(1,918)	
Sub-Total	**3,447,135**	**(5,642,318)**	**79**	**(2,195,104)**	

In order to correct these errors, Kitchener-Wilmot Hydro proposed an adjustment and re-allocation between its RPP and non-RPP customers. The proposed accounting adjustments included a debit to Account 1588 – Power and a credit to Account 1589 – GA. Kitchener-Wilmot Hydro proposed that the adjusted balanced be disposed to customers over a one year period.

Positions of the Parties

VECC, SEC and OEB staff (Parties) submitted that the over-collected amounts from non-RPP customers should be refunded, and as such, the adjustment to Account 1589 should be approved, but no retroactive adjustment should be made to Account 1588 for the under-billed amounts attributable to RPP customers. This would be an asymmetrical treatment.

The submissions of SEC and OEB staff provide, to various degrees, detailed synopsis' of the law and previous cases dealing with retroactivity that have come before the OEB. SEC and OEB staff submitted that retroactive (or out of period) rate adjustments are

generally not permitted; however, there are exceptions to the rule against retroactivity and the OEB's own jurisprudence shows a number of approaches to this issue.

SEC and OEB staff note that the OEB has, in the past, concluded that it has the authority to order repayment to customer who have been historically overcharged. SEC noted that "this should not come as much of a surprise, since utilities have a significant asymmetry of information over ratepayers and the Board. They should not be allowed to benefit from their mistakes, which only they have the ability to reveal."[8] VECC supported SEC's submissions.

The common theme amongst the submissions of the Parties was that utilities have ultimate control of their books and therefore are responsible for ensuring the accuracy of their filings with the OEB. Utilities are entrusted by ratepayers to ensure its calculations of these costs are correct. Parties noted that in this case, Kitchener-Wilmot Hydro did not meet its responsibility to do so. Parties noted that while errors by Kitchener-Wilmot Hydro were unintentional, certain customers were in fact overcharged. Non-RPP customers overpaid for a prior period and should not be out-of-pocket for errors of the utility. Similarly, RPP customers should not be burdened by out of period costs in future years after rates have been declared final.

Parties noted that in effect, an asymmetrical outcome would therefore act as a consequence for the errors of Kitchener-Wilmot Hydro while refunding customers that were harmed by the error.

In its reply submission, Kitchener-Wilmot Hydro disagreed with the submissions of the Parties.

Kitchener-Wilmot Hydro noted the errors were the result of inadvertent mistakes and not the result of any negligence or intentional misconduct. Kitchener-Wilmot Hydro noted:

> Each of the Parties have argued that the OEB should apply the principle of "no retroactive ratemaking" to Account 1588 to prevent a retroactive adjustment that would charge RPP customers $2,195,104 which they were previously under-billed, however the Parties at the same time argue that the OEB should ignore the principle of "no retroactive ratemaking" to permit the refunding of $2,195,104 to non-RPP customers that were previously over-billed. What the Parties fail to acknowledge is that the OEB has never once approved such an "asymmetric disposition" of accounts previously disposed of on a final basis to account for errors to a utility's detriment in the absence of express consent from the utility. [9]

[8] EB-2017-0056, SEC Submission, December 18, 2017, Page 4
[9] EB-2017-0056, Kitchener-Wilmot Hydro Reply Submission, January 12, 2018, Page 16

Kitchener-Wilmot Hydro submitted that if the OEB approves an asymmetric correction, its forecasted net income for 2018 would fall by approximately $2M and its return on equity (ROE) in 2018 would fall to 4.78%.

Kitchener-Wilmot Hydro also noted that an asymmetric correction would amount to a penalty that is entirely disproportionate to the errors that occurred. Kitchener-Wilmot Hydro proposed to voluntarily compensate the OEB for the costs it incurred in respect of its now completed audit, up-to a maximum of $50,000, if the OEB elects to approve the adjustments as proposed by Kitchener-Wilmot Hydro.[10]

Findings

The OEB approves disposition of the December 31, 2016 balances in the group 1 accounts, with interest projected to April 30, 2018, without the adjustments proposed by Kitchener-Wilmot Hydro. The OEB denies Kitchener-Wilmot Hydro's proposal to correct the Account 1588 and 1589 RSVA balances for errors that occurred related to 2013. The account balances at December 31, 2013 were disposed through final tariffs approved by the OEB. The OEB recognizes that the errors in the account balances resulted in an overpayment by non-RPP customers, and a comensurate underpayment by RPP customers, of more than $2M. However, to correct the balances now would be retroactive rate-making.

Kitchener-Wilmot Hydro had proposed to adjust balances to correct for the errors shown in Table 4.1. The OEB has amended the principal account balances proposed by Kitchener-Wilmot Hydro by adding back the $2,193,186 from Table 4.1 to Account 1588 and subtracting it from Account 1589.[11] The revised balances are shown in Table 4.2. As part of the rate order process, Kitchener-Wilmot Hydro is required to confirm that these principal balances correctly reflect the OEB's decision not to adjust for the 2013 errors.

[10] Ibid, Page 20

[11] Kitchener-Wilmot Hydro proposed principle balances in Account 1588 and Account 1589 of $417,070 and $1,221,769 respectively. With the adjustment removed, the principle balance for Account 1588 becomes a credit of $971,417 and Account 1589 becomes a debit of $2,610,256.

Table 4.2: Group 1 Deferral and Variance Account Balances

Account Name	Account Number	Principal Balance ($) A
Smart Meter Entity Variance Charge	1551	(47,280)
RSVA - Wholesale Market Service Charge	1580	(5,934,113)
Variance WMS - Sub-account CBR Class B	1580	387,750
RSVA - Retail Transmission Network Charge	1584	(2,431,822)
RSVA - Retail Transmission Connection Charge	1586	297,607
RSVA - Power	1588	(971,417)
RSVA - Global Adjustment	1589	2,610,256
Disposition and Recovery of Regulatory Balances (2014)	1595	917,990
Disposition and Recovery of Regulatory Balances (2015)	1595	(126,352)
Total for all Group 1 accounts excluding Global Adjustment and CBR		(8,295,387)
Total for all Group 1 accounts		**(5,297,381)**

Kitchener-Wilmot Hydro is ordered to re-calculate interest projected to April 30, 2018 reflecting this Decision.

The total group 1 balance is a credit of $5,297,381 plus interest. The disposition of these group 1 balances will result in a credit going back to all customer classes.

Intervenors and OEB staff provided references to the court cases dealing with rate retroactivity. Although the OEB's powers to set just and reasonable rates are broad, the rule against rate retroactivity is not discretionary (other than with respect to certain exceptions that the OEB does not find apply in this circumstance). As noted in a recent

decision of the Ontario Court of Appeal: "It is well established that an economic regulatory tribunal, such as the Board, operating under a positive approval scheme of ratemaking must exercise its rate-making authority on a prospective basis. Generally speaking, absent express statutory authorization, such a regulator may not exercise its rate-making authority retroactively or retrospectively."

The Supreme Court of Canada has stated that retroactive rate making "is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive" and "the power to review its own previous final decision on the fairness and reasonableness of rates would threaten the stability of the regulated entity's financial situation".[12] The tariff approved by the OEB under which the accounts containing the errors were disposed was final and both the utility and the customers should be able to rely on the finality of rates.

Kitchener-Wilmot Hydro did and does have control of its books and is expected to maintain accurate accounts. They did not in this instance. However, there was no willful misconduct by the Kitchener-Wilmot Hydro, nor has it been enriched by the error. The OEB's audit did not uncover systemic problems with Kitchener-Wilmot Hydro's processes for the RSVA Accounts 1588 and 1589.

One principle of importance in determining whether an adjustment is retroactive rate-making is whether there was prior knowledge by the utility and its customers that there may be retrospective adjustments. The Alberta Court of Appeal has stated that the critical factor for determining whether the regulator is engaged in retroactive ratemaking is the parties' knowledge of whether the rate is subject to future change[13]. The OEB has not previously established an expectation that there could be subsequent adjustments related to a specific period of time once final tariffs have been approved to dispose of account balances for that period.

The OEB has determined that this Decision is appropriate for the circumstances of this case, taking into consideration past rulings in the courts. The OEB also recognizes the current approach to group 1 accounts does not explicitly recognize the potential for ongoing adjustments to these accounts once final rates are approved. The OEB will be reviewing its directions for the RSVAs to determine if it is appropriate to recognize the potential for ongoing adjustments, given the nature of these accounts, even if a

[12] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722, ("*Bell Canada 1989*"), at p. 1749 and 1759

[13] *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28(CanLII), at para 57

particular balance has been disposed on a final basis. The OEB notes that these RSVA accounts are not closed and re-opened each time a balance is disposed.

Furthermore, as noted by Kitchener-Wilmot Hydro, the IESO Market Rules permit adjustments to the commodity settlement amounts for information that is found incorrect. This can result in adjustments to prior periods that may or may not be in the control of a distributor. Host distributors can adjust charges to embedded distributors for prior periods for which the embedded distributor has already disposed of account balances. The OEB will consider this when reviewing the appropriate treatment for the disposition of RSVAs.

The OEB has already introduced additional regulatory processes for the review of the commodity RSVAs to assist distributors in minimizing errors and to find issues before accounts are disposed.

The OEB will not charge Kitchener-Wilmot Hydro for the cost of the audit. The audit confirmed the balances provided by Kitchener-Wilmot Hydro, and did not find any other material issues.

5 IMPLEMENTATION AND ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1) Kitchener-Wilmot Hydro Inc. shall file a draft Rate Order by March 15, 2018 reflecting the OEB's Decision, including:
    i) An RPP and non-RPP separation for the balance in Account 1595 (2014)
    ii) Review and confirmation of the principal balances in Table 4.2
    iii) Calculation of interest projected to April 30, 2018
    iv) Calculation of rate riders to dispose of December 31, 2016 balances over a one-year period.

2) Intervenors and OEB staff may file any comments on the draft Rate Order with the OEB and forward to Kitchener-Wilmot Hydro Inc. within 7 days of the date of filing of the draft Rate Order. The OEB does not intend to allow for an award of costs for the review of the draft Rate Order or for the filing of any comments on the draft Rate Order.

3) Kitchener-Wilmot Hydro Inc. may file with the OEB responses to any comments on its draft Rate Order within 7 days of the date of receipt of comments.

4) Intervenors shall submit their cost claim no later than 7 days from the date of issuance of the Rate Order.

5) Kitchener-Wilmot Hydro Inc. shall file with the OEB and forward to intervenors any objections to the claimed costs within 17 days from the date of issuance of the rate order.

6) Intervenors shall file with the OEB and forward to Kitchener-Wilmot Hydro Inc. any responses to any objections for cost claims within 24 days from the date of issuance of the rate order.

7) Kitchener-Wilmot Hydro Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, EB-2017-0056 and be made electronically through the OEB's web portal at http://www.pes.ontarioenergyboard.ca/eservice/ in searchable/unrestricted PDF format. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at https://www.oeb.ca/oeb/_Documents/e-Filing/RESS_Document_Guidelines_final.pdf. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a USB flash drive in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@oeb.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, March 1, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Date: 2010 11 24
Docket: S-1-CV-2010000079

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHLAND UTILITIES (YELLOWKNIFE) LIMITED and
NORTHLAND UTILITIES (NWT) LIMITED

Applicants

- and -

NORTHWEST TERRITORIES PUBLIC UTILITIES BOARD

Respondent

- and -

CITY OF YELLOWKNIFE and
TOWN OF HAY RIVER

Intervenors

Application for leave to appeal and appeal of a decision by the Public Utilities Board.

Heard at Yellowknife, NT, on November 2, 2010.

Reasons filed: November 24, 2010.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

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Counsel for the Intervenors: Thomas D. Marriott

Date: 2010 11 24
Docket: S-1-CV-2010000079

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REASONS FOR JUDGMENT

[1] This is an application for leave to appeal and an appeal of a decision, numbered 4-2010, issued by the Northwest Territories Public Utilities Board (the "Board") on March 24, 2010.

[2] At the hearing before me, I granted leave and said that reasons for that decision would be forthcoming. Those reasons are contained within this judgment. Since counsel at the hearing were ready and willing to also argue the appeal on the merits, I proceeded to hear that as well. This judgment therefore also contains my reasons for decision on the appeal.

[3] The issue put before the court is whether the Board exceeded its jurisdiction when, as part of its ratesetting exercise for the period 2008-2010, it ordered the

applicants to flow through to customers money received as a result of a tax refund for operations in 2007. The Applicants say it did and that its order amounts to retroactive ratesetting. The Intervenors argue that it is prospective ratesetting since it seeks to redress harm to current customers. The Board takes no position. For the reasons that follow, the appeal is allowed.

Background:

[4] The Board is established by the *Public Utilities Act*, R.S.N.W.T. 1988, c.24 (Supp.), to regulate public utilities in the Northwest Territories. It has jurisdiction to supervise the operations of utility companies, to approve municipal franchise agreements, and, most significantly for purposes of this appeal, to fix rates for utility services. It is part of what has been described by the Supreme Court of Canada, in *ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, as a "regulatory compact" (at para. 63):

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated ...(citations omitted)

[5] With respect to ratesetting, the Board regulates on the basis of specific years (called "test years"). It sets the rates for specific test years and once those rates are set they are final. The only exceptions to that are if the Board's order is merely an interim one or if a deferral account is established. Neither situation applies in this case.

[6] The Act contemplates that the objective for the Board is to fix "just and reasonable" rates. That is not explicit but in several sections dealing with ratesetting, such as subsections 49(1), 51(2), 51(3) and 51(4), the Act repeats the phrase "in fixing just and reasonable rates". In doing so, the Board determines a rate base consisting of the cost of the utility's property used to provide the service and its necessary working capital and then fixes a fair return on that rate base. All parties agree that the Act requires the Board to set rates on a prospective basis, such as described in *Northwestern Utilities Limited et al* v. *The City of Edmonton*, [1979] 1 S.C.R. 684 (at p. 691): "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."

[7] All parties also agree on another basic tenet of ratesetting by public utility boards, that being that, in the absence of specific legislative authority to do so, boards do not have the authority to retroactively change rates: see *ATCO Gas & Pipelines (supra)*, at para. 71. Rates are raised or lowered to reflect current conditions. They are not designed to pay back past excessive profits or recoup past operating losses. The Board can take into account past experience in setting the current rates; but, it cannot design a future rate so as to enable the utility to recover a past loss or to rectify for customers some past over-compensation of the utility. In either case the Board would be engaged in retroactive or retrospective ratesetting.

[8] This case concerns one particular aspect of the utilities' overall finances, the treatment of stock handling charges. In February, 2008, both Applicants filed their respective rate applications for the test years 2008-2010. Up to that time, stock handling charges had been capitalized as part of the company's rate base and the capitalized amount added to the pool of capital cost allowances. As the review of their rate applications went on, the Applicants became aware that these stock handling charges could be claimed as tax deductions. This was because of a ruling from the Canadian Revenue Agency received by their parent company in Alberta. The Applicants decided in early 2008 to claim these deductions on their 2007 tax returns. The Applicants then amended their 2008-2010 rate filings to include the projected benefit of similar deductions in the test years.

[9] It is worthwhile to note that there was no rate application or ruling by the Board for 2007. Rates had been set for the period of 2005-2006 and these were used as the basis for the rates charged in 2007. So the 2008-2010 application was the first opportunity to review the impact of deducting these charges as opposed to capitalizing them.

[10] The amounts received back by the Applicants, as a result of taking these deductions, were relatively small. They were $19,400 for one and $3,800 for the other.

[11] On October 27, 2008, the Board issued two decisions, Decision 24-2008 and Decision 25-2008, dealing with the Applicants' 2008-2010 rate applications. Both decisions addressed the income tax deductions for stock handling charges in the same way:

> The Board notes NUL's treatment of stock handling charges for income tax purposes was different prior to the current test period. Prior to the current test period stock handling charges were not deducted for calculation of the income tax component of revenue requirement, both in the forecasts and in the actuals. As long as NUL's treatment of stock handling charges remains consistent for the forecasts as well as actuals, the Board considers customers will not be harmed. However, if NUL were to choose to follow the route of ATCO Gas and request that its prior year income taxes be reassessed by CRA to the maximum extent possible including deduction for stock handling charges then customers will be harmed if such charges were not were not flowed through to customers.

[12] Both decisions also contained a direction to the applicants that any tax refunds received as a result of claiming these deductions are to be "flowed through" to their customers. The Board's directions were as follows:

> In view of the foregoing, the Board will not direct NUL to retroactively adjust its deductions for stock handling charges respecting prior years. However, if NUL were to choose to request such deductions from CRA respecting prior years, the Board expects that any resulting income tax savings will be flowed through to NUL's customers.

[13] The Board did not say how the refunds are to be "flowed through" to the customers. But, both the Applicants and Intervenors assume that this means that the money received by the Applicants is to be paid over to the current customers.

[14] In January, 2009, the Applicants filed applications with the Board seeking a review and variance of these directions. The Applicants submitted that the stock handling charges related to a prior year, 2007, for which rates had been finalized, while the directions were contained within the Board's decisions relating to 2008-2010 rates. As such, so the Applicants argued, the Board's directions breached the principle against retroactive ratesetting and thus were outside the Board's jurisdiction.

[15] In March, 2009, the Applicants requested the Board to defer consideration of their review and variance applications pending the outcome of an identical dispute before the Alberta Utilities Commission. The Board agreed to do so

[16] On November 12, 2009, the Alberta Utilities Commission issued Decision 2009-215 respecting the treatment of tax refunds received by ATCO Electric Ltd. for similar deductions claimed for prior years. The reasons of the Commission will be discussed in further detail later in these reasons but, in summary, the Commission considered itself to be bound by the principle against retroactive ratemaking, the principle of prospectivity, and the principle of regulatory certainty, and therefore precluded from directing ATCO Electric, either directly or indirectly, to return these funds from prior years to current customers. I was told that this decision has not been appealed or judicially reviewed.

[17] The Board reviewed the Alberta decision and continued with consideration of the review and variance applications. On March 24, 2010, the Board issued Decision 4-2010 in which it dismissed the Applicants' request to vary its earlier directions. This is the subject-matter of this appeal.

Decision 4-2010:

[18] In its decision, the Board started by noting that the rates established for the 2005-2006 period, being the rates that were in place in 2007, were based on the assumption that stock handling charges cannot be deducted for tax purposes. Rather, those charges were capitalized as part of the companies' rate base and the capitalized amount added to the pool of capital cost allowances. It also noted that the Applicants, after they became aware of the deductibility of these charges, had the discretion as to whether to claim the stock handling charges as a deduction for 2007 and prior years but chose to claim only for 2007.

[19] These two points led to what I think are the main arguments supporting the Board's decision.

[20] First, the Board stated that there are certain methodological underpinnings to the establishment of rates. Two of those relate to the calculation of income taxes and capital cost allowance deductions. Any retroactive change in the methodology used in

the establishment of rates, without regard to its impact on future rates, is, in the Board's view, a violation of the principle of prospectivity. In dismissing the Applicants' argument that the Board's directions amount to retroactive ratemaking, the Board wrote:

> The Board considers the amount of Capital Cost Allowance (CCA) that is claimed as a deduction in one time period versus another, for tax purposes, is a timing issue. If more CCA is claimed in a past year, then less Un-depreciated Capital Costs pools would be available for use in future years resulting in a reduction in the CCA deductions in future years. Since CCA claims in a past year impact future year tax calculations, the Board considers any potential adjustments to future customer rates to reflect the carry over effects of past deductions to be not a retroactive adjustment of historical rates but rather a prospective adjustment to restore the integrity of prospective rate making.

[21] Second, the Board was persuaded by the argument advanced by the Intervenors in this case that, since the claiming of stock handling charges as a deduction is solely within the discretion of the Applicants, there is no shared risk as between the utilities and the customers. In other words, this is a purely one-sided benefit. It is not an "efficiency" saving but merely a windfall due to a fortuitous tax ruling and, because claiming higher deductions in one year has an impact on the amount of tax due in future years because of the reduction in capital cost allowance available, the risk results in harm to the customers.

[22] Therefore, the Board was not convinced that its earlier directions were either inconsistent with prospective ratemaking or violated the principle prohibiting retroactive ratemaking.

Application for Leave to Appeal:

[23] Section 78(1) of the *Public Utilities Act* restricts appeals to questions of law or jurisdiction and an appellant must first obtain leave to appeal.

[24] The parties agree on the test to be applied to determine whether leave should be granted: *North West Co.* v. *Town of Fort Smith*, [2007] N.W.T.J. No. 6 (S.C.), at para. 16; *Atco Electric Ltd.* v. *Alberta (Energy and Utilities Board)*, [2003] A.J. No. 117 (C.A.), at para. 17. The Applicants must demonstrate that the appeal raises a serious

arguable point. Subsumed within this test are four criteria: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action; (3) whether the appeal is *prima facie* meritorious; and, (4) whether the appeal will unduly hinder the progress of the case. Also taken into consideration is the standard of review that will apply should leave be granted.

[25] In my view, as I will explain more fully later, the appeal raises a question of jurisdiction. Assuming that the Board had the power to embark on an examination of how, if any, these tax deductions and refunds were to be treated, the issue is whether the Board exceeded its jurisdiction by imposing directions that were tantamount to retroactive ratemaking. And, if it is a jurisdictional issue, then the Board must be correct in law. Thus the issue is significant to the practice.

[26] The issue is obviously significant to the action since it is determinative of the action. So determination of this point will not hinder progress of the action.

[27] The Intervenors argued that the appeal is insignificant since the practical effect of the Board's directions are immaterial. By that they mean that the amount of dollars at stake amount to an insignificant part of the Applicants' total revenue requirements. But, of course, the Applicants respond that it is the principle that counts, not the dollars. This appeal is essentially about the jurisdiction of the Board in exercising its ratesetting powers.

[28] I agree with the points made by the Applicants. Hence, I granted leave to appeal.

Standard of Review:

[29] It is trite law to state that a tribunal has only those powers that are expressly or implicitly conferred on it by its constituent statute. Either the Board had the jurisdiction to issue the directions, or it did not.

[30] The first issue that must be addressed, therefore, is the standard of review. However, as stated in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, it is not necessary to perform an analysis of this issue if the standard of review for the type of question in issue has already been determined by the jurisprudence.

[31] Questions of jurisdiction are reviewed on a standard of "correctness": *ATCO Gas & Pipelines (supra)*, at para. 21. As previously mentioned, s.78(1) of the Act limits appeals to questions of law or jurisdiction. This generally calls for the application of the correctness standard: *Prairie North Regional Health Authority* v. *Kutzner*, [2010] S.J. No. 650 (C.A.), para. 31.

[32] Section 17 of the Act, however, states that the Board has exclusive jurisdiction for all matters in which jurisdiction is conferred on it by the Act and its decisions shall not be questioned or reviewed by judicial review or any other process. Section 19 provides that the Board's determination on a question of fact is conclusive and binding. These constitute privative provisions and therefore any question of fact is not subject to appeal.

[33] The Intervenors argued that the applicable standard of review is reasonableness since the issue, the direction to "flow through" to customers the benefits associated with any income tax reassessments, is one that calls for the special expertise enjoyed by the Board.

[34] There is no doubt that the Board is a specialized tribunal. But, in this case, the question is whether the Board exceeded its jurisdiction. If, as in the case of *Calgary* v. *Alberta (Energy and Utilities Board)*, [2010] A.J. No. 449 (C.A.), a case relied on by the Intervenors, the Board's jurisdiction is decided in its favour, then a review of its decision would be on the standard of reasonableness. But here the fundamental question is jurisdictional. Therefore correctness is the standard.

[35] When I speak of jurisdiction I am cognizant of the Supreme Court's admonishment that only "true" questions of jurisdiction attract the correctness standard of review. This was emphasized by Bastarache and Lebel J.J., writing for the majority, in *Dunsmuir (supra)*, at para. 59:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. *"Jurisdiction" is intended in the narrow sense of whether or not the*

> *tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.* The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta* v. *Calgary (City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added; citations omitted.]

[36] The distinction between the "narrow" and "wide" meanings of jurisdiction was explained by Professors Jones and de Villars in their text, *Principles of Administrative Law* (5th ed.), at p. 140:

> In its broadest sense, "jurisdiction" means the authority to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors - such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result - which take place *after* the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction.
>
> ...
>
> It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to *exceed* its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction [Italics in original; footnotes omitted.]

[37] It is in the last sense of jurisdiction, as described above, that I understand the issue in this case. The Applicants argue that, while the Board may have had the authority to consider the fact that there was a tax refund, the Board *exceeded* its jurisdiction in making the directions it did. The standard of review for this is, as I

have said, correctness. If, however, the Board did not exceed its jurisdiction, the question then is whether these directions fall within the range of reasonable outcomes.

Submissions on the Appeal:

[38] The essence of the Applicants' argument is that the directions amount to retroactive ratemaking since they were made in the context of the 2008-2010 test years rate application whereas the tax refund applies to a prior year (2007). The 2007 rates were “final” and any attempt to reallocate funds from that period amounts to a revision of those rates. In simple terms, it would require the Applicants to give money received from tax refunds for a prior year to current customers.

[39] The Applicants' argument characterized the directions as an “adjustment” to the utility's revenue requirements for the prior year. How is this? Counsel simplified it for me by explaining that lower taxes means a lower cost base which in turn means lower revenue requirements which results in lower rates. Hence it is an implicit adjustment to the 2007 rate structure to have these funds flow through to the customers.

[40] The Applicants placed great reliance on the Alberta Utilities Commission Decision 2009-215 (referred to previously). In their view that decision addressed exactly the same issues as addressed by the Board in this case and held that any flow through of tax refunds to customers is prohibited by the principle against retroactive ratemaking.

[41] The Intervenors took the position that the Alberta Commission's decision did not deal with the same issues and, even if it did, that Commission came to the wrong conclusions.

[42] In their submission, the income tax deductions claimed by the Applicants have resulted in a reduction of the undepreciated capital cost balances available to offset future taxable income and thus lower income tax expenses. Consequently customers will pay a higher amount of income tax expense through rates in future years. Both the Alberta Commission and the Board in this case came to similar findings in this regard. Counsel for the Intervenors noted that the Board expressly stated that the

customers have been “harmed” and the only way to rectify this is to flow through the tax refunds. Counsel described this as a non-reviewable finding of fact.

[43] The difference as between the Alberta Commission's decision and the Board's, in the Intervenors' submission, is that the Alberta Commission was considering various formulas, such as readjusting capital cost balances, while the Board was dealing with a straightforward cause-and-effect scenario, i.e., the deductions in the past cause harm in the present. Thus it is not an exercise in retroactive ratemaking but prospective ratemaking since it merely restores the integrity of the methodology used to set rates.

[44] Counsel also noted that the Alberta Commission did not simply leave the issue when it decided that it could not order a flow-through of the tax refunds in that case. It directed that a deferral account be established to include all income tax deductible capital costs on a go-forward basis.

[45] The Intervenors' counsel also made the argument that, since these tax refunds were received in 2008, and the Board was considering this issue as part of the 2008-2010 rate application review, it may consider these funds to be part of the revenues of the Applicants for a fiscal period under review (as permitted by s.51(2)(a) of the Act) or as part of the utilities' working capital (as required by s. 49(2)(b) of the Act). Thus there would be no requirement to restate the 2007 cost base or revenue requirements.

[46] Finally, the Intervenors made the point that if utilities keep changing the underlying basis of accounting or tax calculations then there would be no regulatory certainty. In this case, the rates were set on the basis that stock handling charges were 100% capitalized. The utilities have, after-the-fact, changed that to reflect 100% of these costs as tax deductible.

[47] In response, the Applicants point out that any “harm” suffered by current or future customers will be off-set by the fact that customers will benefit from the expensing of these costs since that will lower the amount of taxes payable. So, while the utilities benefit from the deduction taken for 2007, the customers will benefit in the test years and every year thereafter due to the increased tax deductions being claimed by the utilities.

[48] Applicants' counsel also painted the Board's (and the Intervenors') attempt to frame the directions in reference to capital cost allowances and undepreciated capital cost base as merely an attempt to do indirectly what cannot be done directly (a point emphasized by the Alberta Commission in its decision). Any alternative technique or method to either justify or reallocate the refunds to the customers is equally objectionable on this ground.

Analysis:

[49] As I noted earlier, all parties agree that the Board, in exercising ratesetting powers, is required to do so prospectively and is prohibited from engaging in retroactive ratemaking. I think it would be helpful to set out some definitions since various terms are often used interchangeably and in different contexts. In the *Calgary* v. *Alberta* case (*supra*), Hunt J.A. gave a helpful description of the meaning of "prospective", "retroactive" and "retrospective", in the context of utility regulation (at paras. 46-49):

> A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd.* v. *Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al.* v. *Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 *("Northwestern Utilities"*).
>
> Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission*), [1989] 1 S.C.R. 1722 at 1749 ("*Bell Canada 1989*"). Utility regulators cannot retroactively change rates ("*Stores Block"* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.
>
> Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same)...

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

[50] The *Calgary* case also illustrates, in its review of pertinent jurisprudence, that the only way in which expenses or surpluses from one year can be reallocated in a subsequent year, or rates can be changed after-the-fact, is by use of deferral accounts or interim rates. Neither applies in this case, as I previously mentioned.

[51] What the present case demonstrates are aspects of both "retrospective" and "retroactive" ratemaking, as those terms are used above. "Retrospective" because the Board, by its directions, is benefitting present customers from a gain incurred in a past year. "Retroactive" because, in taking the refunds away from the utilities and passing them on to the customers, the Board is in effect restating the utilities' rate base and revenue requirement for that past year.

[52] The Board itself seemed to recognize these principles in an earlier decision, number 4-2008 issued on January 30, 2008, dealing with an issue from the review of the Northwest Territories Power Corporation's 2006-2008 rate application. There, the Board issued a directive requiring the Corporation to refund to customers $345,000 that was, in the Board's term, "over-collected"for certain expenses between the 2001-2002 and 2005-2006 test year periods. As I understand it, the Board asserted that the Corporation had claimed certain expenses when setting the rates for those years but did not carry out all the work related to those expenses, resulting in savings in those years but the potential for higher expenses in future years when the work has to be done. The Corporation asked the Board to review this direction. In its decision, the Board vacated the direction "as a matter of law" after reviewing submissions regarding retroactive ratemaking.

[53] To start, I do not accept the Intervenors' argument that, just because the tax refunds were received in 2008, they can be considered by the Board as revenues applicable to the fiscal year for which the Board is considering setting rates. The amounts are directly referable to operations in 2007 and not to the test years under consideration by the Board. Similarly, the consideration of the working capital of the

utilities is the need to consider the “necessary” working capital for the period in question, not what may simply be available.

[54] Since much emphasis was placed in argument on the Alberta Utilities Commission Decision 2009-215, I will review it in more detail.

[55] The Alberta decision was made in the context of ATCO Electric's application for approval of its 2009-2010 general tariff. In it ATCO identified the retention of income tax refunds, as a result of deductions for various costs (including stock handling charges), for 2006, 2007 and 2008 in the amount of $6 million. These costs were previously treated as capital additions for income tax purposes and formed part of the undepreciated capital cost which was then available to lower taxable income over a period of years through a yearly capital cost allowance deduction. In late 2007, however, ATCO became aware of the ability to deduct these items. Once that was identified, ATCO included provision for these deductions in its 2009-2010 tariff application.

[56] Various consumer groups intervened on the rate application and argued that, in order to receive the refunds, the undepreciated capital cost balances were reduced by the amount of the deductions thereby reducing the capital cost allowance in future years. These groups therefore asked that either the $6 million be flowed through to customers, or that the undepreciated capital cost balance be set at the level existing prior to ATCO's claim for the refunds, or that an adjustment be made to the rate base for 2009-2010.

[57] ATCO argued that all of these methods would amount to retroactive ratemaking since it would involve the Commission in adjusting or restating prior years' revenue requirements after the rates for those years had already been fixed. ATCO also argued, as the Applicants do here, that customers benefit in the long term due to its ability to take these deductions in future years.

[58] As I mentioned previously, the Alberta Commission considered the principle of prospectivity, the prohibition against retroactivity, and the need for regulatory certainty, and allowed ATCO to keep the money realized as a result of these deductions. The Commission held that these principles would be undermined if the refunds were to be paid to customers. It reasoned that the rates were finalized for the

years to which the refunds related and all the alternatives considered were simply a mechanism to reallocate the refunds. Also, to make any of the adjustments proposed by the consumers would be simply doing indirectly what could not be done directly.

[59] The Commission acknowledged that, yes, the customers may have lost some benefit as a consequence of ATCO claiming the deductions but to do as the consumer groups proposed would offend the well-established regulatory principles previously mentioned. It referred to past situations to show that issues arising from the difference in treatment of capital versus expense as between tax and regulatory accounts are not new. And, the Commission also commented on the difference between the tax regime, where there may be reassessments and retroactive changes, and the regulatory regime where certainty is the norm (at para. 68):

> The Commission notes the conflicting incentives and imbalance that arise between shareholders and customers when customer rates are finalized but income tax reassessments and refunds may be requested and received by a utility outside of the test years. While the income tax legislation and its regulations allow for retroactive changes to be made in the calculation of income tax expense resulting in an income tax refund to the benefit of shareholders, the Commission must adhere to the principle against retroactive ratemaking, the prospectivity principle and the principle of regulatory certainty.

[60] In my opinion, the issues addressed by the Alberta Commission are the same ones that were before the Board in the present case. And, in my respectful view, the Commission was correct in its analysis.

[61] The Board based its decision on what it characterized as a "retroactive change in the methodological underpinnings used in the establishment of prospective rates" and seemed to say that if such a change had an impact on future rates it would be in violation of the principle of prospectivity. I must admit to some difficulty in understanding what exactly the Board is saying if I keep in mind that rates are set within the parameters of an application for specific test years. It is the methodology used to set rates for the test years in question that determines the rates (not some past or potential future methodology).

[62] The Board said, in its decision, that "any potential adjustments to future customer rates to reflect the carry over effects of past deductions (is) not a retroactive

adjustment". I agree. But the point is that the adjustment is done to future rates, not by reaching back to a past year and flowing through benefits from that year to customers in a future rate period.

[63] The 2008-2010 application before the Board took into account the potential savings from the deductions that the Applicants are now able to take. Whether those savings actually off-set the reduction in available capital cost allowances is not the point (and the evidence on this was far from clear). The point is that the methodology used in the rate application under consideration is consistent with the changes in tax treatment and internally consistent.

[64] I agree with the Intervenors' counsel when he argues that the 2007 tax refunds cannot be considered as an "efficiency gain". They came about due to a change in federal tax policy as opposed to any efficiencies introduced by the utilities. But, if it is a windfall then the solution is not to provide one to the 2008-2010 customer base. The solution is to concentrate on developing appropriate rates for the test years based on current knowledge.

[65] Any attempt to deal with the refunds received for 2007 within the context of the 2008-2010 rate application is, in my opinion, tantamount to retroactive ratemaking. Calling it a "prospective adjustment" is merely doing indirectly what cannot be done directly. It is axiomatic that the courts will look to the substance of what is being done, and not merely the form, and strike down any attempt to do indirectly what a tribunal's enabling statute does not allow to be done directly: see, for example, *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 (at p. 1291).

[66] It may well be, as the Intervenors' counsel suggested, that the Board in this case, as opposed to what was done in the Alberta case, was trying to strike a better balance between the interests of consumers and those of the utilities. The difficulty is that in its attempt to do so the Board exceeded its jurisdiction by engaging in what I previously described as both retroactive and retrospective ratemaking.

Conclusions:

[67] Leave to appeal is granted and the appeal is allowed. Decision 4-2010 is hereby set aside and an order will issue granting variance of Board Decisions 24-2008 and

25-2008 by vacating the direction to flow through to customers any benefits from tax deductions for stock handling charges in prior years.

[68] On the matter of costs, if the parties are unable to agree they may file written submissions to me within 60 days of the date of these reasons for judgment.

J.Z. Vertes
J.S.C.

Dated this 24th day of November, 2010.

Counsel for the Applicant: Loyola G. Keough

Counsel for the Respondent: John Donihee

Counsel for the Intervenors: Thomas D. Marriott

Docket: S-1-CV-2010000079

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

NORTHLAND UTILITIES (YELLOWKNIFE) LIMITED and NORTHLAND UTILITIES (NWT) LIMITED

Applicants

- and -

NORTHWEST TERRITORIES PUBLIC UTILITIES BOARD

Respondent

- and -

CITY OF YELLOWKNIFE and
TOWN OF HAY RIVER

Intervenors

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES

Bell Canada *Appellant*

v.

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

and

Canadian Radio-television and Telecommunications Commission *Intervener*

- and -

TELUS Communications Inc. *Appellant*

v.

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

- and -

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

v.

Canadian Radio-television and Telecommunications Commission, Bell Aliant Regional Communications, Limited

Bell Canada *Appelante*

c.

Bell Aliant Communications régionales, Société en commandite, Association des consommateurs du Canada, Organisation nationale anti-pauvreté, Centre pour la défense de l'intérêt public, MTS Allstream Inc., Société en commandite Télébec et TELUS Communications Inc. *Intimés*

et

Conseil de la radiodiffusion et des télécommunications canadiennes *Intervenant*

- et -

TELUS Communications Inc. *Appelante*

c.

Bell Canada, Arch Disability Law Centre, Bell Aliant Communications régionales, Société en commandite, Conseil de la radiodiffusion et des télécommunications canadiennes, Association des consommateurs du Canada, Organisation nationale anti-pauvreté, Centre pour la défense de l'intérêt public, MTS Allstream Inc., Saskatchewan Telecommunications et Société en commandite Télébec *Intimés*

- et -

Association des consommateurs du Canada et Organisation nationale anti-pauvreté *Appelantes*

c.

Conseil de la radiodiffusion et des télécommunications canadiennes, Bell Aliant Communications régionales,

Partnership, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. and TELUS Communications (Québec) Inc. *Respondents*

Société en commandite, Bell Canada, Arch Disability Law Centre, MTS Allstream Inc., TELUS Communications Inc. et TELUS Communications (Québec) Inc. *Intimés*

INDEXED AS: BELL CANADA *v.* BELL ALIANT REGIONAL COMMUNICATIONS

RÉPERTORIÉ : BELL CANADA *c.* BELL ALIANT COMMUNICATIONS RÉGIONALES

Neutral citation: 2009 SCC 40.

Référence neutre : 2009 CSC 40.

File Nos.: 32607, 32611.

N^os^ du greffe : 32607, 32611.

2009: March 26; 2009: September 18.

2009 : 26 mars; 2009 : 18 septembre.

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

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

Droit des communications — Téléphone — Réglementation des tarifs exigés par les entreprises de télécommunication — Ordonnance du Conseil de la radiodiffusion et des télécommunications canadiennes intimant aux fournisseurs de créer des comptes de report — Comptes créés au moyen des revenus des services téléphoniques résidentiels en milieu urbain en vue d'encourager la concurrence — Ordonnance du CRTC intimant d'utiliser les comptes pour faciliter l'accès des personnes handicapées aux services de télécommunication et pour étendre le service à large bande — Distribution aux abonnés des éventuelles sommes restantes — La Loi sur les télécommunications autorise-t-elle le CRTC à ordonner comme il l'a fait l'utilisation des fonds se trouvant dans les comptes de report? — Loi sur les télécommunications, L.C. 1993, ch. 38, art. 7, 47.

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

Droit administratif — Appels — Norme de contrôle — Conseil de la radiodiffusion et des télécommunications canadiennes — Norme de contrôle applicable à la décision du CRTC prescrivant l'utilisation des comptes de report — Loi sur les télécommunications, L.C. 1993, ch. 38, art. 7, 47, 52(1).

In May 2002, the Canadian Radio-television and Telecommunications Commission ("CRTC"), in the exercise of its rate-setting authority, established a formula to regulate the maximum prices to be charged for certain services offered by incumbent local exchange carriers, including for residential telephone services in mainly urban non-high cost serving areas (the "Price Caps Decision"). Under the formula established by the Price Caps Decision, any increase in the price charged

En mai 2002, dans l'exercice de son pouvoir de tarification, le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») a élaboré une formule pour réglementer les prix maximums exigés pour certains services offerts par des entreprises de services locaux titulaires, y compris pour les services téléphoniques résidentiels dans les zones de desserte — principalement urbaines — autres que celles à coût élevé (la « Décision sur le plafonnement des prix »). Selon la

for these services in a given year was limited to an inflationary cap, less a productivity offset to reflect the low degree of competition in that particular market. The CRTC ordered the carriers to establish deferral accounts as separate accounting entries in their ledgers to record funds representing the difference between the rates actually charged and those as otherwise determined by the formula. At the time, the CRTC did not direct how the deferral account funds were to be used.

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

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

Held: The appeals should be dismissed.

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

formule établie par la Décision sur le plafonnement des prix, toute hausse de prix de ces services pour une année donnée était limitée à un plafond lié à l'inflation, moins une compensation de la productivité visant à refléter le faible degré de concurrence dans ce marché particulier. Le CRTC a ordonné aux entreprises de créer dans leurs grands livres des comptes de report dont les fonds correspondent à la différence entre les tarifs réellement exigés et ceux autrement calculés selon la formule. À l'époque, il n'a pas précisé de quelle façon les fonds des comptes de report devraient être utilisés.

En décembre 2003, Bell Canada a demandé au CRTC la permission d'utiliser le solde de son compte de report pour étendre à des collectivités rurales et éloignées le service Internet haute vitesse à large bande. Le CRTC a sollicité, dans le cadre d'une instance publique, des propositions relatives à l'utilisation des comptes de report. En février 2006, le CRTC a décidé que les comptes de report devaient être utilisés pour améliorer l'accès des personnes handicapées aux services et pour étendre le service à large bande. Toute somme non dépensée devait être distribuée à certains abonnés actuels au moyen d'un crédit unique ou de réductions tarifaires futures. Cette décision est appelée la « Décision sur les comptes de report ».

Bell Canada a interjeté appel de l'ordonnance intimant le versement d'un crédit unique, alors que l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté ont fait appel de la décision prescrivant l'utilisation des fonds aux fins d'expansion du service à large bande. La Cour d'appel fédérale a rejeté les appels. Elle a conclu, d'une part, que le régime institué par la Décision sur le plafonnement des prix a toujours envisagé que les fonds accumulés dans les comptes de report seraient utilisés de la manière que prescrirait le CRTC, et, d'autre part, que ce dernier avait à tout moment agi dans les limites de son mandat. TELUS Communications Inc. s'est jointe à Bell Canada, en tant qu'appelante, devant la Cour.

Arrêt : Les pourvois sont rejetés.

La création et l'utilisation des comptes de report aux fins d'expansion du service à large bande et de versement de crédits aux consommateurs étaient autorisées par les dispositions de la *Loi sur les télécommunications*, laquelle pose le cadre législatif de base de l'industrie des télécommunications au Canada. En particulier, l'art. 7 de la Loi énonce certains grands objectifs de la politique canadienne de télécommunication et l'al. 47*a*) de cette même loi enjoint au CRTC de veiller à leur réalisation lorsqu'il exerce les pouvoirs qui lui sont conférés et concilie les intérêts des consommateurs, des entreprises et de leurs concurrents. Une responsabilité centrale

policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates. [1] [28] [36]

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

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

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

du CRTC consiste à déterminer et à approuver les tarifs justes et raisonnables des services de télécommunication. La poursuite par le CRTC des objectifs de la politique, au moyen de l'exercice de son pouvoir de tarification, constitue précisément ce que l'art. 47 lui demande de faire lorsqu'il fixe des tarifs justes et raisonnables. [1] [28] [36]

Les questions soulevées dans les présents pourvois ressortissent à l'essence même de l'expertise spécialisée du CRTC. Le nœud du litige concerne en fait la méthode d'établissement des tarifs et l'affectation de certains fonds provenant de ces tarifs, un exercice polycentrique que le législateur a confié au CRTC et pour lequel ce dernier possède une compétence particulière. La norme de contrôle est donc celle de la décision raisonnable. [38]

Lorsqu'il a ordonné l'attribution de crédits aux abonnés et lorsqu'il a approuvé l'utilisation des fonds pour l'expansion du service à large bande, le CRTC a agi de manière raisonnable et en conformité avec les objectifs de la politique de la *Loi sur les télécommunications*. Dans la Décision sur le plafonnement des prix, le CRTC a indiqué que les fonds des comptes de report contribueraient à la réalisation de ses objectifs. Lorsque le CRTC a approuvé les tarifs découlant de la Décision sur le plafonnement des prix, la partie des revenus qui avait été versée dans les comptes de report est demeurée assujettie aux prescriptions que pourraient formuler ultérieurement le CRTC. Les comptes de report, ainsi que la possibilité qu'ils fassent par la suite l'objet de prescriptions de la part du CRTC, faisaient donc partie intégrante de l'opération de fixation de tarifs. L'attribution de fonds des comptes de report aux consommateurs ne constituait ni une modification d'une ordonnance tarifaire définitive ni à proprement parler un rabais. Dès la Décision sur le plafonnement des prix, il était entendu que les fonds des comptes de report pourraient notamment être utilisés pour le versement d'un éventuel crédit aux abonnés une fois que le CRTC aurait déterminé l'affectation souhaitable. [64-65] [77]

Il n'y a pas eu interfinancement inapproprié entre les services téléphoniques résidentiels et l'expansion du service à large bande. La *Loi sur les télécommunications* envisage un cadre national global en matière de télécommunications. Les objectifs de la politique de télécommunication — dont le CRTC doit toujours tenir compte — montrent qu'il n'a pas à prendre en considération uniquement le service en cause pour déterminer si les tarifs sont justes et raisonnables. Il a à juste titre considéré les objectifs inscrits dans la loi comme des principes directeurs régissant l'exercice de son pouvoir de tarification et il est arrivé à une conclusion raisonnable. [73] [75] [77]

Cases Cited

Referred to: Telecom Decision CRTC 2002-34, May 30, 2002; Telecom Decision CRTC 2005-69, December 16, 2005; Telecom Decision CRTC 2003-15, March 18, 2003; Telecom Decision CRTC 2003-18, March 18, 2003; Telecom Decision CRTC 2006-9, February 16, 2006; Telecom Decision CRTC 2008-1, January 17, 2008; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] 1 S.C.R. 308; Telecom Decision CRTC 97-9, May 1, 1997; Telecom Decision CRTC 94-19, September 16, 1994; *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007] 3 S.C.R. vii; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; Telecom Decision CRTC 93-9, July 23, 1993; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281; *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60.

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

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Jurisprudence

Arrêts mentionnés : Décision de télécom CRTC 2002-34, 30 mai 2002; Décision de télécom CRTC 2005-69, 16 décembre 2005; Décision de télécom CRTC 2003-15, 18 mars 2003; Décision de télécom CRTC 2003-18, 18 mars 2003; Décision de télécom CRTC 2006-9, 16 février 2006; Décision de télécom CRTC 2008-1, 17 janvier 2008; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *Canadian National Railways Co. c. Bell Telephone Co. of Canada*, [1939] 1 R.C.S. 308; Décision de télécom CRTC 97-9, 1er mai 1997; Décision de télécom CRTC 94-19, 16 septembre 1994; *Edmonton (Ville) c. 360Networks Canada Ltd.*, 2007 CAF 106, [2007] 4 R.C.F. 747, autorisation de pourvoi refusée, [2007] 3 R.C.S. vii; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476; Décision de télécom CRTC 93-9, 23 juillet 1993; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *EPCOR Generation Inc. c. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281; *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60.

Lois et règlements cités

Loi sur les chemins de fer, L.R.C. 1985, ch. R-3, art. 340(1).
Loi sur les télécommunications, L.C. 1993, ch. 38, art. 7, 24, 25(1), 27, 32*g*), 35(1), 37(1), 42(1), 46.5(1), 47, 52(1).

Doctrine citée

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POURVOIS contre un arrêt de la Cour d'appel fédérale (le juge en chef Richard et les juges Noël et Sharlow), 2008 CAF 91, 375 N.R. 124, 80 Admin. L.R. (4th) 159, [2008] A.C.F. no 397 (QL), 2008 CarswellNat 2390, qui a confirmé une décision du Conseil de la radiodiffusion et des télécommunications canadiennes, 2006 LNCRTCE 9 (QL), 2006 CarswellNat 6318. Pourvois rejetés.

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

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

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

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

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

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

The judgment of the Court was delivered by

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

[2] While distinct questions arise in each of the appeals before us, the common problem is whether the CRTC, in the exercise of its rate-setting

Neil Finkelstein, *Catherine Beagan Flood* et *Rahat Godil*, pour l'appelante/intimée Bell Canada.

Michael H. Ryan, *John E. Lowe*, *Stephen R. Schmidt* et *Sonya A. Morgan*, pour l'appelante/intimée TELUS Communications Inc. et l'intimée TELUS Communications (Québec) Inc.

Richard P. Stephenson, *Danny Kastner* et *Michael Janigan*, pour les appelantes/intimées l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté et l'intimé le Centre pour la défense de l'intérêt public.

Michael Koch et *Dina F. Graser*, pour l'intimée MTS Allstream Inc.

John B. Laskin et *Afshan Ali*, pour l'intimé/intervenant le Conseil de la radiodiffusion et des télécommunications canadiennes.

Personne n'a comparu pour les intimés la Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Communications régionales, Société en commandite, et Saskatchewan Telecommunications.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — La *Loi sur les télécommunications*, L.C. 1993, ch. 38, énonce certains grands objectifs de la politique canadienne de télécommunication. Elle enjoint au Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») de veiller à leur réalisation dans l'exercice des pouvoirs qui lui sont conférés par la loi, en conciliant les intérêts des consommateurs, des entreprises et de leurs concurrents dans le contexte de l'industrie canadienne des télécommunications. Les présents pourvois soulèvent la question de savoir si l'organisme a exercé ces pouvoirs d'une manière appropriée.

[2] Bien que chacun des pourvois dont nous sommes saisis soulève des questions distinctes, le problème commun est de savoir si le CRTC, dans

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

Background

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

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

[5] More specifically, the effect of the inflationary cap was to bar carriers from increasing their prices at a rate greater than inflation. The productivity

[1] Telecom Decision CRTC 2002-34, May 30, 2002 (online: www.crtc.gc.ca/eng/archive/2002/dt2002-34.htm).

l'exercice de son pouvoir de tarification, a ordonné d'une manière appropriée l'affectation de fonds à diverses fins. Dans le pourvoi de Bell Canada et de TELUS Communications Inc., c'est la distribution de fonds aux clients qui est contestée, alors que, dans celui de l'Association des consommateurs du Canada et de l'Organisation nationale anti-pauvreté, c'est l'affectation de fonds à l'expansion du service à large bande. Pour les motifs qui suivent, je suis d'avis que les affectations décidées par le CRTC étaient raisonnables au regard des objectifs de la politique canadienne de télécommunication que le CRTC doit prendre en considération dans l'exercice de tous ses pouvoirs, y compris l'approbation de tarifs justes et raisonnables.

Contexte

[3] Le CRTC a rendu sa décision-clé sur le plafonnement des prix[1] en mai 2002 (« Décision sur le plafonnement des prix »). Dans l'exercice de son pouvoir de tarification, le CRTC a élaboré une formule pour réglementer les prix maximums exigés pour certains services offerts par des entreprises de services locaux titulaires (« ESLT »), lesquelles sont principalement des entreprises de télécommunication bien établies.

[4] Dans le cadre de sa décision, le CRTC a ordonné aux entreprises visées de créer dans leurs grands livres des comptes distincts, appelés « comptes de report ». Les fonds de ces comptes de report provenaient des revenus tirés des services téléphoniques résidentiels dans les zones de desserte autres que celles à coût élevé (« les zones autres que les ZDCE »), qui sont principalement urbaines. Selon la formule établie par la Décision sur le plafonnement des prix, toute hausse de prix de ces services pour une année donnée était limitée à un plafond lié à l'inflation, moins une compensation de la productivité visant à refléter le faible degré de concurrence dans ce marché particulier.

[5] Plus précisément, le plafond lié à l'inflation avait pour effet d'empêcher les entreprises d'augmenter leurs prix selon un taux supérieur à l'inflation.

[1] Décision de télécom CRTC 2002-34, 30 mai 2002 (en ligne : www.crtc.gc.ca/fra/archive/2002/dt2002-34.htm).

offset, on the other hand, put downward pressure on the rates to be charged. While market forces would normally serve to encourage carriers to reduce both their costs and their prices, the low level of competition in the non-HCSA market led the CRTC to conclude that an offsetting factor was necessary as a proxy for the effect of competition.

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

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

a) to render reliable and affordable services of high quality, accessible to both urban and rural area customers;

b) to balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies;

c) to foster facilities-based competition in Canadian telecommunications markets;

La compensation de la productivité, quant à elle, créait une pression à la baisse sur les tarifs exigés. Les forces du marché inciteraient normalement les entreprises à réduire à la fois leurs coûts et leurs prix, mais le faible degré de concurrence dans le marché des zones autres que les ZDCE a amené le CRTC à conclure qu'il était nécessaire d'utiliser un facteur de compensation en remplacement de l'effet de la concurrence.

[6] Étant donné les facteurs compensateurs utilisés dans la formule imposée par la Décision sur le plafonnement des prix, il y avait une possibilité de voir baisser les tarifs des services résidentiels dans ces zones si l'inflation tombait en dessous d'un certain niveau. Le CRTC n'a cependant pas ordonné une telle baisse, estimant que des tarifs plus bas, et donc la perspective de revenus inférieurs, constitueraient un obstacle à l'entrée de nouveaux concurrents sur ce marché des télécommunications en particulier. Par conséquent, il a ordonné que les sommes correspondant à la différence entre les tarifs *réellement* exigés, sans la baisse imposée par la formule établie dans la Décision sur le plafonnement des prix, et ceux *autrement calculés* selon la formule, soient perçues auprès des abonnés et comptabilisées dans des comptes de report établis par chaque entreprise. Ces comptes devaient faire l'objet d'un examen annuel par le CRTC. L'intention du CRTC, dans sa Décision sur le plafonnement des prix, était donc que les prix de ces services demeurent à un niveau suffisant pour favoriser l'entrée sur le marché tout en maintenant la pression sur les entreprises titulaires pour qu'elles réduisent leurs coûts.

[7] Voici les principaux objectifs poursuivis par le CRTC lorsqu'il a rendu la Décision sur le plafonnement des prix :

a) rendre des services fiables et abordables, de qualité et accessibles aux clients des zones urbaines et rurales;

b) concilier les intérêts des trois principaux intervenants dans les marchés des télécommunications, c.-à-d., les clients, les concurrents et les compagnies de téléphone titulaires;

c) encourager la concurrence fondée sur les installations dans les marchés canadiens des télécommunications;

d) to provide incumbents with incentives to increase efficiencies and to be more innovative; and

e) to adopt regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives. [para. 99]

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

The Commission anticipates that an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures. The Commission also anticipates that the deferral account would be drawn down to mitigate rate increases for residential service that could result from the approval of exogenous factors or when inflation exceeds productivity. Other draw downs could occur, for example, through subscriber rebates or the funding of initiatives that would benefit residential customers in other ways. [Emphasis added; para. 412.]

At the time, it did not specifically direct how the deferral account funds were to be used, leaving the issue subject to further submissions. While some participants objected to the creation of the deferral accounts, no one appealed the Price Caps Decision (*Bell Canada v. Canadian Radio-television and Telecommunications Commission*, 2008 FCA 91, 80 Admin. L.R. (4th) 159, at para. 14).

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

d) inciter les titulaires à accroître les efficiences et à être plus innovatrices;

e) adopter des approches réglementaires qui imposent le fardeau réglementaire minimum compatible avec l'atteinte des quatre objectifs précédents. [par. 99]

[8] Le CRTC a fait les observations suivantes au sujet de l'utilisation future des fonds du compte de report :

Le Conseil prévoit qu'un rajustement du compte de report serait fait chaque fois qu'il approuverait des réductions tarifaires pour les services locaux de résidence qui sont proposées par les ESLT en raison de pressions concurrentielles. Le Conseil prévoit également que le compte de report serait utilisé pour atténuer les augmentations de tarifs des services de résidence qui pourraient faire suite à l'approbation de facteurs exogènes ou lorsque l'inflation excède la productivité. Cela pourrait aussi se faire par exemple au moyen de rabais aux abonnés ou par le financement d'initiatives à l'avantage des abonnés du service résidentiel d'autres façons. [Je souligne; par. 412.]

À l'époque, il n'a pas précisé de quelle façon les fonds des comptes de report devraient être utilisés, laissant la question en suspens. Certains participants s'opposaient à la création des comptes de report, mais aucun n'a interjeté appel de la Décision sur le plafonnement des prix (*Bell Canada c. Conseil de la radiodiffusion et des télécommunications canadiennes*, 2008 CAF 91, 80 Admin. L.R. (4th) 159 (p. 179), par. 14).

[9] La Décision sur le plafonnement des prix devait s'appliquer aux services offerts par Bell Canada, TELUS et d'autres entreprises pour la période de quatre ans allant du 1er juin 2002 au 31 mai 2006. Dans une décision rendue en 2005, le CRTC a prolongé d'un an l'application de ce régime de réglementation des prix, soit jusqu'au 31 mai 2007[2]. Le CRTC a autorisé quelques réductions des comptes de report après la Décision sur le plafonnement des prix, mais ces réductions ne sont pas en litige dans les présents pourvois.

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[2] Telecom Decision CRTC 2005-69, December 16, 2005 (online: www.crtc.gc.ca/eng/archive/2005/dt2005-69.htm).

[2] Décision de télécom CRTC 2005-69, 16 décembre 2005 (en ligne : www.crtc.gc.ca/fra/archive/2005/dt2005-69.htm).

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

> The Commission, in Decision 2002-34, established a deferral account in conjunction with the application of a basket constraint equal to the rate of inflation less a productivity offset to all revenues from residential services in non-HCSAs. The Commission considers that AT&T Canada's proposal to allocate the Ontario GRT and the Quebec TGE tax savings associated with all capped services to the price cap deferral account is inconsistent with that determination. The Commission finds that Bell Canada's proposal to include the Ontario GRT and Quebec TGE tax savings associated with the residential local services in non-HCSAs basket in the price cap deferral account is consistent with that determination. [Emphasis added; para. 32.]

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

[10] En mars 2003, dans deux décisions distinctes, le CRTC a approuvé les tarifs de Bell Canada et de TELUS[3]. Dans la décision portant sur Bell Canada, le CRTC a semblé envisager le maintien des comptes de report établis dans la Décision sur le plafonnement des prix. Il a ordonné, par exemple, que certaines économies de taxe soient attribuées aux comptes de report :

> Dans la décision 2002-34, le Conseil a établi un compte de report en même temps qu'il a appliqué à tous les revenus des services de résidence dans les zones autres que les ZDCE une restriction au niveau de l'ensemble égale au taux d'inflation moins une compensation de la productivité. Le Conseil estime que la proposition d'AT&T Canada visant à attribuer au compte de report des prix plafonds les économies provenant de la TRB de l'Ontario et de la taxe TGE du Québec associées à tous les services plafonnés n'est pas conforme à cette conclusion. Le Conseil conclut que la proposition de Bell Canada qui veut inclure dans le compte de report des prix plafonds les économies provenant de la TRB de l'Ontario et de la taxe TGE du Québec associées aux services locaux de résidence dans les zones autres que ZDCE est conforme à cette conclusion. [Je souligne; par. 32.]

[11] Le 2 décembre 2003, Bell Canada a demandé au CRTC la permission d'utiliser le solde de son compte de report pour étendre à des collectivités rurales et éloignées le service Internet haute vitesse à large bande. Le CRTC a répondu le 24 mars 2004 en sollicitant dans un avis public des propositions relatives à l'utilisation des comptes de report[4]. Conformément à cet avis, le CRTC a tenu une instance publique dans le cadre de laquelle il a sollicité des propositions relatives à l'utilisation des comptes de report des entreprises concernées. La question a fait l'objet d'un examen approfondi et des propositions ont été reçues de nombreuses parties.

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[3] Telecom Decision CRTC 2003-15, March 18, 2003 (online: www.crtc.gc.ca/eng/archive/2003/dt2003-15.htm) and Telecom Decision CRTC 2003-18, March 18, 2003 (online: www.crtc.gc.ca/eng/archive/2003/dt2003-18.htm).

[4] Telecom Public Notice CRTC 2004-1.

[3] Décision de télécom CRTC 2003-15, 18 mars 2003 (en ligne : www.crtc.gc.ca/fra/archive/2003/dt2003-15.htm) et Décision de télécom CRTC 2003-18, 18 mars 2003 (en ligne : www.crtc.gc.ca/fra/archive/2003/dt2003-18.htm).

[4] Avis public de télécom CRTC 2004-1.

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

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

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

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

[5] Telecom Decision CRTC 2006-9 (online: www.crtc.gc.ca/eng/archive/2006/dt2006-9.htm).

[12] Cela a mené à la publication de la « Décision sur les comptes de report » le 16 février 2006[5]. Dans cette décision, le CRTC a formulé des directives quant à l'utilisation des fonds des comptes de report. Ces directives constituent le fondement des présents pourvois.

[13] Après avoir examiné les divers objectifs inscrits dans la loi applicable, la *Loi sur les télécommunications*, ainsi que les objectifs énoncés dans la décision sur le plafonnement des prix, le CRTC a conclu qu'il fallait viser l'utilisation de la totalité des fonds des comptes de report au plus tard à une date déterminée en 2006 :

> L'annexe de la présente décision fournit des estimations préliminaires des soldes des comptes de report à la fin de la quatrième année de l'actuelle période de plafonnement des prix, en 2006. Le Conseil fait remarquer que les soldes sont censés être très élevés pour certaines ESLT. Il souligne également la crainte que des pratiques non efficientes et des incertitudes ne soient créées s'il permet aux ESLT de continuer à cumuler des fonds dans ces comptes.
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> . . .
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> Le Conseil estime donc qu'il est non seulement indiqué qu'il formule des directives quant à l'utilisation de tous les fonds cumulés dans les comptes de report des ESLT d'ici la fin de la quatrième année de la période de plafonnement des prix, soit en 2006, mais qu'il en fournisse aussi concernant l'utilisation des montants récurrents au-delà de cette période afin d'éviter que d'autres fonds ne s'accumulent dans les comptes de report. Plus loin dans la présente décision, le Conseil énoncera les directives et les lignes directrices concernant l'utilisation de ces montants. [Je souligne; par. 58 et 60.]

[14] Le CRTC a également décidé que les fonds des comptes de report devaient être utilisés principalement à deux fins. En priorité, au moins 5 pour 100 du solde des comptes devaient servir à faciliter l'accès des personnes handicapées aux services de télécommunication. Les 95 pour 100 restants devaient être utilisés pour étendre le service à large bande aux collectivités rurales et éloignées. Les entreprises ont été invitées à présenter des propositions

[5] Décision de télécom CRTC 2006-9 (en ligne : www.crtc.gc.ca/fra/archive/2006/dt2006-9.htm).

proposal as approved was for less than the balance of its deferral account, an affected carrier was to distribute the remaining amount to consumers.

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

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

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

relatives à l'utilisation des fonds des comptes de report pour l'expansion du service à large bande. Si le coût de la proposition approuvée était inférieur au solde de son compte de report, l'entreprise visée devait remettre la somme excédentaire aux consommateurs.

[15] En résumé, le CRTC a donc décidé que les entreprises visées devaient concentrer leurs efforts sur l'extension du service à large bande et l'amélioration de l'accessibilité. Il a en outre décidé que, dans le cas où elles pourraient atteindre ces objectifs sans utiliser la totalité du solde du compte de report, les fonds restants serviraient au versement de crédits aux abonnés. Il convient de souligner que les clients ne devaient pas recevoir un crédit proportionnel à la somme qu'ils avaient payée, étant donné qu'il se serait sans doute avéré trop complexe sur le plan administratif de repérer ces clients et d'établir leurs quotes-parts respectives. Les crédits devaient plutôt être versés à certains abonnés actuels. Des réductions tarifaires futures pouvaient aussi servir à éliminer les montants récurrents dans les comptes.

[16] À l'époque, le solde des comptes de report établis conformément à la Décision sur le plafonnement des prix était considérable. Le compte de Bell Canada s'élevait, selon les estimations, à environ 480,5 millions de dollars, alors que celui de TELUS atteignait environ 170 millions de dollars.

[17] Il est utile d'indiquer de quelle façon le CRTC a expliqué sa décision sur l'affectation des fonds des comptes de report. Évoquant le caractère essentiel des télécommunications au Canada, pays au « vaste territoire » et à la « population relativement dispersée », le CRTC a insisté sur le retard pris par le Canada dans l'adoption des services à large bande (par. 73-74). Il a souligné le contraste entre la grande disponibilité de ces services dans les zones urbaines et le réseau moins étendu dans les collectivités rurales et éloignées. Il a ajouté que les objectifs énoncés dans la Décision sur le plafonnement des prix et à l'al. 7*b*) de la *Loi sur les télécommunications* comprenaient l'amélioration de la qualité des services de télécommunication dans ces collectivités et que l'expansion du réseau

its view, this initiative would also provide a helpful complement to the efforts of both levels of government to expand broadband coverage. It therefore concluded that broadband expansion was an appropriate use of a part of the deferral account funds (paras. 73-80).

[18] The CRTC also explained that while customer credits would be consistent with the objectives set out in s. 7 of the *Telecommunications Act* and with the Price Caps Decision, these disbursements should not be given priority because broadband expansion and accessibility services provided greater long-term benefits. Nevertheless, credits effectively balanced the interests of the "three main stakeholders in the telecommunications markets" (para. 115), namely customers, competitors and carriers. It concluded that credits did not contradict the purpose of the deferral accounts, and contrasted one-time credits with a reduction of rates. In its view, credits, unlike rate reductions, did not have a sustained negative impact on competition in these markets, which was the concern the deferral accounts were set up to address (paras. 112-16).

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

[20] On January 17, 2008, the CRTC issued another decision dealing with the carriers' proposals to use their deferral account balances for the purposes set

national à large bande favoriserait leur développement social et économique. À son avis, cette initiative apporterait en outre un complément utile aux efforts déployés par les deux paliers de gouvernement en vue d'étendre la couverture des services à large bande. Il a par conséquent conclu que l'expansion de ces services constituait une utilisation appropriée d'une partie des fonds des comptes de report (par. 73-80).

[18] Le CRTC a aussi expliqué que, si l'attribution de crédits aux clients était compatible avec les objectifs énoncés à l'art. 7 de la *Loi sur les télécommunications* et avec la Décision sur le plafonnement des prix, il ne fallait pas pour autant donner la priorité à ces déboursements, étant donné que l'expansion des services à large bande et les services favorisant l'accessibilité seraient plus profitables à long terme. Néanmoins, les crédits permettaient effectivement de concilier les intérêts des « trois principaux intervenants dans les marchés des télécommunications » (par. 115), à savoir les clients, les concurrents et les entreprises titulaires. Le CRTC a conclu que les crédits n'allaient pas à l'encontre de l'objectif des comptes de report et il a souligné la différence entre les crédits uniques et les réductions tarifaires. À son avis, les crédits, contrairement aux réductions tarifaires, n'avaient pas d'incidence négative continue sur la concurrence au sein de ces marchés, crainte à l'origine de la création des comptes de report (par. 112-116).

[19] Une conseillère dissidente a exprimé son désaccord au sujet de l'utilisation des fonds du compte de report. À son avis, le CRTC n'avait pas le mandat d'ordonner l'expansion des réseaux à large bande dans l'ensemble du pays. D'une manière générale, le CRTC avait eu pour politique de garantir la prestation d'un service de base, et non celle de services comme les services à large bande. La conseillère estimait par conséquent inapproprié pour le CRTC de se fonder sur les objectifs de la *Loi sur les télécommunications*.

[20] Le 17 janvier 2008, le CRTC a rendu une autre décision portant sur les propositions des entreprises titulaires quant à l'utilisation du solde de leur

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

[21] Bell Canada, as well as the Consumers' Association of Canada and the National Anti-Poverty Organization, appealed the CRTC's Deferral Accounts Decision to the Federal Court of Appeal. The Deferral Accounts Decision was stayed by Richard C.J. in the Federal Court of Appeal on January 25, 2008. The decision requiring further submissions on plans to distribute the deferral account balances was also stayed by Sharlow J.A. pending the filing of an application for leave to appeal to this Court on April 23, 2008. Both stay orders were extended by this Court on September 25, 2008. The stay orders do not apply to the funds allocated for the improvement of accessibility for individuals with disabilities.

[22] In a careful judgment by Sharlow J.A., the court unanimously dismissed the appeals (2008 FCA 91, 80 Admin. L.R. (4th) 159), concluding that the Price Caps Decision regime always contemplated the future disposition of the deferral account funds as the CRTC would direct, and that the CRTC acted within its broad mandate to pursue its regulatory objectives. For the reasons that follow, I agree with the conclusions reached by Sharlow J.A.

Analysis

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

[6] Telecom Decision CRTC 2008-1 (online: www.crtc.gc.ca/eng/archive/2008/dt2008-1.htm).

compte de report pour les fins mentionnées dans la Décision sur les comptes de report[6]. Certains plans ont été approuvés en partie seulement, si bien que seule une partie du solde du compte de report des entreprises en cause se trouvait affectée à ces projets. Le CRTC a donc ordonné à ces entreprises de lui présenter, au plus tard le 25 mars 2008, un plan de distribution du solde sous forme de crédits aux abonnés résidentiels des zones autres que les ZDCE.

[21] Bell Canada, de même que l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté, ont interjeté appel devant la Cour d'appel fédérale de la Décision sur les comptes de report rendue par le CRTC. Le 25 janvier 2008, le juge en chef Richard de la Cour d'appel fédérale a sursis à l'exécution de cette décision. Un sursis d'exécution a également été ordonné par la juge Sharlow de cette même cour, le 23 avril 2008, à l'égard de la décision exigeant la présentation d'observations complémentaires sur les plans de distribution du solde du compte de report, jusqu'au dépôt d'une demande d'autorisation d'appel devant notre Cour. Le 25 septembre 2008, la Cour a prorogé ces deux ordonnances de sursis, qui ne visent pas les fonds affectés à l'amélioration de l'accès des personnes handicapées aux services de télécommunication.

[22] Dans un jugement soigné rédigé par la juge Sharlow, la Cour d'appel fédérale a unanimement rejeté les appels : 2008 CAF 91, 80 Admin. L.R. (4th) 159 (p. 179). Elle a conclu que le régime institué par la Décision sur le plafonnement des prix a toujours envisagé l'utilisation future des fonds accumulés dans les comptes de report de la manière que prescrirait le CRTC, et que ce dernier a agi dans le cadre du mandat étendu dont il dispose pour la poursuite de ses objectifs de réglementation. Pour les motifs qui suivent, je suis d'accord avec les conclusions de la juge Sharlow.

Analyse

[23] Les parties ont exposé des points de vue diamétralement opposés sur l'affectation du solde des comptes de report.

[6] Décision de télécom CRTC 2008-1 (en ligne : www.crtc.gc.ca/fra/archive/2008/dt2008-1.htm).

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

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

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

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

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

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

[24] Pour Bell Canada, le CRTC n'était pas habilité par la loi à ordonner ce qui constituait selon elle des « rabais » rétroactifs aux consommateurs. À son avis, la distribution de fonds ordonnée par le CRTC était essentiellement une modification de tarifs qui avaient été déclarés définitifs. Devant notre Cour, TELUS a plaidé, à l'instar de Bell Canada, que l'ordonnance de « rabais » du CRTC constituait une confiscation injustifiée de biens.

[25] En réponse, le CRTC a fait valoir que le vaste mandat dont il dispose pour la fixation des tarifs en vertu de la *Loi sur les télécommunications* lui permet d'établir et d'ordonner de quelle façon seront utilisés les fonds des comptes de report. Comme les fonds de ces comptes ont toujours été susceptibles d'être remis aux clients, il n'y avait donc aucune modification d'un tarif définitif ni aucune confiscation illégitime.

[26] L'Association des consommateurs du Canada était la seule partie à contester l'affectation de 5 pour 100 du solde des comptes de report à l'amélioration de l'accessibilité, mais elle a abandonné cet argument pendant l'audience devant la Cour d'appel fédérale. Avec l'Organisation nationale anti-pauvreté, elle a soutenu devant notre Cour que le reste du solde des comptes devait être entièrement distribué aux clients et que le CRTC n'avait pas le pouvoir d'autoriser l'utilisation des fonds pour l'expansion du service à large bande.

[27] Ces arguments nous amènent directement au régime législatif en cause.

[28] La *Loi sur les télécommunications* pose le cadre législatif de base de l'industrie des télécommunications au Canada. En plus d'établir plusieurs pouvoirs spécifiques, la loi énonce à l'art. 7 quels sont les grands objectifs visés. Suivant l'al. 47*a*), le CRTC doit tenir compte de ces objectifs dans l'exercice de *tous* ses pouvoirs. Ces dispositions sont ainsi libellées :

7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

(*a*) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

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

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

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

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

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

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

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

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

. . .

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

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

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

a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;

b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

i) contribuer à la protection de la vie privée des personnes.

. . .

47. Le Conseil doit [. . .] exercer les pouvoirs et fonctions que lui confèrent la présente loi et toute loi spéciale de manière à réaliser les objectifs de la politique canadienne de télécommunication et à assurer la conformité des services et tarifs des entreprises canadiennes avec les dispositions de l'article 27.

Le CRTC s'est fondé sur ces deux dispositions pour faire valoir qu'il devait tenir compte de toute une gamme de considérations dans l'exercice de ses pouvoirs de tarification et que la Décision sur les comptes de report n'était qu'un prolongement de cette approche.

[29] The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

. . .

32. The Commission may, for the purposes of this Part,

. . .

(*g*) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.

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

27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

. . .

(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has

[29] La *Loi sur les télécommunications* confère au CRTC le pouvoir de fixer et de réglementer, d'une manière générale, les tarifs des services de télécommunication au Canada. Tous les tarifs imposés par les entreprises, y compris les tarifs des services, doivent être soumis pour approbation au CRTC, qui peut statuer sur toute question concernant les tarifs dans l'industrie des services de télécommunication, comme le montrent les dispositions suivantes :

24. L'offre et la fourniture des services de télécommunication par l'entreprise canadienne sont assujetties aux conditions fixées par le Conseil ou contenues dans une tarification approuvée par celui-ci.

25. (1) L'entreprise canadienne doit fournir les services de télécommunication en conformité avec la tarification déposée auprès du Conseil et approuvée par celui-ci fixant — notamment sous forme de maximum, de minimum ou des deux — les tarifs à imposer ou à percevoir.

. . .

32. Le Conseil peut, pour l'application de la présente partie :

. . .

g) en l'absence de disposition applicable dans la présente partie, trancher toute question touchant les tarifs et tarifications des entreprises canadiennes ou les services de télécommunication qu'elles fournissent.

[30] Le principe directeur aux fins d'établissement des tarifs en vertu de la *Loi sur les télécommunications* est que ceux-ci doivent être « justes et raisonnables ». Il s'agit d'un principe établi depuis longtemps en matière de réglementation. Pour déterminer si les tarifs satisfont à cette norme, le CRTC jouit d'un large pouvoir discrétionnaire, protégé par une clause privative :

27. (1) Tous les tarifs doivent être justes et raisonnables.

. . .

(3) Le Conseil peut déterminer, comme question de fait, si l'entreprise canadienne s'est ou non conformée

complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.

. . .

(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

. . .

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

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

37. (1) The Commission may require a Canadian carrier

(*a*) to adopt any method of identifying the costs of providing telecommunications services and to adopt any accounting method or system of accounts for the purposes of the administration of this Act;

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

[33] This statutory overview assists in dealing with the preliminary issue of the applicable standard of review. Although the Federal Court of Appeal

aux dispositions du présent article ou des articles 25 ou 29 ou à toute décision prise au titre des articles 24, 25, 29, 34 ou 40.

. . .

(5) Pour déterminer si les tarifs de l'entreprise canadienne sont justes et raisonnables, le Conseil peut utiliser la méthode ou la technique qu'il estime appropriée, qu'elle soit ou non fondée sur le taux de rendement par rapport à la base tarifaire de l'entreprise.

. . .

52. (1) Le Conseil connaît, dans l'exercice des pouvoirs et fonctions qui lui sont conférés au titre de la présente loi ou d'une loi spéciale, aussi bien des questions de droit que des questions de fait; ses décisions sur ces dernières sont obligatoires et définitives.

[31] Outre le pouvoir qui lui est conféré par le par. 27(5) d'utiliser « la méthode ou la technique qu'il estime appropriée » pour déterminer si un tarif est juste et raisonnable, le CRTC peut, en vertu du par. 37(1), imposer à une entreprise l'adoption de « méthodes ou systèmes comptables » en vue de la bonne application de la *Loi sur les télécommunications*. Cette disposition dit ce qui suit :

37. (1) Le Conseil peut [. . .] imposer à l'entreprise canadienne l'adoption d'un mode de calcul des coûts liés à ses services de télécommunication et de méthodes ou systèmes comptables relativement à l'application de la présente loi . . .

[32] Le CRTC possède d'autres pouvoirs étendus qui, s'ils ne sont pas en cause en l'espèce, confirment néanmoins l'ampleur des pouvoirs réglementaires que le législateur a voulu lui conférer. Il peut ainsi ordonner à une entreprise canadienne de fournir des services dans certaines circonstances (par. 35(1)); ordonner la fourniture ou la construction d'installations de télécommunication (par. 42(1)); établir un fonds pour soutenir l'accès à des services de télécommunication de base (par. 46.5(1)).

[33] Ce survol de la loi nous aide à trancher la question préliminaire de la norme de contrôle applicable. Bien que la Cour d'appel fédérale ait accepté

accepted the parties' position that the applicable standard of review was correctness, Sharlow J.A. acknowledged that the standard of review could be more deferential in light of this Court's decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paras. 98-100. This was an invitation, it seems to me, to clarify what the appropriate standard is.

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

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

[36] A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Together with its rate-setting power, the CRTC has the ability to impose *any* condition on the provision of a service, adopt *any* method to determine whether a rate is just and reasonable and require a carrier to adopt *any* accounting method. It is

la position des parties selon laquelle la norme de contrôle applicable était celle de la décision correcte, la juge Sharlow a reconnu que la norme de contrôle pourrait faire davantage appel à la déférence à la lumière de la décision rendue par notre Cour dans *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 98-100. Il s'agissait, me semble-t-il, d'une invitation à clarifier la question de la norme applicable.

[34] Bell Canada et TELUS admettent que le CRTC avait le pouvoir d'approuver l'utilisation des fonds des comptes de report pour des initiatives visant l'expansion du service à large bande et l'amélioration de l'accès des personnes handicapées aux services de télécommunication, et qu'elles ont effectivement demandé une telle approbation. Mais selon elles, ce pouvoir ne s'étendait pas à la mesure qu'elles ont qualifiée de « rabais » rétroactifs. De même, dans le pourvoi formé par l'Association des consommateurs du Canada, le cœur de la plainte concerne la question de savoir si le CRTC pouvait ordonner que les fonds soient utilisés de certaines façons, et non sur celle de savoir s'il avait le pouvoir d'ordonner de quelle manière générale les fonds devaient être employés.

[35] Cela signifie que, dans le pourvoi de Bell Canada et de TELUS, le litige porte sur la question de savoir si les pouvoirs discrétionnaires conférés au CRTC par la *Loi sur les télécommunications* lui permettaient d'ordonner l'attribution de crédits aux consommateurs au moyen des comptes de report. Dans le pourvoi formé par l'Association des consommateurs du Canada, il porte sur son pouvoir discrétionnaire d'ordonner que les fonds des comptes de report soient utilisés pour l'expansion des services à large bande.

[36] Une responsabilité centrale du CRTC consiste à déterminer et à approuver les tarifs justes et raisonnables des services de télécommunication. En plus de son pouvoir de tarification, le CRTC peut assujettir la fourniture d'un service à *toutes* conditions, adopter *toute* méthode qu'il estime appropriée pour déterminer si un tarif est juste et raisonnable et imposer *toute* méthode comptable de son choix à

obliged to exercise all of its powers and duties with a view to implementing the Canadian telecommunications policy objectives set out in s. 7.

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

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

[39] This brings us to the nature of the CRTC's rate-setting power in the context of this case. The predecessor statute for telecommunications rate-setting, the *Railway Act*, R.S.C. 1985, c. R-3, also stipulated that rates be "just and reasonable" (s. 340(1)). Traditionally, those rates were based on a balancing between a fair rate for the consumer and

une entreprise. Il doit exercer tous ses pouvoirs et fonctions de manière à réaliser les objectifs de la politique canadienne de télécommunication énoncés à l'art. 7.

[37] La lecture conjuguée de l'art. 27 et du par. 37(1) permet de conclure à l'existence du pouvoir du CRTC d'établir les comptes de report. Ce pouvoir s'étend nécessairement à l'utilisation des fonds de ces comptes, utilisation qui constitue la dernière étape du processus mis en branle par la Décision sur le plafonnement des prix. Le CRTC possède de toute évidence une expertise considérable sur ce type de question. En témoignent les pouvoirs étendus qui lui sont conférés à cet égard par le législateur ainsi que la solide clause privative du par. 52(1), selon laquelle ses décisions sur des questions de fait — dont celle de savoir si une entreprise a adopté un tarif juste et raisonnable — ne peuvent faire l'objet d'un appel.

[38] À mon avis, les questions soulevées dans les présents pourvois ressortissent donc à l'essence même de l'expertise spécialisée du CRTC. Le fond du différend concerne en fait la méthode d'établissement des tarifs et l'affectation de certains fonds provenant de ces tarifs, un exercice polycentrique que le législateur a confié au CRTC et pour lequel ce dernier possède une compétence particulière. Ces constatations militent en faveur de l'application d'une norme de contrôle faisant davantage appel à la déférence. La question à laquelle il nous faut répondre est alors celle de savoir si le CRTC a agi raisonnablement lorsqu'il a indiqué de quelle façon devaient être utilisés les fonds des comptes de report. (Voir *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 25; et *VIA Rail Canada*, par. 88-100.)

[39] Cela nous amène à la nature du pouvoir de tarification du CRTC dans le contexte de la présente affaire. Le texte qui régissait auparavant la tarification des télécommunications, soit la *Loi sur les chemins de fer*, L.R.C. 1985, ch. R-3, précisait lui aussi que les tarifs devaient être « justes et raisonnables » (par. 340(1)). Auparavant, ces tarifs étaient

a fair return on the carrier's investment. (See, e.g., *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93, and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 65.)

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

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

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

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

établis de façon à assurer un tarif équitable pour le consommateur et un rendement équitable sur l'investissement de l'entreprise. (Voir, par exemple, *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193, et *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 65.)

[40] Même avant les formulations larges figurant maintenant dans la *Loi sur les télécommunications*, les organismes de réglementation disposaient d'un vaste pouvoir discrétionnaire pour déterminer les facteurs à prendre en compte et la méthode qu'ils pouvaient adopter pour décider si les tarifs étaient justes et raisonnables. Par exemple, en rejetant une demande d'autorisation dans *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), le juge Taschereau a écrit ce qui suit :

> [TRADUCTION] [S]i la Commission est tenue d'accorder une demande qui est juste pour le public et qui assure aux chemins de fer un rendement équitable, elle n'est pas tenue d'accepter, pour la détermination des tarifs qui seront exigés, la seule méthode proposée par la demanderesse. L'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir. [Je souligne; p. 13.]

Pour arriver à cette conclusion, il s'est appuyé sur le jugement rendu par le juge en chef Duff dans *Canadian National Railways Co. c. Bell Telephone Co. of Canada*, [1939] R.C.S. 308, et sur la proposition suivante faite dans le contexte législatif particulier de cette affaire :

> [TRADUCTION] La loi ne prescrit ni l'ordonnance qui doit être rendue dans une affaire donnée ni les considérations sur lesquelles doit se guider la Commission pour arriver à la conclusion qu'une ordonnance, ou que telle ordonnance particulière, est nécessairement indiquée dans une affaire donnée. Certes, il incombe à tous les organismes publics et autres organismes investis de pouvoirs conférés par la loi d'agir raisonnablement dans l'exercice de ces pouvoirs; mais selon le texte législatif, la Commission est, dans l'exercice d'un pouvoir discrétionnaire administratif qui lui est conféré, l'arbitre ultime quant à l'ordonnance qui doit être rendue, sous réserve de l'appel devant le gouverneur en conseil prévu par l'art. 52. [p. 315]

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

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

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

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

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

[44] It is true that the CRTC had previously used a "rate base rate of return" method, based on a combination of a rate of return for investors in telecommunications carriers and a rate base calculated using the carriers' assets. This resulted in

(Voir aussi Michael H. Ryan, *Canadian Telecommunications Law and Regulation* (feuilles mobiles), §612.)

[41] Le large pouvoir discrétionnaire dont le CRTC disposait déjà pour déterminer si les tarifs sont justes et raisonnables a été encore élargi par l'insertion du par. 27(5) dans la *Loi sur les télécommunications*, lequel lui permet d'utiliser « la méthode ou la technique qu'il estime appropriée », une formulation absente de la *Loi sur les chemins de fer.*

[42] Plus significatif encore, la *Loi sur les chemins de fer* ne contenait aucune disposition analogue à celle de l'art. 47, qui enjoint au CRTC d'exercer son pouvoir de tarification de manière à réaliser les objectifs de la politique canadienne de télécommunication énoncés à l'art. 7. Ces ajouts législatifs sont importants. Conjuguées au pouvoir de tarification du CRTC et à sa faculté d'utiliser la méthode de son choix pour arriver à un tarif juste et raisonnable, les dispositions en question contredisent l'interprétation restrictive des pouvoirs de l'organisme proposée par diverses parties dans les présents pourvois.

[43] La juge d'appel Sharlow a mis en relief cet argument dans le passage suivant de ses motifs :

> Étant donné l'application conjointe des articles 47 et 7 de la *Loi sur les télécommunications* [. . .], la compétence de tarification du CRTC ne se limite pas à la prise en compte des facteurs traditionnellement considérés comme pertinents pour assurer un prix équitable aux consommateurs et un rendement équitable aux fournisseurs de services de télécommunication. L'article 47 de la *Loi sur les télécommunications* prescrit expressément au CRTC de prendre en considération, entre autres, les objectifs de la politique canadienne de télécommunication énumérés à l'article 7 de la même loi. Il s'ensuit à mon avis que le CRTC a le droit, aux fins des décisions de tarification qu'il rend sous le régime de la *Loi sur les télécommunications*, de prendre en considération tous les objectifs de ladite politique énoncés à l'article 7. [par. 35]

[44] Il est vrai que le CRTC avait précédemment utilisé une méthode « base tarifaire/taux de rendement », fondée à la fois sur un taux de rendement pour les investisseurs dans les entreprises de télécommunication et une base tarifaire calculée en

rates charged for the carrier's services that would, on the one hand, provide a fair return for the capital invested in the carrier, and, on the other, be fair to the customers of the carrier.

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

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

The Act . . . provides the tools necessary to allow the Commission to alter the traditional manner in which it regulates (i.e., to depart from rate base rate of return regulation).

. . .

In brief, telecommunications today transcends traditional boundaries and simple definition. It is an industry, a market and a means of doing business that

fonction des actifs des entreprises. Par conséquent, les tarifs exigés pour les services des entreprises, procuraient un rendement équitable sur le capital investi d'une part, et ils étaient justes pour les consommateurs d'autre part.

[45] Toutefois, ces dispositions de portée plus large signifient que l'approche base tarifaire/taux de rendement n'est pas nécessairement la seule façon de fixer un tarif juste et raisonnable. De plus, il ressort des art. 7 et 47 et du par. 27(5) que le CRTC n'est pas tenu de se limiter à la conciliation des intérêts des abonnés et des entreprises à l'égard d'un service donné. Dans la Décision sur le plafonnement des prix, par exemple, le CRTC a choisi de mettre l'accent sur le prix maximum des services plutôt que sur l'approche base tarifaire/taux de rendement. Il l'a fait, en partie, pour favoriser la concurrence au sein de certains marchés, un objectif sans aucun rapport avec la relation entre l'entreprise et l'abonné dans l'approche traditionnelle base tarifaire/taux de rendement. Le CRTC a emprunté une approche similaire fondée sur l'établissement de prix plafonds dans une décision antérieure à la Décision sur le plafonnement des prix[7].

[46] Le CRTC a interprété ces dispositions de manière libérale, considérant qu'elles répondaient au contexte d'une industrie évoluée, dans lequel il s'acquitte de sa mission. Dans sa décision intitulée « Examen du cadre de réglementation »[8], il a écrit ce qui suit :

La Loi prévoit . . . les moyens par lesquels le Conseil peut modifier la méthode de réglementation traditionnelle (c.-à-d. mettre fin à la réglementation base tarifaire/taux de rendement).

. . .

Bref, les télécommunications d'aujourd'hui transcendent les frontières traditionnelles et les définitions simples. Elles forment une industrie, un marché et un moyen

[7] Telecom Decision CRTC 97-9, May 1, 1997 (online: www.crtc.gc.ca/eng/archive/1997/DT97-9.htm).

[8] Telecom Decision CRTC 94-19, September 16, 1994 (online: www.crtc.gc.ca/eng/archive/1994/DT94-19.htm).

[7] Décision de télécom CRTC 97-9, 1er mai 1997 (en ligne : www.crtc.gc.ca/fra/archive/1997/dt97-9.htm).

[8] Décision de télécom CRTC 94-19, 16 septembre 1994 (en ligne : www.crtc.gc.ca/fra/archive/1994/DT94-19.htm).

encompasses a constantly evolving range of voice, data and video products and services. . . .

In this context, the Commission notes that the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service. [Emphasis added; pp. 6 and 10.]

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

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

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

[49] I see nothing in this conclusion which contradicts the ratio in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476. In that case, the issue was

de faire des affaires qui englobent une gamme toujours grandissante de services et de produits vocaux, données et vidéo. . .

Dans ce contexte, le Conseil fait observer que la Loi prévoit l'évolution du service de base en établissant, à titre d'objectif, la fourniture de services de télécommunications fiables et abordables, et non pas simplement un service téléphonique abordable. [Je souligne; p. 7 et 11.]

[47] Dans *Edmonton (Ville) c. 360Networks Canada Ltd.*, 2007 CAF 106, [2007] 4 R.C.F. 747, autorisation de pourvoi refusée, [2007] 3 R.C.S. vii, la Cour d'appel fédérale a tiré des conclusions semblables, faisant observer que la *Loi sur les télécommunications* devait être interprétée en fonction des objectifs de la politique et que l'art. 7 justifiait en partie le point de vue selon lequel « il convient d'interpréter la Loi comme établissant un cadre réglementaire complet » (par. 46). L'auteur Michael H. Ryan a lui aussi conclu à l'obligation d'adopter une approche plus globale :

> [TRADUCTION] Vu l'importance de l'industrie des télécommunications pour l'ensemble du pays, les questions de tarification peuvent parfois prendre une dimension qui leur donne une importance débordant les intérêts immédiats de l'entreprise, de ses actionnaires et de ses clients, et où entrent en jeu les intérêts du public en général. L'organisme de réglementation a aussi l'obligation de prendre en considération ces intérêts de caractère plus général. [§604]

[48] Cela conduit inévitablement, me semble-t-il, à la conclusion que le CRTC peut fixer des tarifs justes et raisonnables pour l'application de la *Loi sur les télécommunications* au moyen de toute une gamme de méthodes, en prenant en considération la diversité des parties prenantes et intérêts mentionnés à l'art. 7, et non seulement ceux qu'il prenait en considération quand il s'acquittait de sa mission en vertu des dispositions plus restrictives de la *Loi sur les chemins de fer*. Cette observation sera également pertinente plus loin dans les présents motifs, lorsque la question des « tarifs définitifs » sera examinée dans le cadre du pourvoi de Bell Canada.

[49] Je ne vois rien dans cette conclusion qui contredise le raisonnement sur lequel repose *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476. Dans

whether the CRTC could make an order granting cable companies access to certain utilities' power poles. In that decision, the CRTC had relied on the Canadian telecommunications policy objectives to inform its interpretation of the relevant provisions. In deciding that the language of the *Telecommunications Act* did not give the CRTC the power to grant access to the power poles, Gonthier J. for the majority concluded that the CRTC had inappropriately interpreted the Canadian telecommunications policy objectives in s. 7 as power-conferring (para. 42).

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

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

cet arrêt, la question était de savoir si le CRTC pouvait rendre une ordonnance pour donner à des câblodistributeurs l'accès aux poteaux électriques de certaines entreprises d'électricité. Dans cette décision, le CRTC s'était fondé sur les objectifs de la politique canadienne de télécommunication pour interpréter les dispositions pertinentes. En décidant que les dispositions de la *Loi sur les télécommunications* ne conféraient pas au CRTC le pouvoir de donner l'accès aux poteaux électriques, le juge Gonthier, qui s'exprimait pour la majorité, a conclu que le CRTC avait mal interprété les objectifs de la politique canadienne de télécommunication énoncés à l'art. 7 en concluant qu'ils conféraient des pouvoirs (par. 42).

[50] Les circonstances de *Barrie Public Utilities* sont complètement différentes de celles dont nous sommes saisis. Ce qui est en cause, en l'espèce, c'est l'établissement par le CRTC de tarifs qui devaient être justes et raisonnables, dans l'exercice d'un pouvoir qui s'appuie incontestablement sur des dispositions législatives non équivoques. Le CRTC se trouvait ainsi à exercer un large pouvoir, pouvoir qu'il devait exercer, selon l'art. 47, « de manière à réaliser les objectifs de la politique canadienne de télécommunication ». Les considérations de politique générale énoncées à l'art. 7 étaient des facteurs dont le CRTC était obligé de tenir compte — ce qu'il a fait.

[51] L'arrêt *ATCO* de notre Cour n'empêche pas non plus la réalisation, par la fixation de tarifs, d'objectifs relevant de l'intérêt public. Dans cet arrêt, le juge Bastarache, se prononçant pour la majorité, a considéré de façon restrictive les pouvoirs conférés à l'Alberta Energy and Utilities Board par la loi applicable. Il fallait décider si l'organisme avait le pouvoir d'attribuer aux abonnés le produit de la vente des biens d'une entreprise réglementée qu'il avait approuvée. On avait soutenu que, comme l'organisme possédait le pouvoir de rendre « toute autre ordonnance » et d'assortir une ordonnance de conditions nécessaires « dans l'intérêt public », il était par conséquent habilité à ordonner l'attribution du produit de la vente.

[52] In holding that the Board had no such authority, Bastarache J. relied in part on the conclusion that the Board's statutory power to make orders or impose conditions in the public interest was insufficiently precise to grant the ability to distribute sale proceeds to ratepayers (para. 46). The ability of the Board to approve an asset sale, and its authority to make any order it wished in the public interest, were necessarily limited by the context of the relevant provisions (paras. 46-48 and 50). It was obliged too to adopt a rate base rate of return method to determine rates, pursuant to its governing statute (paras. 65-66).

[52] Pour conclure que l'organisme n'avait pas ce pouvoir, le juge Bastarache s'est fondé en partie sur la conclusion suivant laquelle le pouvoir de l'organisme de rendre des ordonnances ou d'imposer des conditions nécessaires dans l'intérêt public n'était pas suffisamment précis pour lui conférer le pouvoir d'attribuer le produit de la vente aux clients (par. 46). Le pouvoir de l'organisme d'approuver une vente de biens ainsi que son pouvoir de rendre les ordonnances jugées nécessaires dans l'intérêt public étaient nécessairement restreints par le contexte des dispositions pertinentes (par. 46-48 et 50). L'organisme était également tenu, selon sa loi habilitante, d'adopter une méthode base tarifaire/taux de rendement pour fixer les tarifs (par. 65-66).

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

[53] Dans l'affaire dont nous sommes saisis, contrairement à la situation dans *ATCO*, le pouvoir de tarification du CRTC et son pouvoir d'établir des comptes de report à cette fin sont au cœur même de sa compétence. Le CRTC est légalement habilité à utiliser *toute* méthode qui lui semble appropriée pour fixer des tarifs justes et raisonnables. De plus, il est obligé de tenir compte des objectifs énoncés dans la loi dans l'exercice de ses pouvoirs, alors que dans *ATCO* l'instruction de tenir compte de l'intérêt public revêtait un caractère facultatif et vague. La *Loi sur les télécommunications* écarte plusieurs des restrictions traditionnelles en matière de tarification décrites dans *ATCO*, conférant ainsi au CRTC la capacité de concilier les intérêts des entreprises, des consommateurs et des concurrents dans le contexte plus large de l'industrie canadienne des télécommunications (décision relative à l'examen du cadre de réglementation, p. 7 et 11).

[54] The fact that deferral accounts are at issue does nothing to change this framework. No party objected to the CRTC's authority to establish the deferral accounts themselves. These accounts are accepted regulatory tools, available as a part of the Commission's rate-setting powers. As the CRTC has noted, deferral accounts "enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test

[54] Le fait que le litige porte sur des comptes de report ne change rien à cette analyse. Aucune partie n'a contesté le pouvoir du CRTC d'ordonner l'établissement des comptes de report eux-mêmes. Ces comptes sont des outils réglementaires dont on reconnaît que le Conseil peut se servir dans l'exercice de son pouvoir de tarification. Comme l'a souligné le CRTC, les comptes de report permettent à « un organisme de réglementation [de] reporter l'examen d'un article de frais ou de revenu particulier

year".[9] They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another. While the CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits may have been innovative, it was fully supported by the provisions of the *Telecommunications Act*.

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

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

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

> The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There

[9] Telecom Decision CRTC 93-9, July 23, 1993 (online: www.crtc.gc.ca/eng/archive/1993/DT93-9.htm).

qu'on ne peut estimer avec certitude pour l'année-témoin »[9]. Ils ont traditionnellement permis de parer à certaines éventualités, notamment les écarts entre les coûts et revenus prévus et réels, l'organisme de réglementation pouvant déplacer les coûts et dépenses d'une période réglementaire à l'autre. Bien que le CRTC ait peut-être fait preuve d'innovation avec la création et l'utilisation des comptes de report pour l'expansion du service à large bande et le versement de crédits aux consommateurs, ces mesures étaient parfaitement compatibles avec les dispositions de la *Loi sur les télécommunications.*

[55] À mon avis, le vaste pouvoir discrétionnaire conféré au CRTC pour la détermination des tarifs justes et raisonnables exigés par l'art. 27, son pouvoir d'imposer à une entreprise, en vertu de l'art. 37, l'adoption de toute méthode comptable qu'il estime appropriée et l'obligation qui lui est faite par l'art. 47 de veiller à la réalisation des grands objectifs de la politique canadienne de télécommunication énoncés à l'art. 7 indiquent que la *Loi sur les télécommunications* lui donne une latitude considérable pour établir les comptes de report et approuver l'utilisation qui en sera faite. Ces comptes ont été créés conformément au pouvoir de tarification du CRTC et à l'objectif selon lequel tous les tarifs exigés par les entreprises doivent être justes et raisonnables et le demeurer.

[56] Les comptes de report ne rempliraient pas leur fonction si le CRTC n'avait pas aussi le pouvoir de prescrire la manière dont les fonds de ces comptes doivent être employés. Je suis d'avis que le CRTC pouvait, dans l'exercice de son pouvoir de tarification, ordonner l'utilisation de ces comptes, dans la mesure où il exerçait ce pouvoir de manière raisonnable.

[57] Par conséquent, je souscris aux observations suivantes de la juge d'appel Sharlow :

> La décision sur le plafonnement des prix prescrivait à Bell Canada de porter une fraction de ses tarifs définitifs au crédit d'un compte de report, lequel — le CRTC l'a clairement indiqué — serait utilisé en temps voulu de

[9] Décision de télécom CRTC 93-9, 23 juillet 1993 (en ligne : www.crtc.gc.ca/fra/archive/1993/dt93-9.htm).

is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the *Telecommunications Act*. [Emphasis added; para. 52.]

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

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

[60] In the current case, Bell Canada argued that the rates had been made final, and that the disposition of the deferral accounts for one-time credits was therefore impermissible. More specifically, it argued that the CRTC's order of one-time credits

la manière qu'il prescrirait. Il n'est pas contesté que le CRTC ait le droit d'imposer à un fournisseur de services de télécommunication, en lui prescrivant l'ouverture d'un compte de report, l'obligation éventuelle d'effectuer des dépenses qu'il se réserve de lui ordonner ultérieurement. Il s'ensuit par voie de conséquence nécessaire que le CRTC a le droit de rendre une ordonnance actualisant cette obligation et prescrivant des dépenses déterminées, à condition que l'on puisse plausiblement justifier celles-ci par un ou plusieurs des objectifs de la politique de télécommunication énumérés à l'article 7 de la *Loi sur les télécommunications*. [Je souligne; par. 52.]

[58] Ce cadre d'analyse général nous amène aux questions plus précises soulevées dans les présents pourvois. Dans le premier pourvoi, se fondant sur la décision du juge Gonthier dans l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722 (« *Bell Canada (1989)* »), Bell Canada a plaidé que des tarifs « définitifs » ne peuvent pas être modifiés et que les fonds des comptes de report ne pouvaient donc pas être versés à titre de « rabais » aux clients.

[59] Dans *Bell Canada (1989)*, le CRTC avait approuvé une série de tarifs provisoires. Il les avait ensuite réexaminés à la lumière de la nouvelle situation financière de Bell Canada et avait ordonné à l'entreprise de porter au crédit du compte des abonnés actuels ce qu'il considérait comme des revenus excédentaires. Contestant le pouvoir du CRTC de rendre une telle ordonnance, Bell Canada faisait valoir que l'organisme ne pouvait ordonner l'attribution d'un crédit forfaitaire à l'égard de revenus obtenus à partir de tarifs approuvés par le CRTC, que ces tarifs soient fixés dans une ordonnance provisoire ou définitive. Le juge Gonthier a estimé que, si la *Loi sur les chemins de fer* instituait un système positif d'approbation permettant seulement la tarification prospective, et non rétroactive ou rétrospective, le crédit forfaitaire en question était néanmoins permis puisque les tarifs initiaux étaient provisoires et, partant, susceptibles d'être modifiés.

[60] En l'espèce, Bell Canada a soutenu que les tarifs avaient été rendus définitifs et que l'utilisation des comptes de report pour l'attribution d'un crédit unique était donc impossible. Elle a fait valoir, plus précisément, que l'ordonnance du CRTC concernant

from the deferral accounts amounted to retrospective rate-setting as the term was used in *Bell Canada (1989)*, at p. 1749, namely, that their "purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive".

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

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

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

l'attribution d'un crédit unique, au moyen des comptes de report, équivalait à une tarification rétroactive, au sens dans lequel cette expression est utilisée dans *Bell Canada (1989)* à la p. 1749, c'est-à-dire qu'elle « vis[ait] à remédier à l'imposition des taux approuvés antérieurement qui ont été jugés excessifs en dernier ressort ».

[61] Comme la présente affaire porte sur des revenus mis en réserve dans des comptes de report (ce que la juge d'appel Sharlow a appelé des obligations ou dettes éventuelles), il n'y est selon moi pas question de modification de tarifs définitifs. Comme l'a souligné la juge Sharlow, *Bell Canada (1989)* ne s'applique pas, car on savait dès le départ en l'espèce que Bell Canada serait tenue d'utiliser le solde de son compte de report selon les prescriptions ultérieures du CRTC (par. 53).

[62] Ce serait à mon avis simplifier à outrance que de conclure que *Bell Canada (1989)* s'applique et a pour effet d'empêcher en l'espèce le versement de crédits aux consommateurs. L'arrêt *Bell Canada (1989)* a été rendu sous le régime de la *Loi sur les chemins de fer*, un régime législatif qui, il importe de le rappeler, ne comportait aucune des considérations et prescriptions énoncées aux art. 7 et 47 et au par. 27(5) de la *Loi sur les télécommunications*. Il n'y était pas non plus question de l'utilisation des fonds de comptes de report.

[63] Selon moi, les crédits dont le versement a été ordonné en l'espèce sur les comptes de report ne sont de nature ni rétroactive ni rétrospective. Ils ne modifient pas le tarif initial approuvé, qui comprenait les comptes de report, et ne visent pas non plus à corriger un défaut de l'ordonnance tarifaire définitive au moyen de mesures ultérieures, puisque ces crédits ou réductions avaient été envisagés dès le départ comme utilisation possible du solde des comptes de report. Ces fonds peuvent à juste titre être qualifiés de « revenus mis en réserve », parce que les tarifs définitifs sont *toujours* restés assujettis au mécanisme des comptes de report établi dans la Décision sur le plafonnement des prix. Le recours à des comptes de report empêche donc de conclure qu'il y a eu rétroactivité ou rétrospectivité. De plus, l'utilisation de comptes de report pour tenir compte

been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

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

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

de la différence entre les coûts et revenus prévus et réels n'est habituellement pas considérée comme une tarification rétroactive (*EPCOR Generation Inc. c. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, par. 12, et *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (C.A.T.-N.), par. 97-98 et 175).

[64] La Décision sur les comptes de report marquait le point culminant d'un processus amorcé avec la Décision sur le plafonnement des prix. Dans cette dernière, le CRTC avait indiqué que les fonds des comptes de report devaient être utilisés de manière à contribuer à la réalisation des objectifs de l'organisme (par. 409 et 412). Dans la Décision sur les comptes de report, le CRTC a résumé ses conclusions antérieures selon lesquelles les fonds des comptes de report pourraient être utilisés à diverses fins, notamment pour accorder des crédits aux abonnés (par. 6). Lorsque le CRTC a approuvé les tarifs découlant de la Décision sur le plafonnement des prix, la partie des revenus qui avait été versée dans les comptes de report est demeurée en réserve. Les comptes de report, et la réserve à laquelle étaient assujettis les fonds inscrits à ces comptes, étaient donc une partie intégrante de l'opération de tarification et garantissaient que les tarifs approuvés étaient justes et raisonnables. Rien dans la Décision sur les comptes de report n'est par conséquent venu modifier la Décision sur le plafonnement des prix ou quelque décision antérieure du CRTC sur cette question. L'affectation ultérieure par le CRTC du solde des comptes de report à diverses fins, dont l'attribution d'un crédit aux clients, ne constituait donc pas une modification d'une ordonnance tarifaire définitive.

[65] De toute façon, l'attribution de fonds des comptes de report aux consommateurs ne constituait pas à proprement parler un « rabais ». Comme dans *Bell Canada (1989)*, ces affectations étaient plutôt des versements ou des réductions tarifaires uniques dont les entreprises devaient faire bénéficier leurs abonnés *actuels* en puisant dans les comptes de report. La possibilité d'un crédit unique était présente dès le début de l'opération de tarification. Dès la décision sur le plafonnement des prix, il était entendu que les fonds des comptes de report

subscribers once the CRTC determined the appropriate allocation. It was precisely because the rate-setting mechanism approved by the CRTC included accumulation in and disposition from the deferral accounts pursuant to further CRTC orders, that the rates were and continued to be just and reasonable.

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

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

pourraient notamment être utilisés pour le versement d'un éventuel crédit aux abonnés une fois que le CRTC aurait déterminé l'affectation souhaitable. C'est précisément parce que le mécanisme de tarification approuvé par le CRTC comprenait l'accumulation de fonds dans les comptes de report et l'affectation de ces fonds conformément à des ordonnances ultérieures du CRTC que les tarifs étaient et sont demeurés justes et raisonnables.

[66] Par conséquent, au lieu de voir dans *Bell Canada (1989)* l'établissement d'une règle stricte selon laquelle il ne serait en aucun cas possible d'ordonner le versement de crédits sur des revenus tirés de tarifs définitifs, il importe de rappeler que le juge Gonthier craignait de voir la stabilité financière des services publics réglementés être minée si les tarifs pouvaient connaître des variations arbitraires (p. 1760). Or, rien dans la Décision sur les comptes de report ne compromettait la stabilité financière des entreprises visées. Les sommes en cause ont toujours fait l'objet d'un traitement comptable différent et les entreprises réglementées savaient que la partie des revenus versée aux comptes de report demeurait en réserve. En fait, la formule établie dans la Décision sur le plafonnement des prix aurait accordé des tarifs *inférieurs* à ceux finalement fixés, n'eût été la création des comptes de report. Ces tarifs inférieurs auraient sans doute pu être jugés suffisants pour maintenir la stabilité financière des entreprises. S'ils ont été augmentés, c'est uniquement pour encourager l'entrée de nouveaux concurrents sur le marché.

[67] TELUS a plaidé en outre que la Décision sur les comptes de report constituait une confiscation de ses biens. Voilà un argument que j'ai de la difficulté à accepter. Les fonds des comptes de report n'ont jamais appartenu sans équivoque aux entreprises et ont toujours consisté dans des revenus mis en réserve. Si le CRTC avait voulu que ces revenus soient utilisés au gré des entreprises visées, il aurait pu simplement approuver les tarifs en les considérant comme justes et raisonnables et ordonner que le solde des comptes de report soit remis aux entreprises en question. Il a choisi de ne pas le faire.

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

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

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

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

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

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

[68] Il convient également de souligner que, en approuvant les tarifs de Bell Canada, le CRTC a ordonné à l'entreprise d'affecter aux comptes de report une partie des économies provenant de certaines taxes[10]. Ni le CRTC ni Bell Canada ne pouvaient s'attendre à ce que l'entreprise soit en mesure de conserver cette partie de ses revenus tirés des tarifs, qui correspondait à une obligation fiscale antérieure qu'elle n'était en réalité pas tenue d'acquitter ni de reporter.

[69] Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi de Bell Canada et de TELUS.

[70] La prémisse du pourvoi de l'Association des consommateurs du Canada est que l'utilisation d'une partie des fonds des comptes de report pour l'expansion du service à large bande a fait ressortir le fait que les tarifs exigés par les entreprises n'étaient pas, en un certain sens, justes et raisonnables. L'Association peut avoir gain de cause uniquement si elle démontre que la décision du CRTC était déraisonnable.

[71] L'Association des consommateurs du Canada fait valoir essentiellement que la Décision sur les comptes de report a dans les faits obligé les utilisateurs d'un certain service (les abonnés résidentiels de certaines zones) à subventionner les utilisateurs d'un autre service (les futurs utilisateurs de services à large bande) une fois achevée l'expansion de l'infrastructure à large bande. À son avis, cela indiquait que les tarifs exigés des utilisateurs résidentiels n'étaient pas en fait justes et raisonnables et que, par conséquent, le solde des comptes de report — abstraction faite des sommes déboursées pour améliorer l'accessibilité des services — devait être distribué aux clients.

[72] Comme je l'ai déjà signalé, les comptes de report ont été créés et utilisés conformément au pouvoir du CRTC d'approuver des tarifs justes et raisonnables, et ils faisaient partie intégrante de ces tarifs. Loin de rendre ces tarifs inappropriés, les comptes de report *garantissaient* que les tarifs étaient justes et raisonnables. En outre, les objectifs de la politique de télécommunication énoncés

[10] Décision de télécom CRTC 2003-15, par. 32.

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

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

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

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

à l'art. 7, dont le CRTC doit toujours tenir compte, montrent qu'il n'a pas à prendre en considération uniquement le service en cause pour déterminer si les tarifs sont justes et raisonnables. La loi envisage un cadre national global en matière de télécommunications. Elle n'oblige pas le CRTC à atomiser les différents services. Il appartient au CRTC de déterminer le niveau tolérable d'interfinancement.

[73] L'approche traditionnelle en matière de télécommunications ne peut pas non plus être invoquée à l'appui de l'argument de l'Association des consommateurs du Canada. Les usagers du service d'interurbain financent depuis longtemps la téléphonie locale (Décision sur le plafonnement des prix, par. 2). Par conséquent, même si les tarifs des différents services couverts par la *Loi sur les télécommunications* peuvent être évalués selon le critère des tarifs justes et raisonnables, ils ne sont pas nécessairement rendus déraisonnables ou injustes par la seule existence d'un certain interfinancement entre les services. (Voir Ryan, §604, relativement à la proposition suivant laquelle le CRTC peut déterminer le niveau approprié d'interfinancement pour une entreprise de télécommunication donnée.)

[74] J'estime que le CRTC a correctement tenu compte des objectifs énoncés à l'art. 7 quand il a ordonné l'affectation de certaines sommes à l'expansion du service à large bande et au versement de crédits aux consommateurs. Ce faisant, il a considéré les objectifs inscrits dans la loi comme des principes directeurs régissant l'exercice de son pouvoir de tarification. Le fait pour le CRTC de poursuivre les objectifs de la politique dans l'exercice de son pouvoir de tarification constitue précisément ce que l'art. 47 lui demande de faire lorsqu'il fixe des tarifs justes et raisonnables.

[75] En décidant d'utiliser les fonds des comptes de report pour améliorer les services d'accessibilité et pour étendre aux collectivités rurales et éloignées les services à large bande, le CRTC avait à l'esprit les objectifs qui lui sont fixés par le législateur : « favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à [. . .] renforcer la structure sociale et économique du Canada » (al. 7*a*)); « permettre l'accès

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

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

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

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

Appeals dismissed.

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

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

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

aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs [et] abordables » (al. 7*b*)); « satisfaire les exigences économiques et sociales des usagers des services de télécommunication » (al. 7*h*)).

[76] Le CRTC a entendu plusieurs parties, il a exercé ses pouvoirs en prenant en considération les objectifs que le législateur lui a imposés et il a décidé les mesures appropriées. Dans les circonstances, je n'hésite pas à conclure que le CRTC a pris une décision raisonnable lorsqu'il a ordonné l'expansion du service à large bande.

[77] Je conclurais donc que le CRTC a fait exactement ce que la *Loi sur les télécommunications* lui demandait de faire. Il avait, en vertu de la loi, le pouvoir de fixer des tarifs justes et raisonnables, d'établir des comptes de report et de prescrire de quelle manière devaient être utilisés les fonds de ces comptes. Il était tenu d'exercer ces pouvoirs en conformité avec les objectifs de la politique de télécommunication énoncés dans la loi et, par conséquent, de soupeser et d'examiner toute une gamme d'objectifs et d'intérêts. Il l'a fait d'une manière raisonnable, à la fois lorsqu'il a ordonné l'attribution de crédits aux abonnés et lorsqu'il a approuvé l'utilisation des fonds pour l'expansion du service à large bande.

[78] Je suis d'avis de rejeter les pourvois. À la demande de toutes les parties, aucune ordonnance ne sera rendue quant au dépens.

Pourvois rejetés.

Procureurs de l'appelante/intimée Bell Canada : Blake, Cassels & Graydon, Toronto.

Procureurs de l'appelante/intimée TELUS Communications Inc. et l'intimée TELUS Communications (Québec) Inc. : Burnet, Duckworth & Palmer, Calgary.

Procureurs des appelantes/intimées l'Association des consommateurs du Canada et l'Organisation nationale anti-pauvreté et l'intimé le Centre pour la défense de l'intérêt public : Paliare, Roland, Rosenberg, Rothstein, Toronto.

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

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

Procureurs de l'intimée MTS Allstream Inc. : Goodmans, Toronto.

Procureurs de l'intimé/intervenant le Conseil de la radiodiffusion et des télécommunications canadiennes : Torys, Toronto.

In the Court of Appeal of Alberta

Citation: Calgary (City) v. Alberta (Energy and Utilities Board), 2010 ABCA 132

Date: 20100423
Docket: 0801-0030-AC
Registry: Calgary

Between:

City of Calgary

Appellant
(Applicant)

- and -

Alberta Energy and Utilities Board

Respondent
(Respondent)

- and -

ATCO Gas and Pipelines Ltd.

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Marina Paperny

Reasons for Judgment Reserved of The Honourable Madam Justice Hunt
Concurred in by The Honourable Madam Justice Paperny

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurring in Part

Appeal from the Alberta Energy and Utilities Board
Decision 2008-001 dated January 8, 2008 and
Decision 2005-036 dated April 28, 2005

Reasons for Judgment Reserved of
The Honourable Madam Justice Hunt

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

Facts

History of Deferred Gas Accounts (DGA)

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

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

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

[5] In 2001 ATCO and the appellant City of Calgary (Calgary) were both parties to a hearing that considered, *inter alia*, the methodology for determining the GCRR: Methodology for Managing

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

Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate Unbundling (Unbundling) Proceeding, Part A: GCRR Methodology and Gas Rate Unbundling. Decision 2001-75 (Alberta Energy and Utilities Board, 2001). Its context was the transition to competitive retail gas service. The Board noted its general supervisory power over utilities and its power to fix just and reasonable rates as the basis of its authority to deal with the issues in the hearing: p. 10.

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

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

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

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

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

Origin of this Dispute

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

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

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

Board Decisions

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

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

[15] As to the DGA and DGA Reconsideration Decisions, Calgary obtained leave to appeal on the following question: "Whether the Board erred in law or in jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 199[9][2] and 2004.": *Calgary (City) v. Alberta (Energy and Utilities Board*), 2009 ABCA 150 at para. 9, [2009] A.J. No. 408. ATCO has discontinued its application for leave to appeal the Limitations Decision.

DGA Decision (Decision 2005-036)

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

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

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

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

Limitations Decision (Decision 2006-042)

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

[21] In the resulting Limitations Decision, the Board considered its jurisdiction to establish limitation periods for the DGA/GCRR process in the context of its statutory mandate to set just and

[2] Calgary did not challenge the adjustments the Board approved to ATCO's northern territory DGA arising from transportation imbalances for the 1998 - 2004 period (Board factum at para. 14). Accordingly, 1999 (not 1998, as was stated in the leave decision) is the appropriate starting point.

reasonable rates and court decisions approving their use. It concluded that setting the GCRR requires the use of DGAs. Moreover:

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

[22] The Board adopted a general limitation period of two years prior to the effective date of the proposed GCRR for refunds to and recoveries from consumers. It permitted applications for

> approval of an adjustment to the DGA, where the cause of the adjustment originates outside the two-year limitation period, provided the following conditions are met:
>
> > (a) the adjustment sought exceeds the threshold value by being greater than 5% of the average monthly DGA gas commodity costs of the previous 12 months; and
> >
> > (b) the adjustment arose from special circumstances that were not within the utility's control.
>
> p. 17

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

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

DGA Reconsideration Decision (Decision 2008-001)

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

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

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

Legislation

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

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

> **Powers of the Board**

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

[...]

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

(a) make any order that the ... PUB may make under any enactment;
[...]
(d) with respect to an order made by the Board ... in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
(e) make an order granting the whole or part only of the relief applied for;

[...]

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

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

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

Powers of Board

36 The Board ... may ...

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

Rate base

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

Schedule of rates

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

> (a) for the progressive increase in the price of gas to the owner of the gas utility,
> (b) for an increase in the price of gas to the owner of the gas utility by reason of changes in any prices received by the owner on resale of the gas,
> (c) for an increase in the price of gas to the owner of the gas utility by reason of the payment of higher prices by any purchaser of gas in any gas producing area, or
> (d) for the redetermination of the price of gas to the owner of the gas utility either by agreement of the parties or pursuant to arbitration,

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

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

[...]

Excess revenues or losses

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

> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
>
> > (i) the whole of the fiscal year of the owner in which a proceeding is initiated ...,
> > (ii) a subsequent fiscal year of the owner, or
> > (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,
>
> and need not consider the allocation of those revenues and costs to any part of that period,

[...]

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

(d) the Board shall by order approve

(i) the method by which, and
(ii) the period, including any subsequent fiscal period, during which,

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

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

Jurisdiction and powers

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

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

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

[...]

Fixing of rates

89 The Board ... may ...

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

Chronology of Legislation

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

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

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

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

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

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

> **Powers of the Board**
>
> 27. The Board ... may ...
>
> > (a) fix just and reasonable individual rates ...
>
> **Rate base**
>
> 28.(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner that is used or required to be used in his services to the public within Alberta and fix a fair return thereon.
>
> **Excess revenue or losses**

> 31. ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of an application.

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

Discussion

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

> (1) What is the source of the Board's jurisdiction over DGAs?
> (2) Did the Board retroactively change rates or did its decision have a prohibited effect?
> (3) What standard applies to this Court's review of the Board's decisions?
> (4) Against that standard, do the Board's decisions to allow ATCO to use the DGA to record transportation imbalances for 1999 to February 2004 warrant this Court's intervention?

The first two are threshold issues; if the decision under appeal falls because of the answer to either of them, the subsequent issues do not arise.

Issue 1. What is the source of the Board's jurisdiction over DGAs?

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

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

A. *Nature and Function of Deferral Accounts in Utility Regulation*

[36] A consideration of the nature and function of deferral accounts provides context:

> Deferral accounts allow a utility to accumulate variances between a utility's approved rate based on forecasted costs and the utility's actual costs for a given period. Typically, at the end of the period, a utility will then collect from customers through a rate rider any balances in the deferral accounts owing by them and refund any balances owing to them.
>
> *ATCO Electric* at para. 26.

> In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000 ...
>
> *Epcor Generation Inc. v. Alberta (Energy and Utilities Board*), 2003 ABCA 374 at para. 2, 346 A.R. 281 ("*Epcor*").

> [D]eferral accounts ... are accepted regulatory tools, available as a part of ... rate-setting powers ... [they] ...'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year' [citation omitted]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.
>
> *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 at para. 54 ("*Bell Aliant*").

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

B. *Source of the Board's Authority*

[38] What, then, is the source of the Board's jurisdiction to permit the use of DGAs as a regulatory tool? As outlined above at para. 3, the DGA at issue was approved in 1988. Nevertheless,

before 1988 the Board employed tools with a similar function to regulate gas utilities. Judicial views about the source of the Board's authority to use those tools are instructive.

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

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

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

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

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

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 ("*Stores Block*") at para. 63.

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

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

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

[44] Calgary argues against reliance on sections 36 and 37 as the source of the Board's authority because of the Supreme Court's admonition against employing general statutory authority to ground the exercise of overly-broad Board powers, see e.g., *Stores Block* at para. 50. Elsewhere in the same decision, however, the Court emphasized the need to determine whether the exercise of the proposed power is a "practical necessity for the regulatory body to accomplish the object prescribed by

legislation": para. 77. According to the majority, such necessity was lacking in *Stores Block*. Here, for reasons outlined above at paras. 36-37, the use of DGAs is required if the Board is to regulate utilities effectively. Moreover, in *Bell Aliant*, Abella J. explained at paras. 51 - 53 that *Stores Block* did not "preclude the pursuit of public interest objectives through rate-setting". She contrasted *Stores Block* by pointing out that in *Bell Aliant*, the CRTC's rate-setting authority and its ability to establish deferral accounts for that purpose were at the very core of its competence. The same holds true in this case.

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

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

[46] A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 ("*Northwestern Utilities*").

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

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

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

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

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

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

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

[53] In *Bell Aliant*, the Supreme Court also upheld a CRTC decision to order the disposition of funds that had accumulated in a deferral account. The Court rejected the argument that this constituted retrospective rate-setting because the rates had already been finalized. Abella J. pointed out that it was known at the outset that the CRTC would make subsequent orders about how to use the balance in the deferral accounts. At para. 63 she added (citations omitted and emphasis added):

> In my view, the <u>credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning</u>. These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision. <u>The use of deferral accounts therefore</u>

> precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting ...

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

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

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

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

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

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

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

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

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

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

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

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

[64] Reinforcing this conclusion are the reasons given for applying the reasonableness standard in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 A.R. 183 at paras. 15 - 18 (leave to appeal refused [2008] S.C.C.A. No. 347). See also *ATCO Electric*, where the Court determined in its standard of review analysis that "[w]ith ... the widespread use of deferral accounts, determining the appropriate methodology to be used in calculating prudent costs of financing these deferral accounts engages the Board's specialized expertise.": para. 63. Reasonableness is also the standard applied to a gas regulator's decision to permit a utility to recover material and previously unrecorded costs for the provision of gas services: *Natural Resource Gas Ltd. v. Ontario (Energy Board*) (2006), 214 O.A.C. 236, 149 A.C.W.S. (3d) 889.

Issue 4. Has the reasonableness standard been breached ?

[65]

> Reasonableness is a deferential standard ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. ... [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

In my view, this standard has been breached.

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

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

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

[67] Presumably the "nature of the DGA" point refers to the Board's historical assessment of the DGA contained in section 2.3, entitled "Nature of DGA Adjustments & Recovery Period". In that section, the Board examined the purpose of the DGA when approved in 1988: "reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR, i.e. the rate it used to recover the commodity costs of gas from sales customers." In describing the change made in 2001 (altering the reconciliation period from a seasonal to a monthly basis), the Board repeated that the purpose of DGA adjustments was "to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred". It is manifest that the costs approved in the decisions under appeal did not fall within the original purpose of the DGA, namely, adjusting for gas price volatility.

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

[69] Set against these two rationales for granting the bulk of ATCO's application are the Board's many other comments:

- DGAs have evolved into a vehicle to fix all possible gas cost errors and pass them on to consumers;
- when first implemented reconciliations of the DGA were not expected to go back further than 12 months. Longer periods were sometimes accepted under special circumstances
- the DGA "was never set up with the intention of permitting all prior period accounting errors, particularly those that would have been subject to ATCO's management and control";
- accounting errors should typically be absorbed by the utility's shareholders;
- the DGA should not be treated as a catch-all for fixing errors, including those with a long history or resulting from human error, when adequate processes have not been in place to capture and correct the problem at an early stage;
- seven years represents a significant lag presenting obvious inter-generational equity issues;

- ATCO had an onus to ensure the System was working properly and was providing correct data;
- it did not appear that ATCO implemented an appropriate and timely review process for System design;
- there was no evidence of actual internal or external audits being performed to ensure the design was valid as the System was being put into service; and
- between 1998 and 2002 there was a lack of oversight by ATCO to test and develop appropriate controls to ensure that the System output generated was as intended.

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

- it doubted whether it could rely on ATCO's revised imbalance amounts;
- little on the record demonstrated the extent to which the numbers were faulty, perhaps partly because of ATCO's unilateral actions in destroying data;
- there was no demonstration that the System report was adequately tested at the time of inception;
- the System lacked audits;
- ATCO lacked adequate internal controls and supervisory systems;
- there was inadequate proof of corrections and opening balances; and
- there was a lengthy delay in discovering the errors.

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

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

[73] As the Board intimated, there are compelling reasons why this sort of loss should be borne by shareholders rather than long-after-the-fact consumers. Shareholders have the ability to control

or at least influence ATCO's management practices. Consumers do not. Requiring consumers rather than shareholders to bear most of the loss does not encourage utilities to conduct operations in a careful, time-sensitive way. The Board itself appropriately observed at p. 5 of the DGA Decision that allowing ATCO (full) recovery "could be considered ... a reward for poor management".

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

Procedural Matters

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

Conclusion

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

Appeal heard on January 13, 2010

Reasons filed at Calgary, Alberta
this 23rd day of April, 2010

Hunt J.A.

I concur:

Authorized to sign for: Paperny J.A.

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté
Concurring in Part

A. Introduction and Issues

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

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

B. Facts

1. ATCO Finds Significant Error

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

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

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

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

[83] The amounts were significant. ATCO's recalculations suggested that in southern Alberta its gas costs from 1999 to 2004 had in fact been a total of $11.6 million higher than it had recorded in any of its books or its regular filings with the Commission. In the north, they were almost $2 million lower for 1998 to 2004.

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

> AG [ATCO Gas] submitted that there were two distinct aspects of imbalances: the management, control and reporting of other gas owners' imbalances that result from the shipment of other owners' gas through the pipeline network (collectively referred to herein as Transportation Processes), and the recognition of the effect that other gas owners' imbalances have on regulated gas supply procurement and the timing of cost recovery from regulated sales customers (DGA/GCRR Processes).
>
> AG submitted that other gas owners' imbalances were made up of transportation imbalances and exchange imbalances. Transportation imbalances are associated with active transportation contracts, which reflect the physical movement of gas through ATCO's pipeline system. AG described Transportation Processes as including, without limitation, measurement, nomination, allocation, reporting, preparing statements, invoicing and receiving payment from other gas owners who contract for transportation service. AG also noted that exchange imbalances are those associated with active exchange contracts, which reflect a physical swap of gas between ATCO and a counterparty and in which there are no monthly imbalance settlement provisions. (§ 2.1, p. 3, A.B. p. F6)

* * *

> The Board [now the Commission] agrees with AG that this Application concerns the disconnection that occurred between the true and correct imbalances reported in the Transportation Processes. . . .
>
> (*id.* at p. 4, A.B. p. F7)

* * *

> . . . In addition, the Board notes that ATCO did not appear to take the appropriate action to modify the functionality of the TIS system with respect to Rate 11 delivery input which ultimately led AP [ATCO Pipelines] employees to input inaccurate delivery data in order to 'quiet' an error message.
>
> (*id.* at p. 5, A.B. p. F8)

2. ATCO Proposed to Pass on the Shortfall

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

3. The Commission's Three Decisions

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

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

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

> . . . The Board [now the Commission] considers that the error in the design of the TIS Report along with the management practices related to process control, including those related to the TIS Report, are of concern.

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

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

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

2005 the Commission fixed the northern refund at $541,000, and the leave to appeal does not cover the northern errors or rebate. No one in the north has appealed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A Commission footnote says that the Supreme Court of Canada approval referred to in the quotation is in ***Edmonton v. N.W.U.L.*** [1961] S.C.R. 391.

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

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

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

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

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

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

4. Unreasonable Decision

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

C. Legislative History

1. Introduction

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

[115] A half-century's dialogue between courts and the Legislature is outlined in subpart 2. It reveals a very clear picture. The courts found firm legislative limits which the Legislature adjusted only slightly, and otherwise confirmed, basically keeping them to the present day.

2. Chronology

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

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

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

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

(e) September 22, 1960 Appellate Division decided ***Edmonton v. N.W.U.L. (#2)*** 34 W.W.R. 241, considering items (b) and (c) above. The Supreme Court of Canada varied this decision on April 25, 1961 on other grounds (allowing a purchased-gas adjustment clause): [1961] S.C.R. 392, 34 W.W.R. 600. The Supreme Court of Canada held that utility rates must be based on an estimate of future expenses (p. 612 W.W.R.). It apparently accepted the proposition that until the 1959 amendment, the Commission had no power at all to make retroactive rates or allowances, not even for regulatory delay.

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

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

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

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

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

> **40** In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,
>
> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion **applicable to a period** consisting of
>
> (i) the whole of **the fiscal year of the owner in which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them,
>
> (ii) **a subsequent fiscal** year of the owner, or
>
> (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

> and need not consider the allocation of those revenues and costs to any part of that period,
>
> (b) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner that is in the Board's opinion applicable to the **whole of the fiscal year of the owner** in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
>
> (c) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner **after the date on which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them, that the Board determines has been **due to undue delay in the hearing and determining** of the matter, and
>
> (d) the Board shall by order approve
>
> (i) the method by which, and
>
> (ii) the period, including any subsequent fiscal period, during which,
>
> any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.
>
> (Emphasis added)

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

3. Conclusion

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

That is the only legislative amendment to the Court decisions. New para. (d) on methods and periods is vague, but seems to be purely ancillary (on which see the ***Stores Block*** decision discussed in Part D.5 below).

[117] Given this history, this Alberta legislation is incompatible with any Commission power to take into account to base, or adjust, rates on actual shortfalls or excesses of revenues or expenses in a year earlier than the year in which the application by the utility is filed.

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

D. The Decision Appealed is Retroactive

1. Introduction

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

2. Final Prospective Rate-Making

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

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

> [4] The Board [now the Commission] is by the [Gas Utilities Act] directed to "fix just and reasonable . . . rates, . . . tolls or charges . . ." which shall be imposed by the Company . . . The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective

period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. . . . It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. . . .

* * *

[5] While the Statute does not precisely so state, **the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 [now s. 40] there is nothing in the *Act* to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application** (*vide: City of Edmonton et al. v. Northwestern Utilities Limited*, [1961] S.C.R. 392, *per* Locke J. at 401, 402).

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

> The PUB approves or fixed utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. . . . The revenue required to pay all 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. . . .

[7] The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby

> forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that **the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the *Act* which make this clear** . . . Section 32 likewise refers to rates "to be imposed thereafter by a gas utility".
>
> * * *
>
> [22] It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. **It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods**. (emphasis added)

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

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

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

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

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

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

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

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

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

3. Cost-Plus Billing

[128] If one were to ignore all the law above, in theory gas utilities could instead use a different system. Consumers could pay them for gas on a cost-plus basis. Cost-plus is the way that

government contractors like to be paid, and that law firms often charge. In theory, one could simply set rates for each year after the fact, once all the gas had been consumed, and all the consumption and expense figures were in and verified. In the meantime, consumers would merely pay something on account, and have the actual final figure adjusted later by a refund or extra charge.

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

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

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

[132] Here is another danger. If the utility ends by making a profit, and there is no automatic adjustment at year end, the utility can hope that no consumer group will make a fuss, and so the company can hang on to the profit. If consumers do apply to the Commission, the utility can suggest that it is too early to tell, and to wait a few years to see if arguable offsetting losses turn up elsewhere. So what revenues to offset against what expenses becomes almost arbitrary. Conversely, if the utility makes a loss at year end, it can apply immediately for an additional payment by consumers. The utility will have recourse to the regulator only when the facts mean that it will win and the consumers will lose. On the evils of changing the rules in mid-game, see MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 238. Recall that the Alberta deferred rate account is just a number written in a book. It is not a trust account in a bank, or any other type of segregation of funds; nor is it even funds.

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

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

4. Commission Powers are Confined by Legislative Aims

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

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

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

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

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

5. Shareholders' Risk

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

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

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

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

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

> . . . the Board [now Commission] was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. . . . **The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by the ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates** [citing ***N.W.U.L.***, ***Coseka***, and ***Dow*** cases]. But more importantly, it cannot even be

> said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility.
>
> (*id.* at para. 71, emphasis added)

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

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

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

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

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

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

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

[147] Calgary's initial January 21, 2005 argument to the Commission (Tab 47, p. 3), pointed out that ATCO's 2004 error-correction application was in effect a request for a backstop guarantee against unexpected shortfalls in profit, citing previous Commission decisions. The Commission's 2005 decision does not mention that concern. The quotations from the Supreme Court of Canada

above show the fundamental error in the Commission's 2008 decision now under appeal. And it is also virtually cost-plus billing, as noted in subpart D.3 above.

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

6. Stages of a Rate Hearing

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

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

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

> and not yet decided (i.e. fiscal year #3, and also year #4 up to date of decision).
>
> Step C: In Phase I, the Commission sets its own estimate of the expenses and taxes which the Utility will incur, e.g. in year #4, plus a reasonable rate of return on its investments (rate base) for the foreseeable period after the application date. That is a lump sum of future needed gross revenue per year (or month). Then in Phase II, the Commission estimates future gas consumption, and designs a set of rates which it estimates will produce that lump sum of needed gross revenue.

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

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

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

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

[154] Therefore, one must not confuse two different topics:

> (1) First topic: whether **future** consumption or expenses will be the same as forecast now;
>
> (2) Second topic: whether **past** expenses were the same as previously forecast some years ago.

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

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

[156] Written argument to the Commission was not exhaustive, and may not have spelled out every implication of these points. Possibly the Commission did not distinguish the "first topic" from the "second topic". Its actual reasons on this topic were not lengthy, but I note two things. In Part B.3(c), I quoted the middle paragraph of the Commission's 2008 reasons ("The provisions of the GUA and PUBA relied on . . ." p. 8, A.B. p. F32.) In the mention of retroactivity, note the phrase there "in the event that the [Commission] intends to approve a tariff effective prior to the date on which the tariff application is made." But no such condition or qualification exists in s. 40 or the case law. The time limit about past under-recoveries applies just as much to rates to come into effect later (as rates almost always do). Parts C and D show that at length. Little in the Commission's 2006 or 2008 reasons reviews or applies the full force of the law recited here in Parts C and D. And the original purpose of the deferred gas accounts (step B(1) above) morphed in 2005 into a repeal of the restrictions in step B(2) above.

7. Interim Rates

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

[158] An interim order must later be replaced by a final order, and the rate will no longer be open to change. See ***Coseka Res. v. Saratoga*** (1981) 31 A.R. 541 (C.A.), and ***Calgary v. Madison*** (*supra*, Part D.2) at 662-63 (D.L.R.) cited with approval by the Supreme Court of Canada in ***Bell Can. v. R.*** [1989] 1 S.C.R. 1722, 1752h-1754f; and also see p. 17600g-1761a.

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

[160] The term "interim" is ambiguous. But the traditional meaning is just that a full rate hearing would take too long, and the company cannot afford to go on that long under the old rates (especially in inflationary times). So a quick and approximate rate increase is put in, in the expectation these

new rates will soon be replaced by more careful ones. That usefully leads to an overlapping topic, the purpose of deferral accounts.

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

8. Function of Deferred Accounts

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

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

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

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

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

[167] Any deferred account which is mere memorandum (calculation) by itself changes nothing, excuses nothing, and is at best a result, not a cause. But if it is regarded as unallocated funds whose later ownership depends on profits or losses, then it likely violates the Court of Appeal and Supreme Court of Canada rulings in ***Stores Block*** and similar decisions (in Parts D.2 and D.5 above). The

refund here to the consumers of the unexpected profits plainly falls within that. And the reverse, recouping unexpected profit shortfalls in the deferred accounts, is an even bigger violation of that case law. So for those reasons, I do not see a deferred account as any licence to violate the usual legal rules barring retroactive rates or use of expense overruns too far back.

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

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

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

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

9. Jurisdiction

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

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

[174] Now I turn to another topic. I should emphasize that the above portions of my reasons do not find want of jurisdiction or power on the part of the Commission. The preceding parts of my

judgment are not a search for a power. So it cannot be a power which existed somewhere else. My suggestion is not a power, or jurisdiction. Instead, I find a legal statutory prohibition (statutory and judge-made).

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

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

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

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

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

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

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

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

10. Conclusion

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

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

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

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

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

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

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

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

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

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

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

E. History of Deferred Gas Accounts

1. Introduction

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

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

2. Creation and Purpose

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

> DGA [deferred gas account] procedures were initially approved by the Board [now Commission] in 1987 and finally approved in 1988 **for the purpose of reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR [Gas Cost Recovery Rate], i.e. the rate it used to recover the commodity costs of gas from sales customers**. These procedures ensured that customers paid only the actual cost of gas consumed by them. In addition, they ensured that the utility neither profited from nor suffered losses in the course of selling the gas. This premise currently remains in effect for the sale of gas under a regulated rate.
>
> **Initially, reconciliation of the DGA was made on a winter and summer seasonal basis** when the application for the respective period's GCRR was filed. **In 2001, the Board approved a change in the methodology for determination of a GCRR from a seasonal to a monthly basis**. This change in methodology was implemented in April 2002. The purpose of allowing prior period adjustments in the DGA was to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred, that would have otherwise impacted the determination of a GCRR.
>
> (2005 decision at p. 8, A.B. p. F11, emphasis added)

* * *

The Board concluded from this prior decision that the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas in the DGA process the differences fell to the account of the customer.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.

(2005 decision at p. 10, A.B. p. F13)

* * *

. . . the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years.

(2005 decision at p. 11, A.B. p. F14)

* * *

Decision E88018, dated March 18, 1988 stated:

> **The DGA procedure was proposed [by AG's predecessors] to be in place until gas costs could be forecast with a reasonable degree of certainty**.

and in a later section also stated:

> [AG's predecessor] contended that once gas prices attain some stability and can be forecast with some degree of accuracy, there likely will be no need for a DGA type account. If a DGA mechanism is not approved, [the predecessor] suggested that there would be significant swings to its earnings. [The predecessor] confirmed that when the first reconciliation proceedings are held, the Board and the Intervenors may examine not only the projected gas costs for the next reconciliation period but also those costs that are related to the period under review. (Tr. p. 488) And further:
>
> > 'There's no attempt in the deferred gas account mechanism that's been proposed to bypass the

> Board's ability to rule on the prudence of a cost.' (Tr. p. 489)

The Board concludes from this prior decision that **the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased** to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas **in the DGA process the differences fell to the account of the customer**.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.
(*id.* at pp. 9-10, A.B. F12-13, emphasis added, footnotes omitted)

*** * ***

In some cases, . . . prior period adjustments have been specifically approved for imbalances resulting from measurement errors that have related to periods of over one year.
(2005 decision at pp. 10-11, F13-14)

* * *

Previous to the establishment of the DGAs, a utility treated all estimates for its gas supply, both volume and price, as prospective in its General Rate Application (GRA). The establishment of the DGA provided a means by which a utility could make corrections and adjust for the actual price of the gas supplied and thereby correct the customer rates. The regulated sales rate used to recover the cost of gas was called the gas cost recovery rate (GCRR). Use of the DGA takes into account that, under a regulated gas sales rate, customers pay only the actual costs of the gas consumed by them and **the utility is neither to incur a profit nor suffer a loss** in the course of procuring and selling the gas.

> **In 1987 parties believed that the DGA would be a temporary feature because the continuing volatility of gas prices was not anticipated**. However, contrary to these expectations, the purpose and need for the use of DGAs has continued. Initially, the DGAs were reconciled twice a year on a winter/summer seasonal basis. During the period from 1987 to March 2002, the Board allowed prior seasonal adjustments to be made in reconciliation of the DGA in respect of the preceding same season.
>
> (2006 decision, p. 2, emphasis added, footnote omitted)

[187] More examples are found in the Appendix.

3. Loose Later Practices

[188] However, ATCO's practices later became lax in a number of respects, and sometimes small adjustments of other types were made in the deferral accounts. That had never been the purpose of the accounts. The Commission described that:

> . . . However, the Board [now Commission] is aware that, during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines. Prior period adjustments for various types of corrections have been relatively common occurrences. While the Board and interested parties may not have previously taken issue with these types of corrections, the Board is concerned that the DGA seems to have evolved into a vehicle to fix all possible errors as a cost of gas to be charged to sales customers under a regulated rate.
>
> (2005 decision at p. 10, F13)
>
> * * *
>
> . . . **The Board believes that, normally, reconciliations were not expected to look back further than 12 months.** As the process evolved, some prior period adjustments were made which extended back further than 12 months. Under special circumstances, for example, involving measuring equipment malfunctions, prior period adjustments involving longer periods have been accepted by the Board. However, the Board considers that **the DGA was never set up with the intention of permitting all prior period accounting errors**, particularly those that would have been subject to ATCO's management and control, **to be processed and rectified through the DGA.**

> **The Board is troubled by the evolutional use of the DGA. The DGA replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder.** It now appears that the DGA is being treated as a catch-all for fixing errors, including those that have a long history, or appear to be the result of human error, where adequate processes have not been in place to capture and correct the problem at an early stage. Notwithstanding that some prior period adjustments previously approved by the Board may have covered an extended period of time, the Board considers that **seven years represents a significant lag presenting obvious intergenerational equity issues.**
>
> (*id.* at p. 11, F14, emphasis added)

4. Calgary's Argument

[189] Calgary's factum and book of authorities cite or quote past Commission orders fully confirming the Commission's recitals quoted above (in subparts 2, 3). The appellant also shows that those accounts were promptly reconciled to allow for errors in prediction, and that the Commission gave orders replacing the interim rates initially established with final rates reflecting the reconciliations. After some years, that was done monthly (based on a three-month rolling average).

[190] In written argument filed with the Commission on its 2008 application, ATCO had objected that the Commission should not see a full history of its own orders governing the deferred gas account. That objection is hard to reconcile with the arguments which ATCO had made to the Court of Appeal in the 2007 appeal (need for a fuller record). However, ATCO did not object to that evidence in this new appeal. (ATCO's original argument to the Commission that ATCO lacked time to check old Commission decisions was not made again to the Court of Appeal, and of course became moot long ago.)

[191] Old Commission decisions are not exactly evidence (not really fact) and are not much (if at all) law. They are previous process, and are all about the same utility (or its two predecessors). They are not tendered here to prove facts, but for their directions and decisions.

[192] In the present appeal, the appellant Calgary, the respondent ATCO, and the Commission itself, all reproduced old Commission decisions in their various books of authorities.

[193] Any court can look at its own previous decisions and records. See ***Kin Franchising v. Donco*** (1993) 7 Alta. L.R. (3d) 313, 316 (para. 7) (C.A.); *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 42. Additional authorities are found in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 45-54 (ch. 45, Pt. Z.3) (2003). I see no reason to withhold that power from a formal tribunal like this Commission (with all its powers). See the *Alberta Utilities Commission Act***,** 2007, c. A-37.2, s. 11,

and cf. ***Germain v. Auto Injury App. Comm.***, 2009 SKQB 106, [2009] 7 W.W.R. 509. Especially when the tribunal is an ongoing regulator with constant applications over the rates and accounts of the same handful of companies. This Commission has looked at its previous decisions for many many years. A classic decision of the Supreme Court of Canada says that the Commission can get its information in whatever mode it sees fit: ***N.W.U.L. v. Edmonton*** [1929] S.C.R. 186, 193. And if the Commission can take notice, why cannot the Court of Appeal take such judicial notice on appeal from the Commission?

[194] Furthermore, it was ATCO itself which began all this, and its application to that end expressly submitted that the Commission should make the "adjustments" (surcharges) to consumers by looking back to the Commission's old approval of DGAs. (See ATCO's application of May 31, 2004, § 4.1 "History", present Commission Record Tab 1, pp. 4-5.)

[195] Therefore, it is not surprising that the Commission did **not** decline to look at any previous decisions by itself. Instead it recited and quoted a number of them in its 2005 original decision, and in its 2008 decision reconsidering that. The Commission did **not** say (in 2005 or 2008) that it (or Calgary) lacked evidence about this.

[196] The Commission's public website gives ready access to some decisions from 1996 to 1999, and many thereafter. Quicklaw also reports its decisions from 2002. Print copies of all Commission decisions (to 1999) are available in one Law Society Library and (to 2008) in the Alberta Government Library. (The University of Alberta law library has some Commission decisions.) The Commission will supply copies on request. So the text of past decisions is not open to doubt. Anyone can access them to check the accuracy of quotations or summaries.

[197] Therefore, the Commission was correct to inspect its past decisions on DGAs. I have amplified my recitals of this history by quoting two or three additional passages from old Commission decisions (pointed out by ATCO in its October 12, 2007 argument, Tab 64, p. 3, quoting decision 2005-036). I have also described some additional passages from Calgary's argument of October 5, 2007 to the Commission (Tab 61): see an Appendix to this judgment. The description has been checked against the original Commission decisions.

[198] In any event, the old controversy about taking notice of the former Commission orders has no effect on the result, because those additional references to past orders reinforce but do not change the factual picture painted by the Commission itself in the 2008 decision now under appeal.

F. The *Bell Telephone* Decision of the Supreme Court of Canada

1. Introduction

[199] Counsel cited ***Bell Canada v. C.R.T.C. (Bell Aliant)***, 2009 SCC 40, [2009] 2 S.C.R. 764. It involved telephone companies' infrastructure under federal legislation.

2. Legislation

[200] The Canadian Radio-television and Telecommunications Commission no longer regulates telephones under traditional rate-regulating legislation. Now it must follow Canada's *Telecommunications Act*, 1993 c. 38, whose objectives, duties, and powers are vastly broader, and cover more than telephones.

[201] I will outline some features of the *Telecommunications Act*, which have no equivalent in Alberta's 1999-2007 legislation applicable to gas utilities or their rates (the *Alberta Energy and Utilities Board Act*, the *Gas Utilities Act*, and the *Public Utilities Act*.)

[202] The *Telecommunications Act* imposes on the C.R.T.C. a mandatory duty to implement a number of very wide and deep policy objectives when it exercises any of its powers or performs any of its duties (s. 47(a)). Among those mandatory objectives are to

- safeguard, enrich and strengthen the social and economic fabric of Canada . . . (s. 7(a))
- enhance . . . efficiency and competitiveness, at the national and international levels . . . (s. 7(c))
- promote . . . ownership and control . . . by Canadians. (s. 7(d))
- promote the use of Canadian transmission facilities . . . within Canada . . . and points outside . . . (s. 7(e))
- foster increased reliance on market forces . . . (s. 7(f))
- stimulate research and development . . . and encourage innovation . . . (s. 7(g))
- respond to the economic and social requirements of users . . . (s. 7(h))
- contribute to the protection of . . . privacy (s. 7(i))

[203] The C.R.T.C. also has unusual statutory powers. It can require any telecommunications company to provide any service in any manner (s. 35(1)) or to construct any facility (s. 42(1)). And (most apposite here), the Commission can require the company to "contribute . . . to a fund to support continuing access by Canadians." (s. 46.5(1)). Therefore the C.R.T.C. has positive proactive

duties going far beyond fair prices (rates), reliability of service and supply, or even safety, of one company.

3. The Supreme Court's Decision

[204] The Supreme Court of Canada (and the Federal Court of Appeal) confirmed the C.R.T.C.'s decision to follow a scheme which it ordered a few years before. That was not to reduce excessive phone rates (for competition reasons), but instead to hold a portion of the revenue in profitable urban markets in a special account to be later spent on infrastructure improvements to benefit consumers.

4. Is the Supreme Court of Canada Decision Distinguishable?

[205] I have concluded that the ***Bell*** decision can and should be distinguished here, for the following eight reasons.

(a) Different Legislative Objectives and Powers and History

[206] The Supreme Court of Canada itself expressly distinguished Alberta's *Gas Utilities Act* and said that the federal C.R.T.C. has broader objectives and power than does Alberta's Commission. See the ***Bell*** case, paras. 17, 22, 36, 39-43, 45-48, 50-53, 55, 57, 72, 74-75 and 77. The Supreme Court of Canada even distinguishes decisions about the C.R.T.C. in earlier years when that tribunal was governed by the more traditional type of rate-of-return regulation like the Alberta system. (In those days the old system was mandated for telephone companies by the *Railway Act*.) See the ***Bell*** decision at paras. 39-46, and 62. See subpart 2 above. To the same effect is para. 41 of the Federal Court of Appeal decision (2008 FCA 91) which the Supreme Court of Canada affirmed.

[207] In particular, the Supreme Court of Canada pointed out that traditional rate regulation is a two-way contest between the interests of the utility company and its particular consumers. The C.R.T.C. (on the other hand) has to meet objectives for all Canadians in all parts of Canada, e.g. fostering competition: see paras. 45 and 47. What is in issue in the present dispute between Calgary and ATCO is the limited traditional type of rate-making power. See the precise passages in Court of Appeal and Supreme Court of Canada decisions, describing and mandating that Alberta scheme, quoted in Parts C and D above.

[208] The present ATCO appeal is about a price (rate or revenue) fair as between the utility and the consumer; nothing more. Though the ***Bell*** decision's origin had a little to do with such questions, the actual ***Bell*** decision was about increasing access and competition, and dictating to the various telephone companies compulsory long-term infrastructure competition.

[209] See also subpart (b) below, on "price-cap regulation".

[210] There is an even more striking distinction between the C.R.T.C. and Alberta's Commission. For most of its history, the Commission has been separate from the Energy Resources Conservation Board. The rate regulator, the Alberta Utilities Commission, is now again separate. The broader policy about the industry and its physical form is no part of the Commission's functions, as illustrated by the Genesee power plant decision: ***Alberta Power v. Public Utilities Bd.*** (1990) 102 A.R. 353 (C.A.). Though the Energy Resources Conservation Board had decided that the new second Genesee power plant was needed and gave a permit to build it, after the plant was built, the Public Utilities Board (now the Commission) could and properly did exclude it from the rate base as not "used or required to be used".

[211] Alberta's two tribunals were temporarily merged effective February 15, 1995 (by 1994 c. A-19.5). But the merger ended effective January 1, 2008 (by 2007 c. A-37.2), before the decision under appeal. Furthermore, the **legislation** for the two tribunals remained separate even during the period of the merged tribunal, 1995-2007.

[212] See also ***Barrie Pub. Utils. v. Cdn. Cable TV Assn.***, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (paras. 9-19).

(b) Different Purposes for Setting Up Deferred Accounts

[213] I must stress that in ***Bell***, the C.R.T.C. was using an entirely new type of utility regulation (invented in the United Kingdom in the 1980s). It is called price-cap regulation. Unlike traditional rate (price) regulation, this does **not** fix rates; in order to give incentives, it merely sets a maximum and makes sophisticated allowances for the result. The difference between the two types of regulation is explained by Netz, *loc. cit. supra*, at 417 ff., especially p. 425-28.

[214] One cannot just look at the title of an account, or fixate upon a name like "deferred". One must find the purpose and operation of the account in question. See Part D.8 above.

[215] From the outset, the account described in the ***Bell*** decision was designated expressly to decide later who would own or use the money contained in it. See the Supreme Court of Canada decision, paras. 6, 8-9, 22 (and the Federal Court of Appeal's paras. 43 and 52.) That surplus sum was expected to arise, and did arise, from continuing to charge high urban rates, despite a new theoretical or tentative cap on rates. The difference (surplus) was to be collected and held in the new fund (account) (para. 6). That was a scheme very different from the Alberta fixed-rate scheme. Too many such statements in the Supreme Court's ***Bell*** decision emphasize the fund's very different purpose to list them fully; some are found in its paras. 37, 57, 61, 63, 64, 66, and 67.

[216] The Alberta accounts (DGAs) had very different purposes. They came from an old short-term system for handling very unpredictable raw material costs (gas field prices). It seems to have been an accident, oversight or happenstance (not a Commission order) that they lasted for years. See the detailed history above in Part E.

(c) Alberta Balance Was Largely the Product of a Single "Adjustment" Entered After the Fact Years Later, not an Ongoing Thing

[217] Alberta's deferral account had already been reconciled years earlier, i.e. settled. I doubt that it still "existed" in any real sense in 2004, still less that the 1998 or 1999 parts did. Revisiting the old Alberta deferral account was just a device invented years later when a long-standing and ongoing error was finally discovered: see Parts B.1, 2 and 3(a), and D.3 and D.8 above. Here the Commission let the utility use an old account which had been set up for one temporary purpose to be used for a totally different purpose than that contemplated before.

[218] Conversely, in the ***Bell*** case, the C.R.T.C. managed an existing fund of money growing steadily. The C.R.T.C. largely and in principle confirmed its original purpose.

(d) Encumbered Fund vs. Deficit

[219] The ***Bell*** judgment and C.R.T.C. order were a final decision about ownership of surplus funds which previously had encumbered or provisional ownership. See the Supreme Court of Canada decision, paras. 63, 65.

[220] However, ATCO's account was on balance (and entirely in the south) a deficit, not a surplus. A deficit cannot have an owner, nor be encumbered. Still less was any deficit intended or ordered to have either here.

(e) Limited Term in *Bell*

[221] The ***Bell*** account had a definite beginning and end, forecast at the outset (2001-7 but later ended early, in 2006). See the Supreme Court of Canada decision, para. 9, cf. paras. 10-13.

[222] In ***Bell***, the rates were confirmed and adjusted once and for all, to prevent any further accumulations of reserve funds. The fund (account) was to be closed out and cease to exist: see the Supreme Court of Canada decision, paras. 13 and 15 end.

[223] But the Alberta Commission's 2005, 2006, and 2008 decisions allowed the old gas companies' deferred accounts to be available in future to do it all again (though usually not beyond two years). See Part B.3 above.

(f) The *Bell* Rates Were in Effect Interim, Whereas ATCO's were Final

[224] This is stated by the Federal Court of Appeal's decision, paras. 50-52, and by the Supreme Court of Canada's decision, para. 61.

(g) *Bell* was Confined to Certain Geographic Areas

[225] The funds in the telephone companies' deferred accounts were confined to excess revenue in geographic areas where more competition was needed. Structural changes were needed and so the C.R.T.C. authorized them. Those areas were residential local services in non-high-cost serving areas basket (mostly urban): see ***Bell*** paras. 4, 6, 10. But in the present ATCO appeal, all (later) gas customers simply got a retroactive rate increase (or refund).

(h) *Bell* Refunds were Incidental

[226] In principle, the C.R.T.C. ordered the telephone companies to spend all the reserved segregated funds on service improvements (handicapped services and more broad-band capacity). Refunds to customers were just incidental amounts which could not be spent: see the Supreme Court of Canada's decision, paras. 14, 15, and 20.

[227] But the only use or remedy even suggested before Alberta's rate-making Commission was a second charge (or refund) to the customers for the same old gas long since consumed.

G. Other Distinguishable Decisions

[228] The Commission's decision and some factums cited ***Epcor Generation v. A.E.U.B.***, 2003 ABCA 374, 346 A.R. 281 (one J.A.). Note that a power to change rates retroactively there was conceded; here it is in issue. The rate was agreed there to be interim (paras. 12, 14, 15), not final as here. Calgary's argument to the Commission in the present case (October 12, 2007, Tab 65, p. 2) quotes statements by the Commission in ***Epcor*** confirming that. The proposed dispute on which leave was sought was only over details, indeed unique sharing ratios (***Epcor***, para. 13), not retroactivity itself as here (paras. 9-10). That motion dealt with a defined time and topic only: the 2000 pool price of electricity. And many issues were factual (paras. 23 ff.). It was a decision by only one Justice of Appeal on a motion for leave, not an appeal. ***Epcor*** is not on point.

[229] One other case cited is ***Re Board of Commissioners of Public Utilities (Ref. re s. 101 Public Utilities Act)*** (1998) 164 N. & P.E.I.R. 60 (Nfld. C.A.). This was a split decision. It involved Newfoundland legislation on regulation of electric utilities. Except for the broad outlines, that legislation bears no resemblance to Alberta legislation regulating gas activity rates.

[230] The majority of the Newfoundland Court of Appeal held that setting a rate of return for a utility was not just a step in calculations leading to fixing rates (prices). They held that it set a ceiling for rate of return, and if the later actual rate of return exceeded that ceiling, the Commission could later adjust rates to offset that. Such a rate-of-return ceiling enforced later is emphatically not the Alberta practice or legislation. Nor can I reconcile that view with the Supreme Court of Canada's later decision in the ***Stores Block*** case, *supra*. Indeed the Newfoundland Court of Appeal largely proceeded on its own interpretation of its legislation, and scarcely mentioned any of the Supreme

Court of Canada decisions cited above (and none of the Alberta Court of Appeal decisions). I do not find the majority decision persuasive. It is distinguishable, in any event.

H. Standard of Review

1. Conflicting Precedents on This

[231] First, the Supreme Court of Canada held that the standard of review was correctness: ***Barrie Pub. Utils. v. Cdn. Cable TV Assn.***, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (paras. 9-19). Then it gave a somewhat different decision, as follows. Whether the Commission has a given power is determined on appeal on the standard of correctness, but if it is found to have that power, the actual method used to carry out the power attracts a more deferential approach: "***Stores Block***" case, ***ATCO Gas and Pipelines v. E.U.B.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1.

[232] I am reluctant to try to create my own ***Pushpanathan*** analysis here, and then use it to decide which Supreme Court of Canada decision to follow, or to try to distinguish one of the Supreme Court of Canada decisions.

2. Standard Does Not Matter Here

[233] Nor need I do so here, for it would not affect the result. Even on the reasonableness tests, the decision of the Commission under appeal is unreasonable and does not survive. That is so for the reasons given in Part D.10 ("Conclusion") and Part F above. None of those topics is discretionary. The legal limits here are statutory or based on binding precedent, and go to the very nature of the process. The errors are fundamental, and ones of basic principle. Parts D.4, D.5 and D.6 show that. The Commission cannot be acting reasonably when it departs from the fundamental principles laid down by the Legislature and the courts for the Commission to follow. It did depart seriously here, and its decision is unreasonable. See also Part D.9 above.

I. Conclusion

[234] It is now about 12 years since the accounting errors in question began, and about six years since ATCO sought relief from the Commission. The Commission has held three hearings on the topic and has declined to hear more evidence. I would fear denying justice by delaying justice, were we merely to tell the Commission to reconsider the topic in yet a fourth hearing.

[235] I would have allowed the appeal, and vacated so much of the Commission's 2005 and 2008 orders as allows the (southern) recovery of former costs or expenses. I would have directed the Commission under the *Alberta Utilities Commission Act* s. 29(14), that the law requires it to dismiss that part of ATCO's application entirely. There was no appeal, nor leave to appeal from the (northern) rebate to consumers.

[236] I would have awarded costs of the appeal to the City appellant payable by ATCO. There should be no costs to or from the Commission, even though its factum went rather far into the merits. But I would caution the Commission that doing that endangers its position in various respects. See ***N.W.U.L. v. Edmonton*** [1979] 1 S.C.R. 684, 708-09, paras. 36-37.

J. Procedure

[237] The appeal book contains a fuzzy scan of the three Commission decisions in question, and of some court orders. In future, documents should either be printed from electronic copies, or sharp photostats should be made from originals. In contrast, the Commission's filed record has perfect clarity.

[238] The Commission filed one copy of its record, as directed by s. 29(10) of the *Alberta Utilities Commission Act*. Rule 537.1 then contemplates that counsel for the appellant will file multiple copies of Extracts of Key Evidence to supplement the Appeal Digest, reproducing only those parts of the full record that are needed (by all parties) to dispose of the appeal. If the appellant overlooks including something, the respondent can also file Extracts of Key Evidence. No party filed any extracts here. A panel contains three justices, usually based in two different cities, so the absence of individual sets of Extracts hinders the efficient disposition of the appeal.

[239] The appellant's citations of court cases included no reported citation. That violates the Consolidated Practice Directions, para. D.1(b). In future it would help this Court to have at least one publisher's (or website) citation (as well as the neutral cite).

Appeal heard on January 13, 2010

Reasons filed at Calgary, Alberta
this 23rd day of April, 2010

Côté J.A.

Appearances:

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Appendix

More History of Deferred Gas Accounts

N.W.U.L. = Northwestern Utilities
C.W.N.G. = Canadian Western Natural Gas

1987	Orders E87051 and E87052 (July 3): Commission approved in principle applications by ATCO's predecessors to establish a Deferred Gas Accounting and Reconciliation procedures, to be in place until cost of buying gas could be forecast with reasonable certainty.
1988	Decision E88018 and Order E88019 (March 18): Commission held (on N.W.U.L. and C.W.N.G. rates) that the Gas Cost Recovery Rate was interim and would change at least two times/year. Seasonal rates were to be established, but the Commission would monitor the reconciliations more frequently: monthly. The actual review and finalization would be done two times each year. The cumulative actual balance in the DGA on each March 31 and each October 31 would be refunded to or collected from customers through the GCRRs in the ensuing season. Thereafter in 1988 further Commission orders did reconcile those accounts two times/year for each gas company.
1989-1991	Further Commission orders also in effect reconciled the accounts. Decision C90041 (December 7, 1990) confirmed the system. Some of these orders said that the rates remained subject to review. Interim Order E89020 (April 4, 1989) said that DGA balances should be minimized, and so any significant increase in gas supply costs between normal application dates should lead to an application by C.W.N.G. for a change in the GCRR.
1994-1997	By Decision 94072 (October 28, 1994) DGA reconciliations for C.W.N.G. were to be annual, not semi-annual. GCRRs were from time to time approved. Order U97010 (January 16, 1997) quoted and reiterated Order 89020 (of April 4, 1989), which in turn summarized Order 88018. Order U97052 (May 7, 1997) re C.W.N.G. said that the DRA calculation method meant that under- or over-recovery in one-half year cumulated in the DGR would be collected or refunded in the next one-half year's period, given normal weather and accuracy of sales forecasts. This would substantially maintain intergenerational equity. Order U97053 (May 7, 1997) for N.W.U.L. gave final approval of the company's GCRR for 2-1/2 months.

	Decisions U97129 and U97130 (October 31, 1997): Commission reconciled C.W.N.G.'s and N.W.U.L.'s actual gas cost recoveries.
1998	Decision U98067 (April 13) accepted C.W.N.G.'s reconciliation and refused requests to re-examine the DGA process. Order U98071 (May 4) confirmed C.W.N.G.'s summer GCRR as final.
1999-2000	Various interim orders. Order U2000-161 (April 17) made ATCO Gas-South's GCRR final. More interim orders made for both companies. Order U2000-308 (October 27) deferred acceptance of ATCO North's (former N.W.U.L.'s) reconciliation and set a new interim rate.
2001	Order U2001-001 (January 24) left GCRR rates for ATCO South as interim. Order U2001-002 (January 24) was similar for ATCO North. Order U2001-061 (March 28) was similar; as were Orders 2001-062 (March 28) and U2001-448 (December 14). In 2001 the Commission held a hearing re methods to set the GCRR. Decision 2001-075 (October 30) (on methodology) described the existing procedures (reconciliation two times/year) (pp. 3-4), but noted the DGA balances had become large. The Commission decided (p. 64) to switch to monthly written reconciliations to minimize DGA balances. A three-month rolling period would be used for reconciliations.
2002	Decision 2002-026 (April 18) (p. 3) recited the Commission's duty and power to fix "the appropriate final share of the deferral account balances due from each customer class". On p. 4 the Commission said it had been hoped under- and over- recoveries in the DGA would balance out but unexpectedly they had not. But in principle, rates should be established prospectively.
2003	Decision 2003-106 (December 18) (p. 135) said that for the DGA and reconciliation the GCFR would be revised monthly.

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]

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.
>
> . . .
>
> 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:

[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.

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 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 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, 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.]

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 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.

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 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 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.

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.

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2014-0043

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 Enbridge Gas Distribution Inc. for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

DECISION AND ORDER
April 10, 2014

Enbridge Gas Distribution inc. ("Enbridge") filed an application with the Ontario Energy Board (the "Board") on February 13, 2014 under section 36 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B) for an order giving final approval for Rider C commodity unit rates that were approved on an interim basis in the Board's EB-2013-0406 Decision and Interim Order, dated December 20, 2013.

Enbridge's EB-2013-0406 application was filed in accordance with the Quarterly Rate Adjustment Mechanism ("QRAM") process for a rate adjustment relating to gas costs effective January 1, 2014 (the "QRAM proceeding"). In that application, among other things, Enbridge proposed a refund of $10.1 million from the Gas Acquisition – Commodity and the Gas in Inventory Re-valuation components of the Purchased Gas Variance Account ("PGVA"). Enbridge indicated that the $10.1 million should have been refunded to sales (i.e. system gas) service customers in prior QRAMs but was not, due to errors in the calculation of account balances. Enbridge described the errors as "mechanical" as the formulae within Excel spreadsheet models were incorrect.

The Board's decision in the QRAM proceeding for January 1 gas costs was issued by delegated authority. The decision indicated that the proposed refund of $10.1 million raised possible issues of rate retroactivity that were not typically dealt with by a delegated authority; therefore, a refund of $10.1 million, contained in the commodity components of Rider C, was approved, but on an interim basis, subject to a separate application to be filed by Enbridge.

Enbridge filed this application to finalize the interim Rider C. As part of its application Enbridge filed the Decision and Order of the Board in the QRAM proceeding as well as the evidence on the record in that proceeding. The Board granted intervenor status to all intervenors in the QRAM proceeding and provided parties with the opportunity to file comments and interrogatories. All parties were invited to make submissions on whether the $10.1 million refund constitutes retroactive ratemaking.

The Industrial Gas Users Association ("IGUA") and Board staff filed submissions on March 6, 2014. Each supported Enbridge's proposal to refund the money.

Board Findings

Based on the facts of the case, the Board agrees with Enbridge and the parties that the money should be refunded to customers.

Enbridge has acknowledged that it committed an unintentional error which resulted in over $10 million being incorrectly recovered from customers.

The parties support Enbridge's proposal and there is no disadvantage to customers from this approach.

The Board acknowledges that Enbridge's QRAM orders were final in EB-2012-0352 and EB-2013-0045 and that Rider C is an out-of-period adjustment. However, the Board has considered the facts of this case in the context of the *MCI Telecommunications v. Public Service Commission*[1], a United States decision referenced in Board staff's submission. While the facts of the cases are distinguishable, the conclusions are the same. An out-of-period adjustment can be justified if it ensures a utility does not profit on account of its own errors.

[1] *MCI Telecommunications v. Public Service Commission*, 840 P.2d 765 (Utah 1992)

THE BOARD ORDERS THAT:

1. The Rider C commodity unit rates approved on an interim basis in the Board's EB-2013-0406 Decision and Interim Order, dated December 20, 2013, are considered final.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. IGUA shall submit their cost claims no later than 7 days from the date of issuance of this Decision and Order.

2. Enbridge shall file with the Board and forward to IGUA any objections to the claimed costs within 21 days from the date of issuance of this Decision and Order.

3. IGUA shall file with the Board and forward to Enbridge and response to any objections for cost claims within 28 days from the date of issuance of this Decision and Order.

4. Enbridge shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote the file number, **EB-2014-0043**, be made electronically through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Daniel Kim at daniel.kim@ontarioenergyboard.ca and Board Counsel, Maureen Helt at maureen.helt@ontarioenergyboard.ca.

ADDRESS

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DATED at Toronto, April 10, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission), 2014 ABCA 397

Date: 20141202
Dockets: 1301-0069-AC
1301-0070-AC
Registry: Calgary

1301-0069-AC

Between:

ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.

Appellants

- and -

Alberta Utilities Commission

Respondent

1301-0070-AC

And Between:

ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.

Appellants

- and -

Alberta Utilities Commission and
Office of the Utilities Consumer Advocate of Alberta

Respondents

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Peter Martin

Reasons for Judgment Reserved of The Honourable Chief Justice Fraser

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurring in the Result

Reasons for Judgment Reserved of The Honourable Mr. Justice Martin
Dissenting in Part

Appeal from the Alberta Utilities Commission
in Application No. 1566373, Proceeding ID No. 20
Dated the 20th day of February, 2013

Appeal from the Alberta Utilities Commission
Decision 2013-051
Dated the 20th day of February, 2013

Reasons for Judgment Reserved of
The Honourable Chief Justice Fraser

I. Introduction

[1] In Alberta, the regulatory compact, which involves a balancing of the interests of utility companies and their customers, has its limits. And this case demonstrates one of them. The roots of the regulatory compact, as it has been dubbed, can be found in the 19th century and the emergence of public utility regulation in North America. That regulation was designed to prevent the abuse of monopolistic powers by utility companies. The shape and content of the regulatory compact were initially developed through the common law. Later, as in Alberta, legislators in individual jurisdictions statutorily defined the specific terms governing its scope.

[2] The general concept is that in return for the undertaking to serve all customers in a defined service area, the utility is granted an *opportunity* both to earn a reasonable return on its prudent investment and to recover its prudently incurred expenses. However, the regulatory compact was never an arrangement under which utility companies were entitled to find pockets deeper than their own – their ratepayers – in order to recover every expense incurred in pursuit of their corporate and shareholders' interests. Put simply, the regulatory compact did not confer on utilities an absolute guarantee that they would be entitled to recover all incurred costs and expenses, reasonable or otherwise.

[3] Moreover, the terms of the regulatory compact have always been subject to evolution and the re-balancing of competing interests of consumers and utility companies when times and circumstances change. This is as it should be, especially in this era of deregulation of the gas and electrical sectors in Alberta. There is no industry today that is immune to change. Or that enjoys a *right* to be protected from the consequences of change, whether those arise from legislative choices, deregulation or court decisions.

[4] These appeals by the appellants, ATCO Gas and Pipelines Ltd. (ATCO Gas) and ATCO Electric Ltd. (collectively ATCO Utilities) relate to decisions made by the Alberta Utilities Commission (Commission) in two separate proceedings about legal and consulting costs (collectively legal costs) claimed by the ATCO Utilities. It is important to keep in mind what these appeals are about. Leave was granted on a single common issue and, accordingly, it was directed that the two appeals be heard together. In ***Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)***, 2013 ABCA 331 at para 31, Conrad JA granted leave on the following question:

> Did the Commission err in law or jurisdiction by denying or limiting recovery of the Appellants' claimed regulatory costs and

> by treating the costs of or incidental to any hearing or other proceeding of the Commission differently than other costs?

[5] What is not at issue on these appeals is whether the actual amounts of the costs awards themselves were reasonable. The factums filed by the ATCO Utilities on both appeals were dedicated in their entirety to the question of whether the Commission possessed a separate authority to award legal costs. No suggestion was made that, if this were so, the costs awards that the Commission actually made were themselves unreasonable.

[6] For the reasons that follow, I would dismiss both appeals. The common issue appears deceptively simple. It is anything but. These appeals serve as a cautionary example of the complexity associated with the regulation of the utilities sector and why courts should be circumspect before interfering with decisions of expert tribunals. They raise a number of linked issues that go directly to the heart of the Commission's authority to regulate Alberta's utilities sector. In particular, did the Alberta government give the Commission the authority to determine the legal costs of regulated utility companies in proceedings before it? If so, does the Commission have the discretion to award – or not award – legal costs as it considers reasonable? Or is the Commission required by statute or under the regulatory compact to award the utility companies their legal costs in all proceedings before it providing those costs meet the "prudently incurred" standard inherent in that compact? What are the terms of the regulatory compact as statutorily prescribed in Alberta? And what impact has deregulation had on the scope of legal proceedings before the Commission?

[7] To understand what is at stake and why I have concluded that the Commission did not err in its ultimate decisions to both partially deny and partially limit the legal costs of the ATCO Utilities in one hearing and partially limit them in another, I must untangle a complex set of facts. These relate not only to the proceedings that led to these appeals but to other proceedings before the Commission and other court decisions as well.

[8] I begin with the historical and statutory framework (Part II). I next outline the relevant background facts relating to each Commission proceeding after first providing a general overview (Part III). I then address the standard of review and explain why the Commission's decision that it has a separate authority to determine the legal costs, if any, payable to parties in proceedings before it is to be reviewed for reasonableness, not correctness (Part IV). That is followed by a detailed analysis of why the Commission's interpretation of its authority to make costs awards is reasonable (Part V). Finally, I confirm that the appeals should be dismissed (Part VI).

II. Historical and Statutory Framework

[9] The Commission was created on January 1, 2008 by the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*Act*). The Commission's earliest predecessor was the Alberta Board of Public Utilities Commissions (PUB) created in 1915. The PUB has had a long and storied history

in Alberta. It was Alberta's first regulatory agency with the primary responsibility to regulate utility rates and services.[1] That included not only the electric utility sector but also the natural gas utility sector.

[10] The *Gas Utilities Act*, passed initially in 1960, remains a major piece of legislation governing the Commission's jurisdiction.[2] In 1985, the price of natural gas, but not the transmission or distribution of natural gas, was deregulated by a federal-provincial agreement.[3]

[11] In 1995, the PUB was merged with the Energy Resources Conservation Board (ERCB) to create the Alberta Energy and Utilities Board (EUB). The purpose was to create a more streamlined regulatory process. Although both the PUB and ERCB remained as separate entities, the EUB was invested with all the powers and rights of the PUB and the ERCB.[4] In addition, the EUB was given the power to act on its own initiative or motion: s. 10(2), *Alberta Energy and Utilities Board Act*, SA 1994, c A-19.5 (*EUB Act*). The members of the EUB were the members of the ERCB and the PUB: s. 3(1), *EUB Act*. The EUB had the right to delegate any of its powers and duties to the PUB or ERCB unless regulations prohibited that delegation: s. 12, *EUB Act*.

[12] The creation of the EUB in 1995 coincided with the Alberta government's adoption of legislation that same year to "deregulate" or more precisely, restructure, certain aspects of the electric energy industry in Alberta.[5] That deregulation began with the enactment of the *Electric Utilities Act*, SA 1995, c E-5.5. Given the changes in the *Electric Utilities Act*, the EUB held a hearing in 1996 to restructure electric tariffs. At that point, the major utility companies applied to separate their generation, transmission and distribution services. That led in turn to further restructuring in accordance with the *Electric Utilities Amendment Act*, SA 1998, c 13. Other

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[1] It also exercised authority over a wide range of other matters including supervising debentures issued by municipalities, regulating the sale of securities within Alberta, approving tariffs for provincial railways, approving highway crossings by railway branch lines and governing rates for Alberta's only telecommunications company at the time, namely Alberta Government Telephones. Its authority to regulate a wider range of services was expanded through the years. Later, in 1938, Alberta created the Petroleum and Natural Gas Conservation Board to focus on Alberta's energy resources. However, pipeline regulation remained within the PUB's authority.

[2] SA 1960, c 37. The PUB started regulating gas and electricity rates long before the 1960 *Gas Utilities Act* or the 1995 *Electric Utilities Act*.

[3] Prior to 1985, the price of natural gas was set by agreements between Canada and Alberta. Then on October 31, 1985, Canada and Alberta signed the Natural Gas Markets and Pricing Agreement which became known as the Halloween Agreement. Under this Agreement, natural gas prices are now determined by the market. Since 2004, Albertans may choose to purchase their natural gas from a "Regulated Retailer" that is regulated by the Commission or from a "Competitive Retailer" that is not. Utilities are not permitted to make a profit on the supply cost of gas. For more details, see "Alberta's Energy Market" on the Commission website at http://www.auc.ab.ca/market-oversight/albertas-energy-market/Pages/default.aspx.

[4] The immediate predecessor to the ERCB had been the Oil and Gas Conservation Board whose origins lay in the Petroleum and Natural Gas Conservation Board created in 1938 to conserve Alberta's energy resources and ensure their orderly development.

[5] For an excellent article providing a summary of electric deregulation in Alberta, see Terra Nicolay, "Regulation by Any Other Name: Electricity Deregulation in Alberta and the Power Purchase Agreements" (2011) 29:1 J Energy & Nat'l Res L 45.

legislative refinements were made in 2003 with the *Electric Utilities Act*, SA 2003, c E-5.1. Of particular note, as of 2001, the EUB no longer regulated wholesale electricity prices in Alberta.

[13] Late in 2007, the Legislature decided that the EUB's functions would once again be performed by two separate bodies, the Commission and the ERCB. Thus, as of January 1, 2008, the Commission began its operations in accordance with the *Act*. Like the EUB, the Commission was given the power to act on its own initiative or motion. In addition to regulating utilities, the Commission was also given jurisdiction over hydroelectric projects, power plants, and transmission lines: see *Hydro and Electric Energy Act*, RSA 2000, c H-16.[6] At the same time, the ERCB, which, like the PUB, had continued to exist throughout the term of the EUB, once again began to discharge the duties it had to govern the oil and gas sector. Then, in 2013, the *Energy Resources Conservation Act*, RSA 2000, c E-10 was repealed by the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*), which replaced the ERCB with the Alberta Energy Regulator.[7]

[14] In summary, prior to 1995 when the EUB was created, utility regulation was within the domain of the PUB. Effective as of 2008 and continuing to this day, the Commission, as the successor to the PUB and the EUB, regulates Alberta's utilities sector through numerous pieces of legislation including the *Public Utilities Act*,[8] the *Gas Utilities Act*,[9] the *Electric Utilities Act*,[10] the *Pipeline Act*,[11] the *Hydro and Electric Energy Act*, and the *Gas Distribution Act*.[12]

[15] The Alberta government has implemented this specialized and integrated legislative framework to ensure that the Commission is able to provide oversight of the transmission, distribution and some aspects of the retail sale of natural gas and electricity within Alberta. That oversight includes the Commission's familiar regulatory rate-setting function *vis à vis* certain investor-owned natural gas, electric and water utilities and certain municipally owned electric utilities only.[13] Rate-setting involves ensuring that customers have access to the utility at a fair price while also providing utility companies with the opportunity to earn a fair return for their

[6] Prior to the creation of the EUB in 1995, this fell within the mandate of the ERCB: see *Hydro and Electric Energy Act*, RSA 1980, c H-13, s. 1(a). Today, these projects are initially proposed, in terms of their identified need, by the Alberta Electric System Operator established under the *Electric Utilities Act*.

[7] The Alberta Energy Regulator was established under s. 3, and the ERCB dissolved under s. 81, of *REDA*.

[8] RSA 2000, c P-45.

[9] RSA 2000, c G-5.

[10] SA 2003, c E-5.1.

[11] RSA 2000, c P-15.

[12] RSA 2000, c G-3.

[13] The Commission does not regulate Rural Electric Associations, municipally-owned utilities (with the exception of ENMAX in Calgary and EPCOR in Edmonton), natural gas co-ops, and most importantly, competitive retailers with whom customers sign a contract with a set price for the energy in question.

investors. However, the Commission's rate-setting authority is limited. In particular, the Commission does not regulate the price of natural gas which has been deregulated since 1985 nor the wholesale price of electricity which has been deregulated since 2001.

[16] Equally important, the Commission's role in regulatory rate-setting constitutes only part of the Commission's duties. Utility regulation today occurs against a backdrop of deregulation. It also involves changing economic models, including performance-based and incentive regulation designed to bolster competition and improve efficiency. The Commission's broad supervisory mandate extends to these issues too. In addition, the Commission must also deal with a myriad of technical, operational and infrastructure issues frequently involving difficult social, economic and environmental policy choices.[14] For example, companies that propose to construct electric generation, transmission or distribution facilities are required to secure site approval from the Commission. This often requires infrastructure and facility hearings. The Commission's jurisdiction extends as well to adjudicating cases brought to the Commission by the Market Surveillance Administrator (MSA). The MSA monitors the electricity and natural gas markets in Alberta to ensure they are operated in a fair, efficient and competitive manner.[15] It will be obvious therefore that, in exercising its statutory authority, the Commission is empowered to employ several different kinds of proceedings or hearings. Not all are regulatory rate-setting hearings.

[17] One final point. The Commission is a specialized body with a high level of expertise in a wide range of areas: ***Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)***, 2014 ABCA 28 at para 26. These include: utility regulatory reform, competition policy, strategic planning and development, wholesale markets, service quality and compliance standards, performance-based and incentive regulation, capital structure of regulated utilities, debt and equity markets, utility assets dispositions, utility deregulation and, of course, rate-related regulation – along with the policy considerations involved in each. Of particular relevance to this appeal is the Commission's expertise in determining the amount and appropriateness of legal costs for applicants and interveners in the many kinds of proceedings before it.

III. Background Facts

A. Overview of Commission Decisions

[18] The ATCO Utilities challenge the Commission's decisions on legal costs in two separate proceedings. Proceeding No. 20, also known as the Utility Asset Disposition Proceeding (UAD Proceeding), is the subject of Appeal 1301-0069. Proceeding No. 2066, also known as the

[14] Section 17(1) of the *Act* explicitly requires the Commission to "give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment."

[15] The Commission is also charged with dealing with alleged contraventions of the rules of the Independent System Operator which operates under the name Alberta Electric System Operator.

Performance-Based Reform Proceeding (PBR Proceeding), is the subject of Appeal 1301-0070. In both Proceedings, the Commission determined that it had the authority to manage and assess the legal costs of all regulated utilities in Alberta (collectively the Alberta Utilities) in proceedings before it and to establish rules and guidelines for the recovery of such legal costs. With respect to this latter point, the Commission had, shortly after it was created, adopted Rule 022. This Rule, which dealt with the awarding of costs to applicants and interveners in proceedings before the Commission, also included a Scale of Costs. So too does the current form of Rule 022 adopted effective February 6, 2013 which was in force at the time that the Commission made both costs orders now under appeal.[16]

[19] In both Proceedings, the ATCO Utilities were made parties by the Commission and invited, but not compelled, to participate. And in both Proceedings, the Commission declined, in exercising its costs authority, to award the ATCO Utilities all their legal costs.

[20] In particular, in the UAD Proceeding, the Commission awarded legal costs in accordance with Rule 022 for the period subsequent to October 17, 2012 only. The Commission initiated this Proceeding to consider the implications of the Supreme Court of Canada's decision in ***ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)***, 2006 SCC 4, [2006] 1 SCR 140 [***Stores Block***]. The UAD Proceeding commenced on April 2, 2008 and was suspended on November 28, 2008 at the request of the ATCO Utilities. It did not resume until four years later on October 17, 2012. The Commission initially denied all legal costs to the Alberta Utilities, including ATCO Utilities. However, during a review initiated by the ATCO Utilities, the Commission agreed to award the Alberta Utilities a significant portion of their legal costs but only for the post-resumption period. A full chronology of events leading to this costs decision follows in Part B below.

[21] In the PBR Proceeding, the Commission awarded the ATCO Utilities their legal costs in accordance with Rule 022 plus a premium of 20% on top of the Scale of Costs. That Proceeding, again initiated by the Commission, involved an examination of performance-based regulation (PBR) as part of a broader initiative by the Commission to reform utility regulation in Alberta. A full chronology of events leading to this costs decision follows in Part C below.

[22] The ATCO Utilities assert that, as regulated public utilities, they, and other regulated utilities, enjoy a general "right" to recover from their ratepayers all their prudently incurred costs for utility operations. In their view, that includes all their legal costs for all proceedings before the Commission, the only limitation being that these costs must meet the "prudently incurred" standard.

[16] Rule 022 was initially approved by the Commission on January 2, 2008, the day after the Commission came into effect. That form of Rule 022 was stated to have been "Formerly EUB Directive 31B and Rules of Practice". Rule 022 was later the subject of further consideration by the Commission and a revised Rule, approved September 30, 2008, was adopted effective October 1, 2008. It was then adopted in its current form effective February 6, 2013. The only change of substance between the current Rule 022 and the version it replaced relates to the documentation required for taxi claims.

[23] The issue on appeal – indeed, the *only* issue on appeal – is whether the Commission had the statutory authority to do what it did. As Conrad JA put it: "The relevant issue for this court is the Commission's finding that it did have the *statutory authority* to make cost related rules and award or deny costs incurred by all participants in proceedings before it, including utilities": 2013 ABCA 331 at para 13, emphasis added.

[24] It is appropriate to pause here to stress that this appeal is not about how the legal costs that the Commission awards to Alberta Utilities are actually recovered. This too is within the discretion of the Commission. Various approaches may be taken to that subject.[17] Nevertheless, in the end, one way or another, the ATCO Utilities will be entitled to recover from their ratepayers the legal costs awarded by the Commission.

B. Chronology of Events Relating to the UAD Proceeding

[25] On April 2, 2008, the Commission issued a Notice initiating the UAD Proceeding. The Notice set out the Commission's three principal objectives in doing so as follows (at Appeal Record Digest (ARD) 69, P2), all of which were directly linked to the implications of ***Stores Block***:

> (1) provide interested parties an opportunity to advance and defend their interpretation of ***Stores Block***;
>
> (2) provide interested parties an opportunity to identify and explore the potential implications of ***Stores Block*** to utility regulation in Alberta; and
>
> (3) develop a consistent, principled approach to applying the guidance provided by ***Stores Block***, while providing sufficient flexibility to address the specifics of each proceeding.

[26] In ***Stores Block***, a majority of the Supreme Court concluded that ATCO shareholders should receive the total gain from appreciation in the value of land ATCO sold in Calgary despite the fact that ATCO's original investment had formed part of the rate base on which gas rates had been calculated and paid by ratepayers since 1922.

[27] In doing so, the Supreme Court reversed the long-standing practice of the EUB and its predecessors under which such gains would be shared between utility company shareholders and ratepayers. The result was to overrule the EUB which had found, consistent with that past

[17] Under section 13.1 of Rule 022, where the Commission has awarded costs in a hearing or other proceeding, it shall issue a cost order setting out the amount of the award and to whom and by whom the payment must be made. Section 13.4 provides that the cost order may state whether "an applicant named in the order is authorized to record the costs in its hearing costs reserve account."

practice, that an amount equivalent to ATCO's profit on the land should be allocated one-third to the utility and two-thirds as a credit to the utility's cost base for the benefit of ratepayers. Since rate decisions are not made in a factual vacuum disconnected from reality, present or future, that past practice had no doubt informed the EUB's view of what were just and reasonable rates in individual cases. The EUB would have been well aware that what it might consider appropriate at the rate-making front end would be directly linked to what it might consider appropriate at the back end, namely the sharing, in some manner, by regulated utilities of the gains made on their disposition of assets in certain circumstances.

[28] Thus, perhaps not surprisingly, ***Stores Block*** led to many more issues – and problems – than the case itself answered. The Notice included as Appendix A a long list of issues (Issues List) (at ARD 69, P6-8), some obvious, some not so obvious, that the Commission considered it was duty bound to address as a result of ***Stores Block***. The Notice stated in part at ARD 69, P1-2:

> The Stores Block Decision may have various implications with respect to regulation of Alberta utilities. In particular, the guidance provided by the courts may require re-consideration of certain aspects of traditional regulatory approaches to the acquisition and disposition of utility assets and to the setting of just and reasonable rates. Parties have argued various interpretations of the Stores Block Decision in several recent proceedings before the EUB and in various ongoing proceedings before the Commission. The Commission would like to develop a comprehensive understanding of these potential implications through this Proceeding and then to apply that understanding in a consistent manner in future decisions.

[29] The obvious issues flowing from ***Stores Block*** included: who is responsible for losses arising from the disposition of utility assets; should the rules allocating gains and losses on sale of assets outside the ordinary course of business also apply to assets sold in the ordinary course of business; does the Commission have the jurisdiction to require regulatory approval prior to the disposition of an asset which is no longer used or required to be used to provide service in Alberta; and is the Commission entitled to consider the proceeds of disposition on sale of assets as "revenue" to the utility companies for the purpose of fixing just and reasonable rates? The Notice and the Issues List revealed the magnitude, and complexity, of the issues arising from ***Stores Block*** as the Commission attempted to deal with the significant fallout from this case.

[30] In its Notice, the Commission also advised that all Alberta Utilities "shall be considered as parties to this Proceeding whether or not they register and actively participate in the Proceeding": ARD 69, P3. Thus, the Alberta Utilities were entitled, but not required, to participate in the UAD Proceeding. By making all Alberta Utilities parties, the Commission obviated the need for each Alberta Utility to apply individually to be made a party to the UAD Proceeding. All were invited to make written submissions addressing the issues in the Issues

List. The Notice also informed the Alberta Utilities, which included the ATCO Utilities, that the Commission would decline to consider cost claims by parties and that all would be responsible for their own costs. As explained in the Notice at ARD 69, P3:

> Parties who participate shall not be entitled to submit cost claims to the Commission and no funding will be awarded by the Commission to participants. **Each party shall be responsible for its own costs.** The Commission considers this Proceeding to deal with generic issues which concern all stakeholders and that utility ratepayers should not be required to underwrite the costs of the participants through regulated rates. [Emphasis in original]

[31] On April 11, 2008, the ATCO Utilities sent a letter requesting that the Commission reconsider its decision that the utility companies that chose to participate in the hearings would be responsible for their own legal costs. They further suggested that written submissions in the UAD Proceeding be deferred pending a decision of this Court relating to ATCO Gas's Carbon storage facility (what became ***ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)***, 2008 ABCA 200 [***Carbon***], leave to appeal to SCC refused, (2008), 469 AR 396 (note) (December 4, 2008)). In ***Carbon***, this Court concluded, as argued by ATCO Gas, that an asset was not "used or required to be used" under s. 37 of the *Gas Utilities Act* unless it continued to be used in an operational sense. Thus, even though it continued to generate revenue which could be used for the benefit of ratepayers, it was no longer part of the rate base.

[32] On May 9, 2008, the Commission sent a letter to the ATCO Utilities denying their request for a deferral. Regarding costs, it confirmed its previous position as outlined in the Notice. However, the Commission indicated it would be prepared to revisit the issue following the completion of its then ongoing review of cost recovery under Rule 022.

[33] In August, 2008, parties to the UAD Proceeding filed written submissions on the issues outlined in the Notice. That presumably included the ATCO Utilities. Reply submissions were due October 27, 2008. Then, on September 30, 2008, the Commission advised that it had adopted a revised Rule 022 to come into force October 1, 2008.

[34] On October 21, 2008, the ATCO Utilities filed a motion requesting that the Commission suspend the UAD Proceeding. Grounds for the request included i) allegations of bias on the part of the Commission and ii) pending decisions of this Court in the "Harvest Hills" matter and the "Salt Cavern" matter.[18] Two days later, the Commission relieved parties from having to file Reply Submissions by October 27, 2008, as initially scheduled.

[18] This Court granted leave on both appeals on November 12, 2008: see 2008 ABCA 381 and 2008 ABCA 382.

[35] On November 28, 2008, the Commission suspended the UAD Proceeding.[19] While rejecting any reasonable apprehension of bias, the Commission agreed to the suspension pending the outcome of the "Harvest Hills" and "Salt Cavern" appeals given the overlap of issues between these cases and the UAD Proceeding.

[36] "Harvest Hills" was decided on May 8, 2009 in ***ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)***, 2009 ABCA 171, leave to appeal to SCC refused, 33269 (January 28, 2010). There this Court concluded that the Commission could only attach a condition to the sale of an asset where there was a close connection between the sale of the asset and the immediate need to replace it. "Salt Cavern" was decided on June 30, 2009 in ***ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)***, 2009 ABCA 246, leave to appeal to SCC refused, (2010), 487 AR 404 (note) (January 28, 2010). There this Court concluded that a utility's unilateral withdrawal of an asset from its rate base was not a "disposition" under s. 26 of the *Gas Utilities Act*, and therefore did not require prior approval from the Commission. In both cases, ***Stores Block*** figured prominently in this Court's decisions in favour of ATCO Gas and its shareholders.

[37] On September 17, 2010, the Commission initiated a separate proceeding, Proceeding No. 833, entitled Generic Cost of Capital. Then on December 3, 2010, ATCO Gas filed a 2011-2012 General Rate Application (Phase I), initiating Proceeding No. 969. A year later, on December 5, 2011, the Commission issued its General Rate Application Decision. That Decision addressed in part the issue of production abandonment, the Commission finding that costs associated with assets which no longer have an operational purpose should be removed from a utility's rate base and borne by utility shareholders. Three days later, on December 8, 2011, the Commission issued its Generic Cost of Capital Decision. That Decision addressed in part the issue of stranded assets, the Commission finding that risks associated therewith should be borne by utility shareholders rather than ratepayers.

[38] Within two months, applications were filed for review and variance of both Decisions. In particular, on February 3, 2012, ATCO Gas filed an application for review and variance of the General Rate Application Decision. And on February 6, 2012, the ATCO Utilities filed an application for review and variance of the Generic Cost of Capital Decision.

[39] On June 4, 2012, the Commission issued Decision 2012-154[20] reviewing its Generic Cost of Capital Decision. In reviewing this Decision as it related to stranded assets, the Commission concluded that this issue should be considered either as part of the UAD Proceeding or in a generic proceeding regarding asset disposition and stranded assets. A few days later, on June 8, 2012, the Commission issued Decision 2012-156[21] reviewing its General Rate Application Decision. It concluded that the issue of production abandonment should also be considered either

[19] Decision 2008-123.
[20] Proceeding No. 1697.
[21] Proceeding No. 1698.

as part of the UAD Proceeding or as part of a generic proceeding regarding asset disposition and stranded assets.

[40] On June 19, 2012, the ATCO Utilities sought clarification from the Commission on a number of points in Decisions 2012-154 (stranded assets) and 2012-156 (production abandonment). In so doing, they also advised they would be filing cost claims on the basis that they had satisfied the preliminary question under both Decisions. In accordance with s. 5.3 of Rule 022, applicants who satisfy the "preliminary question" – that is, who convince the Commission that a decision should be reviewed – are eligible to claim costs for all aspects of the review proceeding. Later that month, on June 28, 2012, the Commission agreed to hear the ATCO Utilities' cost claims after the completion of the review proceedings relating to these two Decisions.

[41] It was not until October 17, 2012 that the Commission recommenced the UAD Proceeding. It also confirmed at that time that the UAD Proceeding would be broadened to include both the issue of stranded assets and production abandonment, one of the options that the Commission had suggested in Decision 2012-154 and Decision 2012-156 respectively. The Commission again reiterated its initial position that each party would be responsible for their own legal costs of participating in the UAD Proceeding.

[42] Later on November 23, 2012, the ATCO Utilities and a number of other Alberta Utilities filed an application to review and vary the Commission's October 17, 2012 decision confirming that each party would be responsible for their own legal costs in the UAD Proceeding. On December 18, 2012, the Commission agreed to proceed with a review of its October 17, 2012 decision without the need for any further submissions on whether to do so.

[43] The Commission issued its costs decision in the UAD Proceeding on February 20, 2013. It is from this costs decision that the ATCO Utilities now appeal. The Commission affirmed its earlier decision not to award legal costs for the period prior to October 17, 2012. That was the period during which the UAD Proceeding was limited to the questions raised in the Notice about the implications of ***Stores Block***. However, the Commission varied its decision with respect to legal costs incurred after the UAD Proceeding recommenced on October 17, 2012. That was the date on which the stranded costs and production abandonment issues were added to the UAD Proceeding. The Commission allowed the ATCO Utilities and other Alberta Utilities their respective legal costs calculated in accordance with the Scale of Costs under Rule 022 from October 17, 2012 until December 31, 2012 (in the case of Alberta Utilities regulated according to performance-based regulation) or the close of the UAD Proceeding (in the case of all other utilities and interveners).

[44] On January 17, 2014, after the Commission had released its decision on the merits in the UAD Proceeding,[22] the Commission then issued its actual costs orders in the UAD Proceeding.[23] In accordance with its February 20, 2013 Decision (which is the subject of this appeal), the Commission awarded ATCO Electric Ltd. $87,061.55 of the $104,685.10 it had claimed and ATCO Gas $62,923.56 of the $75,299.36 it had claimed.

[45] In the result, the ATCO Utilities received a substantial portion of the legal costs they had claimed in the UAD Proceeding for the period October 17, 2012 and following. These legal costs were calculated by the Commission in accordance with the Commission's Scale of Costs under Rule 022. The *only* period for which the ATCO Utilities did not receive legal costs was from the inception of the UAD Proceeding on April 2, 2008 until it was suspended on November 28, 2008 at the request of the ATCO Utilities. On the record before this Court, the Commission held no hearings during that time period. The legal costs for the ATCO Utilities for that time frame appear to be related to written submissions filed prior to the date of suspension of the UAD Proceeding and matters incidental thereto.

[46] On August 20, 2014, this Court granted the ATCO Utilities and others leave to appeal on a number of questions relating to the Commission's decision on the merits in the UAD Proceeding: ***FortisAlberta Inc v Alberta (Utilities Commission)***, 2014 ABCA 264. That appeal remains to be heard.

C. Chronology of Events Relating to the PBR Proceeding

[47] On February 26, 2010, the Commission sent a letter to interested parties, including the ATCO Utilities, advising of a rate regulation initiative roundtable. Parties were invited to participate in a roundtable discussion to assist the Commission with its initiative to reform utility rate regulation in Alberta. The stated purposes for this initiative were twofold at ARD 70, P1:

> The first is to develop a regulatory framework that creates incentives for the regulated companies to improve their efficiency while ensuring that the gains from those improved efficiencies are shared with customers. The second purpose is to improve the efficiency of the regulatory framework and allow the Commission to focus more of its attention on both prices and quality of service important to customers.

[48] The Commission's initiative proceeded from the assumption, set out in the letter, that rate-base rate of return regulation "offers few incentives to improve efficiency, and produces incentives for regulated companies to maximize costs and inefficiently allocate resources:" ARD 70, P1. As the Commission went on to say at ARD 70, P2: "Traditional rate-base rate of return

[22] Decision 2013-417.
[23] Decision 2014-013.

regulation provides few opportunities to create meaningful positive economic incentives which would benefit both the companies and the customers." To overcome these perceived problems with natural monopolies, the Commission indicated in the letter that it intended to reform regulation for electric and natural gas distribution services by replacing rate of return regulation with PBR. Under PBR, rates are typically adjusted annually by a formula that recognizes expected inflation and achievable productivity improvements. In the letter, the Commission advised that it had scheduled PBR to be implemented commencing July 1, 2011.

[49] A roundtable was held in March 2010 during which various distribution companies each agreed to file a PBR proposal. It was also agreed that the Commission would initiate a short proceeding to establish common principles in order to guide and assess those PBR proposals. On May 14, 2010, the Commission sent a letter to interested parties setting out the process for developing the PBR principles. That led to a PBR workshop in May of that year followed in June by parties filing their submissions and reply submissions on the principles that should guide PBR.

[50] On July 15, 2010, the Commission issued Bulletin 2010-20 setting out the five principles it would use to examine specific PBR proposals. Later, on December 13, 2010, the Commission released Decision 2010-578 dealing with its costs orders in favour of those companies participating in the Commission's development of those PBR principles. ATCO Gas and ATCO Electric submitted a cost claim totalling $48,791.96. The Commission awarded this entire amount on the basis of its Scale of Costs. No one appealed this Decision.

[51] That same month, December of 2010, the Commission agreed to the requests of ATCO Gas and ATCO Electric to delay their PBR proposal deadline to March 31, 2011 and to delay the Commission's implementation of PBR itself to January 1, 2013. In April, 2011, the Commission sent a letter setting out a new proceeding schedule whereby PBR proposals were to be submitted by July 22, 2011. The ATCO Utilities and others filed PBR applications by that deadline.

[52] On July 26, 2011, the Commission sent out a Notice of the PBR Proceeding to all natural gas and electric distribution utilities regulated by the Commission advising that the ATCO Utilities and some of the other Alberta Utilities had separately applied to the Commission for approval of a multi-year PBR plan for their respective distribution utility.[24] The PBR Proceeding was designed to allow the Commission to hear these separate applications together.

[53] In February, 2012, the ATCO Utilities filed updated PBR applications. Oral hearings for the PBR Proceeding commenced in April 2012 and lasted until May 9, 2012. Parties to the PBR Proceeding, including the ATCO Utilities, filed written arguments with the Commission in June with reply arguments filed by July 13, 2012.

[24] This PBR Proceeding was also known as Proceeding No. 566.

[54] Later, on July 18, 2012, the ATCO Utilities and other Alberta Utilities sent a letter to the Commission advising that they intended to seek full recovery of their legal costs for participating in the PBR Proceeding. Those legal costs would be in excess of the Commission's Scale of Costs under Rule 022 given what the Alberta Utilities argued were the complexity and unique nature of the PBR Proceeding. On July 30, 2012, the Commission established Proceeding No. 2066 to consider cost claims related to the PBR Proceeding. In August, the ATCO Utilities submitted cost claims requesting full recovery of their legal costs in the PBR Proceeding.

[55] The Commission issued Decision 2012-237 on September 12, 2012 dealing with the merits of the PBR Proceeding. It set out the Commission's determinations about the form of PBR to be employed for electric and natural gas distribution companies in Alberta commencing January 1, 2013.

[56] Then, on February 20, 2013, the Commission issued Decision 2013-051, the second decision under appeal before this Court. The Commission awarded legal costs to the ATCO Utilities in accordance with Rule 022 plus an additional 20%. It rejected arguments that the ATCO Utilities were entitled to all their legal costs "prudently incurred" and that the Commission's Scale of Costs was in conflict with the relevant legislation. ATCO Electric was awarded $914,463.83 of the $1,300,461.44 it claimed, while ATCO Gas was awarded $691,499.23 of the $1,060,443.05 it claimed.

[57] Having clarified that these appeals are limited to whether the Commission had the authority to award legal costs to the ATCO Utilities on a basis other than full recovery of all legal costs that meet the prudence standard, I next turn to the degree of scrutiny that this issue attracts.

IV. Standard of Review

[58] Where a tribunal is interpreting its home statute or a statute closely connected to its function and with which it is particularly familiar, the standard of review is presumptively reasonableness: ***Canadian Artists' Representation v National Gallery of Canada***, 2014 SCC 42 at para 13 [***National Gallery***]; ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67 at para 21, [2013] 3 SCR 895 [***McLean***]; ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61 at paras 34, 39, [2011] 3 SCR 654 [***ATA***]. Even if a question of law is involved, administrative decisions are not necessarily reviewed for correctness: ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras 55-56, [2008] 1 SCR 190 [***Dunsmuir***]; ***Carbon***, *supra* at para 16; ***Newfoundland and Labrador Hydro v Newfoundland and Labrador (Board of Commissioners of Public Utilities)***, 2012 NLCA 38 at para 85, 323 Nfld & PEIR 127.

[59] Exceptions capable of overcoming the reasonableness presumption include constitutional questions; issues central to the legal system not within the expertise of the tribunal; the drawing of jurisdictional lines between two competing specialized tribunals; and questions of true

jurisdiction: ***Canadian National Railway Co. v Canada (Attorney General)***, 2014 SCC 40 at para 55; ***Smith v Alliance Pipeline Ltd.***, 2011 SCC 7 at para 26, [2011] 1 SCR 160 [***Smith***].

[60] The presumption will also be overcome in the exceptional circumstance of an administrative tribunal and a court having concurrent jurisdiction to decide the issue in the first instance: ***Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada***, 2012 SCC 35 at paras 10-20, [2012] 2 SCR 283 [***Rogers***]; ***Lethbridge Regional Police Service v Lethbridge Police Association***, 2013 ABCA 47 at para 28, 542 AR 252. There is no suggestion that the exception from ***Rogers*** applies here. It is the Commission which is charged with determining legal costs in the first instance. That remains so regardless of the possibility that a court may come to consider the matter before the Commission: see ***McLean***, *supra* at para 24; ***Sound v Fitness Industry Council of Canada***, 2014 FCA 48 at paras 45-51, 455 NR 87.

[61] Instead, the ATCO Utilities argue that the Commission's decisions on legal costs should be reviewed for correctness because they involve a question of "true jurisdiction". Indeed, this point is foundational to their entire case. In their view, the Commission had no jurisdiction to award legal costs on the basis it did. Instead, on their theory, the Commission *must*, in accordance with both the statutory regime in effect in Alberta and the regulatory compact, award the ATCO Utilities all their legal costs for all proceedings before the Commission. Thus, it follows that the Commission is required to treat the legal costs of the ATCO Utilities, if they satisfy the prudence standard, as prudently incurred costs recoverable from their ratepayers. In other words, according to the ATCO Utilities, the only discretion the Commission possesses is in determining the extent to which those legal costs have been "prudently" incurred. In their view, the Commission has no authority to limit legal costs of regulated utilities to the amounts in the Scale of Costs set by the Commission, much less to deny costs and the Commission's claimed authority to the contrary involves a question of true jurisdiction.

[62] Courts should be careful before quickly labelling issues as ones of "true" jurisdiction: ***Council of Canadians with Disabilities v VIA Rail Canada Inc.***, 2007 SCC 15 at para 89, [2007] 1 SCR 650. A statute may confer numerous powers on a tribunal and it is common to say that a tribunal has the "power" or "jurisdiction" to take a particular step or action. However, the use of the word "jurisdiction" in this context does not raise issues of true jurisdiction providing that the powers are exercised within the four corners of the enabling statute. As pointed out by Rothstein J in ***ATA***, *supra* at para 34:

> In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction.

[63] The Supreme Court's revised definition of jurisdiction has substantially restricted the kinds of matters that fall into the true jurisdiction category – and understandably so. The Supreme Court has yet to identify a question of true jurisdiction post-***Dunsmuir***, Rothstein J going so far in ***ATA*** as to question whether the category should exist at all. Recently, the United States Supreme Court actually did away with the concept in ***City of Arlington, Texas v Federal Communications Commission***, 133 S Ct 1863 (2013). Moldaver J noted in ***McLean***, *supra* at para 25 the trend of counsel attempting, without success, to rely on exceptions like true jurisdiction. He essentially reiterated the point that cases involving "true jurisdictional" issues will be very limited.

[64] Questions of true jurisdiction are narrow in scope and typically involve what may be called boundary jurisdiction issues. One example is where there is a conflict between which of two tribunals has jurisdiction over a particular matter. Or where the question is whether the subject tribunal has the jurisdiction over an issue as opposed to the courts or the executive branch of government. Where a tribunal is interpreting its home or a related statute, the category of questions of true jurisdiction will be read particularly narrowly: ***National Gallery***, *supra* at para 13; ***ATA***, *supra* at para 34. To put it the way that the Manitoba Court of Appeal did in ***Manitoba v Russell Inns Ltd. et al.***, 2013 MBCA 46 at para 52, 361 DLR (4th) 581 [***Russell Inns***]:

> ... true jurisdiction is a very narrow concept. If the legislation (usually the home statute) gives the adjudicator the authority to decide or to act, the manner in which it makes that decision or exercises that authority is not a question of "true jurisdiction" for the purposes of determining the applicable standard of review.

[65] The Commission's decisions on legal costs do not involve questions of true jurisdiction. Its decision to award costs to the ATCO Utilities on a basis other than as prudently incurred costs did not require it to determine whether it was statutorily permitted "to decide a particular matter": ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, 2011 SCC 53 at para 18, [2011] 3 SCR 471 [***Mowat***]. It is common ground that the Commission has the statutory authority to award legal costs for proceedings and hearings before it. The only issue is whether it is required to decide the quantum of legal costs using one standard (full recovery as prudently incurred costs) rather than another (what the Commission considers reasonable in the exercise of its discretion). This question does not go to true jurisdiction so as to mandate a correctness standard of review. Instead, what is at issue is the scope of the discretion conferred on the Commission by statute. This is plainly within the range of jurisdiction and not outside the boundary of jurisdiction.[25] A tribunal's power to award legal costs often involves the interpretation of its home statute and is thus typically reviewed for reasonableness: see, for

[25] This situation is analogous to that described in ***Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168***, 2012 SCC 68 at paras 107-108, [2012] 3 SCR 489 where the Supreme Court made the point that the CRTC's broad mandate to set rates and licensing conditions "involve 'a polycentric exercise', necessitating a 'considerable scope' of jurisdiction".

example, ***Smith***, *supra* at paras 27-33; ***Russell Inns***, *supra* at paras 68-78; and ***Mowat***, *supra* at paras 25-27.

[66] Admittedly, in ***Stores Block***, the Supreme Court, by a narrow 4-3 split, did characterize as "jurisdictional" and review for correctness the issue of whether the Commission's predecessor, the EUB, had the power to allocate proceeds of the sale of a public utility's assets to ratepayers. However, three points must be made. First, ***Stores Block*** preceded the Supreme Court's reformulation of the test for judicial review in ***Dunsmuir*** and this Court must now view the characterization of issues through the ***Dunsmuir*** lens. Put simply, that was then, and this is now. Second, the narrowing of the concept of "true jurisdictional issues" post-***Dunsmuir*** has led to increased deference towards utility regulators even where the so-called "regulatory compact" may be implicated: see Dustin Kenall, "De-Regulating the Regulatory Compact: The Legacy of *Dunsmuir* and the "Jurisdictional" Question Doctrine" (2011) 24 Can J Admin L & Prac 115; ***Toronto Hydro-Electric System Limited v Ontario Energy Board***, 2010 ONCA 284, 99 OR (3d) 481, rev'g (2008), 93 OR (3d) 380 (SCJ), leave to appeal to SCC refused, (2010), 280 OAC 400 (note). Third, the question before this Court does not involve as in ***Stores Block*** an open-ended concept of "public interest" (though I hasten to add that I make no comment on the scope of the Commission's proper authority under this concept) but rather specific wording dealing with the awarding of costs.[26]

[67] Nor does this Court's decision in ***Shaw v Alberta (Utilities Commission)***, 2012 ABCA 378, 539 AR 315 [***Shaw***] support the position of the ATCO Utilities. ***Shaw*** concerned legislative changes to utilities regulation and their effect on the Commission's ability to consider the public interest as part of a needs assessment for transmission lines. This Court found that the question was one of true jurisdiction since it had to be determined whether, as a result of legislative amendment, the issue remained within the Commission's statutory mandate or had been transferred to the legislature or executive. That situation is clearly distinguishable from the present appeals, which, unlike ***Shaw***, do not involve the question of whether it is the Commission or some other body or branch of government that has the authority to consider a particular subject matter.

[68] In summary, the Commission made its legal costs decisions on the basis of its interpretation of the *Act*. As this is its home statute, reasonableness presumptively applies and the ATCO Utilities have been unsuccessful in establishing that the applicable standard of review should be correctness. Accordingly, the Commission's conclusion that it has the statutory authority to award legal costs in the exercise of its reasonable discretion separate and apart from prudently incurred costs recoverable under the *Act* is to be assessed for reasonableness.

[26] Further, after ***Stores Block***, and pre-***Dunsmuir***, courts found ways to distinguish what some viewed as an unnecessarily narrow interpretation of the EUB's authority: see ***Natural Resource Gas Ltd. v Ontario Energy Board*** (2006), 214 OAC 236 (CA).

[69] All this said, even if I am wrong and the standard of review that applied to the Commission's interpretation of the scope of its authority to award legal costs were correctness, that standard would be met in any event. I now turn to why the Commission's decision that it has the authority and right to determine the amount of legal costs, if any, awarded to regulated companies appearing in proceedings before it is not only reasonable in law, it is correct.[27]

V. Analysis

A. Legal Costs in Proceedings Before the Commission

[70] It is important to bear in mind the different categories of legal costs that utility companies might incur in various proceedings before the Commission. As is evident from these appeals, not all of those legal costs are those typically called regulatory costs, namely ones incurred in the course of rate-base rate of return hearings.

[71] The UAD Proceeding did not involve actual rate-setting for a specific utility. The primary focus in the UAD Proceeding was initially on the implications of ***Stores Block***. In dealing with the consequences of ***Stores Block***, the Commission was required to confront many different issues, the vast majority of which concerned the extent to which the shareholders of Alberta Utilities or Alberta ratepayers would benefit – or not – from certain issues and consequences flowing from ***Stores Block***. The UAD Proceeding was later expanded to include issues relating to stranded assets and abandonment of production assets owned by gas utilities, both of which are linked to deregulation of the utilities sector.

[72] The PBR Proceeding too did not involve traditional rate-base regulation. It was part of the overall reform of the utility sector consequential upon the Alberta government's deregulation initiative. Those reforms included the Commission's initiative to replace rate of return regulation with PBR. The intention was to devise incentives to encourage Alberta Utilities to become more efficient. The purpose of the PBR Proceeding was to allow the Commission to consider applications by the ATCO Utilities and other Alberta Utilities for approval of their multi-year PBR plans. Thus, while the PBR Proceeding was directed to rates generally, it was a fundamentally different proceeding than the traditional hearing involving rate-base rate of return regulation.

[73] The point from all this is that in proceedings before the Commission, legal costs will be incurred for a variety of reasons. Not all are related to rate of return regulation.

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[27] This avoids any issue about whether there would be, in any event, only one reasonable interpretation about the scope of the Commission's authority with respect to the awarding of legal costs: see ***McLean***, *supra* at para 38.

B. Interpretive Approach

[74] The starting point for considering what the relevant Alberta legislation provides on the subject of legal costs in proceedings before the Commission is this. There is no requirement in law compelling the Alberta government to statutorily provide for any legal costs to be paid to any party appearing before any tribunal established by it. As a general principle, the scope of authority of a provincially-created tribunal, including its ability to award legal costs in proceedings before it, falls within the exclusive domain of the provincial government. Tribunals are not courts and thus court costs, as that term is commonly understood, are not a mandatory feature of proceedings before tribunals. For example, the default rule for those appearing before the Workers Compensation Board in Alberta is no costs for anyone. In fact, the Legislature might also provide that the regulated entities are responsible for part or all of the costs of the regulating tribunal.[28]

[75] The case law is clear that the *Act* must be read in its entire context, in its grammatical and ordinary sense and in harmony with the legislative scheme, its object and the intention of the legislature: ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27 at para 21. When the Legislature has expressly addressed a matter, those words are to be taken as meaningful and not as window dressing: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) [Sullivan] at 210 ("It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.")

[76] Further, since all words in a statute take their colour from their surroundings, a court is obliged to consider the total context of the provisions to be interpreted: see ***Stores Block***, *supra* at para 48; ***Chieu v Canada (Minister of Citizenship and Immigration)***, 2002 SCC 3 at para 34, [2002] 1 SCR 84; ***Bell ExpressVu Limited Partnership v Rex***, 2002 SCC 42 at para 27, [2002] 2 SCR 559 [***Bell ExpressVu***]; Sullivan, *supra* at 24-25. In this regard, one must also consider how the *Act* operates with other relevant legislation since the Commission is governed by multiple pieces of legislation: ***Shaw***, *supra* at para 32. This larger statutory scheme under which the Commission carries out its multi-faceted duties cannot be ignored. As Baroness Hale correctly observed in ***Stack v Dowden***, [2007] UKHL 17 at para 69: "In law, context is everything". Statutes dealing with the same subject matter should be interpreted in a manner that ensures harmony, coherence and consistency between them: ***Németh v Canada (Justice)***, 2010 SCC 56 at para 14, [2010] 3 SCR 281; Sullivan, *supra* at 224; ***Lévis (City) v Fraternité des policiers de Lévis Inc.***, 2007 SCC 14 at para 47, [2007] 1 SCR 591; ***Bell ExpressVu***, *supra* at para 27.

[77] The purpose of this interpretive exercise has been summed up this way. "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co. v Canada (Attorney General)***, 2005 SCC 26 at para 102, [2005] 1 SCR 533. Against

[28] Indeed, s. 70 of the *Act* allows the Commission to impose an "administrative fee" in order to pay for its own expenditures associated with carrying out its duties. It may impose this on an owner of a utility. Section 70(6) deems the amount thus paid a cost for the purposes of the *Public Utilities Act*. In addition, historically, the costs of the Alberta Energy Regulator, and its predecessor ERCB, have been paid in part by the companies being regulated: see ss. 28 and 29 of *REDA*.

this interpretive backdrop, I will now explain why I have concluded that the Commission's interpretation of its authority under the *Act* with respect to the issue of legal costs is reasonable.

C. Why the Commission's Interpretation of Its Authority Under the *Act* is Reasonable

[78] The ATCO Utilities contend that the *Act* does not grant the Commission any authority to award legal costs according to its own guidelines. Instead, they maintain that as regulated utilities, they have a *right* to full recovery of all their prudently incurred costs and this includes their legal costs. In their view, the source of that right can be found in the relevant legislation and in the regulatory compact. On their theory, Alberta ratepayers would be responsible every day in every way for every legal cost that the Alberta Utilities incur in proceedings before the Commission (subject only to their being "prudently incurred"). This assertion, all-encompassing in its sweep, would effectively strip the Commission of any authority to require a regulated utility to bear its own legal costs or even to limit those legal costs in accordance with the Scale of Costs adopted by the Commission or otherwise.

[79] The Commission concluded that the *Act* conferred on the Commission the authority to decide whether, and to whom, to award legal costs and the amount of those legal costs. That conclusion is entirely reasonable. I offer six reasons why this is so. Indeed, I am bound to say that this conclusion is correct.

1. The *Act* Grants the Commission Discretionary Authority Over Costs

[80] First, the textual wording of the relevant legislation confers on the Commission the authority and discretion with respect to the awarding of costs. Tribunals obtain their jurisdiction from express statutory grants and by application of the doctrine of jurisdiction by necessary implication: ***Stores Block***, *supra* at para 38; ***Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)***, [1989] 1 SCR 1722 at 1756. The Alberta government has historically chosen to confer a very broad grant of authority on the tribunal responsible for regulating the utility sector in this province. This was recognized by Binnie J in ***Stores Block***, *supra* at para 113 (in dissent but not on this point):

> While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most.

[81] That is most assuredly so, perhaps in part because Alberta has been at the forefront of the development of the energy industry in this country; perhaps in part because Alberta recognized long ago that tribunals governing the utility sector required a broad jurisdiction to address the issues flowing from a large province with, at an earlier time, a limited population; and perhaps because the governments of this province have, throughout this province's history, understood

the strong public interest in tempering the consequences of natural monopolies through a tribunal with the robust powers required to accomplish this objective.

[82] The reality is this. For at least the last 91 years, the Legislature of this province has conferred on the Commission and its predecessors, including the PUB, the express statutory authority to determine whether to award participants in proceedings or hearings before it, their legal costs, if any, and, if so, the amount of those legal costs. This grant represents a deliberate legislative choice.

[83] Section 21, the current statutory provision on this subject, has been in the *Act* since the *Act* came into force January 1, 2008. Since then, the Commission has consistently relied on this section in deciding when and if costs should be awarded to participants in proceedings or hearings before it, and if so, the amount of those costs. Section 21(1) provides as follows:

> **Costs of Proceedings**
>
> 21(1) The Commission may order by whom and to whom its costs and any other costs of or incidental to any hearing or other proceeding of the Commission are to be paid.

[84] Costs, as that term is used in s. 21(1), includes legal costs. The Supreme Court has previously considered the question of what meaning ought to be ascribed to the term "costs" in an administrative tribunal's enabling legislation. As noted by LeDain J in ***Bell Canada v Consumers' Association of Canada***, [1986] 1 SCR 190 at 207: "I would agree that the word "costs" ... must carry the same general connotation as legal costs".

[85] The ATCO Utilities assert that s. 21 is only intended to authorize recovery of costs *by the Commission and interveners*. That is not so. Neither the wording of the statutory provisions nor the legislative history supports this interpretation. The section expressly states that the Commission "may order *by whom* and *to whom*" not only its costs but "*any other costs of or incidental to any hearing or other proceeding of the Commission are to be paid*" [Emphasis added]. This wording is clearly broad enough to include "applicants" as well as "interveners" in proceedings before the Commission.

[86] This discretion on the part of the Commission to decide when and if costs will be awarded, and to whom, also happens to be consistent with the legislative history relating to the Commission's predecessors for more than nine decades in this province. That this is so can be seen by examining statutory provisions under earlier legislation. Language similar to s. 21(1) allowing the EUB and before it, the PUB, to determine the amount of costs, and to whom and by whom they would be payable, can be traced back to 1923: see SA 1923, c 53, s. 49. The costs language from that era was essentially carried forward through RSA 1942, c 28, s. 50; RSA 1955, c 267, s. 51; SA 1960, c 85, s. 60; RSA 1970, c 302, s. 60; and RSA 1980, c P-37, s. 60. A

subsection was added in SA 1990, c 34, s. 3, creating a s. 60 that essentially mirrored what became s. 68 in the 2000 version of the *Public Utilities Board Act*.

[87] Prior to the *Act*, the EUB, the Commission's predecessor, had the express right to award costs in its discretion under s. 68 of the *Public Utilities Board Act*, RSA 2000, c P-45 as follows:[29]

> 68(1) The costs of and incidental to any proceeding before the Board, except as otherwise provided in this Act, are in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order that its costs of or incidental to any proceeding before the Board are to be paid and by whom they are to be paid.
>
> (3) The Board may order by whom and to whom any costs are to [be] paid, and by whom they are to be taxed and allowed.
>
> (4) The Board may prescribe a scale under which costs are to be taxed.
>
> (5) The Board may, with the approval of the Lieutenant Governor in Council, prescribe the fees to be paid by local authorities or persons interested in the matters that come before the Board.

[88] When the *Act* was passed in 2007, Part I of the *Public Utilities Board Act*, which included s. 68, was repealed.[30] Instead, the Legislature included a costs provision in the *Act*, namely s. 21(1). What the Legislature has done in its more contemporary and plain language wording under the *Act* is to combine in this general s. 21(1) the various sections involving the authority to make costs orders under s. 68, in particular ss. 68(2) and (3).

[89] This brief historical review reveals that, for 91 years, the Legislature of this Province has seen fit to grant to every tribunal responsible for regulating the utility sector in Alberta – the PUB, later the EUB and now the Commission – the general discretion to award costs of proceedings before it. In wording familiar to this day, the 1923 legislation gave the PUB the authority to order "by whom and to whom any costs" were to be paid.[31] That necessarily includes a regulated utility participating in proceedings before that tribunal. The PUB had this authority

[29] While these powers were originally granted to the PUB, the EUB assumed the same powers when it was created in 1995: *EUB Act*, s. 10(1).

[30] At that time, the *Public Utilities Board Act* was renamed the *Public Utilities Act*: see SA 2007, c A-37.2, s. 82(25).

[31] See s. 49(2) of the *Public Utilities Act*, SA 1923, c 53.

from 1923 until 1960 under various provisions of the *Public Utilities Act* and from 1960 to 1995 under s. 60 of the *Public Utilities Board Act*. And the EUB had this authority to determine whether to award costs, if any, and by whom and to whom and how much under the *Public Utilities Board Act* (s. 60 from 1995 to 2000 and s. 68 from 2000 to 2007).

[90] When the Legislature repealed Part I of the *Public Utilities Board Act*, including s. 68, and replaced it with the *Act* and in particular s. 21, there is no indication that the Legislature intended to strip the Commission of its right to determine by whom and to whom costs would be payable in proceedings before the Commission. Indeed, previously, s. 68 constrained the general authority of the PUB since this section stated that the PUB had the power to award costs "except as otherwise provided in this Act". However, by contrast, under the *Act*, the Commission's discretionary power to award costs is not stated to be subject to – and is not subject to – any statutory exceptions. In particular, the Commission's general discretion is not statutorily restricted to assessing only the prudence of legal costs incurred by utilities in proceedings before the Commission.

[91] In adopting the present legislative framework, including the *Act*, the Legislature also explicitly granted the Commission, as with its predecessors, the power and right to make rules governing any matter within its jurisdiction, that is within its authority under the *Act*. Hence s. 76(1)(e) of the *Act* provides as follows:

> (1) The Commission may make rules governing any matter or person within its jurisdiction, including ...
>
> > (e) rules of practice governing the Commission's procedure and hearings ....

[92] Since the awarding of costs falls within the Commission's jurisdiction, that power includes the right to make rules relating to the costs payable by, and to, applicants and interveners in proceedings before the Commission. In accordance with this more general rule-making authority under the *Act*, the Commission has adopted Rule 022 dealing with costs. Despite the fact that Rule 022 is entitled "Rules on Intervener Costs in Utility Rate Proceedings", it is clear from its provisions that it is intended to apply, and does, not only to interveners but also to applicants in proceedings before it. Section 2(c) defines "costs order" as an order of the Commission awarding costs on a claim for costs to a "participant" under s. 21 of the *Act*. In turn, "participant" is defined in s. 2(d) as an *applicant or an intervener* in a hearing or proceeding for a rate application or related to a rate application.[32] Therefore, the Rule explicitly distinguishes between applicants, on the one hand, and interveners, on the other – and includes both.

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[32] Section 1 of Rule 022 also states: "These rules apply to hearings or proceedings for rate applications of utilities under the jurisdiction of the Commission or related to rate applications". Regardless, the Commission is entitled, in exercising its general discretion to award costs, to use the Scale of Costs for all forms of proceedings or hearings before it.

[93] As noted, Rule 022 includes a Scale of Costs that has been adopted by the Commission. Under s. 3.3 of Rule 022, an "applicant" is eligible to claim costs. Section 9.1 of Rule 022 provides that an eligible participant may apply to the Commission for an award of costs incurred in a hearing or other proceeding by filing a costs claim. Under s. 9.2, an eligible participant may only claim costs in accordance with the Scale of Costs. Given the amounts specified in the Scale of Costs, a utility reimbursed in accordance with that Scale is essentially recovering the majority of its *solicitor-client costs*. Moreover, the Scale of Costs is flexible, not rigid, and contemplates the possibility of the Commission's adjusting the amounts it awards for legal costs – and that includes increasing those amounts – depending on the circumstances of the individual case and the eligible participant.

[94] The ATCO Utilities made much of the fact that the discussions in the Legislature about Bill 46 that resulted in the *Act* focussed on the funding of legal costs for interveners.[33] In their view, those discussions support their assertion that s. 21(1) was intended to deal only with the costs of interveners and the Commission. Indeed, they went so far as to argue that this section was added to ensure that the Commission could award costs for interveners, the implication being that the Commission's predecessors did not have this right. However, this is not consistent with the legislative history of utility regulation in Alberta.

[95] Prior to the passage of the *Act* in 2007, a broader class, interveners generally, had the right to seek funding for their legal costs for proceedings before the Commission.[34] A review of Hansard reveals that the Alberta government decided that only "local interveners", and not other interveners, should have the right to recover their legal costs when challenging the location of certain facilities. Thus, in the *Act*, the Legislature restricted funding in certain cases to what it defined as "local interveners".[35] In doing so, it also included a separate section, s. 22(2), dealing with costs payable to local interveners, including the Commission's right to make rules for payment of costs to them.[36] The *Act* also gave the Commission the right under s. 21(2) to make rules respecting the payment of costs to interveners other than local interveners.[37] The point to be

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[33] Alberta, Legislative Assembly, *Hansard*, 26th Leg, 3rd Sess (15 November 2007) at 2005 (Mr. Knight).

[34] It has been noted that "[t]he Alberta Public Utilities Board was the first regulatory tribunal in Canada to award intervenors' costs": Janet Keeping, "Intervenors' Costs" (1990) 3 Can J Admin L & Prac 81 at 86.

[35] For purposes of s. 22, "'local intervener' means a person or group or association of persons who, in the opinion of the Commission, (a) has an interest in, and (b) is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision or order of the Commission in or as a result of a hearing or other proceeding of the Commission on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, but unless otherwise authorized by the Commission does not include a person or group or association of persons whose business interest may include a hydro development, power plant or transmission line or a gas utility pipeline."

[36] Section 22(2) provides: "The Commission may make rules respecting the payment of costs to a local intervener for participation in any hearing or other proceeding of the Commission."

[37] Thus, s. 21(2) provides: "The Commission may make rules respecting the payment of costs to an intervener other than a local intervener referred to in section 22."

taken from all this is that nothing in either s. 21(2) or s. 22 derogates from the Commission's general discretion under s. 21(1) to issue costs orders relating to those appearing in proceedings before it, whether as applicants or interveners.

[96] Further, it should be noted that s. 11 of the *Act* confers on the Commission the powers of a superior court judge regarding the payment of costs:

> In addition to any other powers conferred or imposed by this Act or any other enactment, the Commission has, in regard to the attendance and examination of witnesses, the production and inspection of records or other documents, the enforcement of its orders, *the payment of costs* and all other matters necessary or proper for the due exercise of its jurisdiction or otherwise for carrying any of its powers into effect, all the powers, rights, privileges and immunities that are vested in a judge of the Court of Queen's Bench. [Emphasis added]

[97] Since this section extends to the Commission the same powers respecting the payment of costs that a superior court judge enjoys, that includes the awarding of costs. Section 11 therefore reinforces the Commission's right to determine when and to whom legal costs will be awarded in connection with the proceedings before it. However, s. 11 does not constrain the right on the part of the Commission to make its own rules relating to the *amount* of those costs and the considerations it may take into account in awarding them. This it has done in Rule 022.

[98] Further, a general discretion to award costs necessarily implies the discretion to decline to award costs: ***Northern Engineering & Dev. Co. v Philip***, [1930] 3 DLR 387, [1930] 1 WWR 615 (Man CA).[38] Indeed, this Court has held that it will not interfere simply because a Board exercises its discretion to deny costs for participating in a hearing, even in the absence of reasons: ***Wood Buffalo (Regional Municipality) v Alberta (Energy and Utilities Board)***, 2007 ABCA 192 at paras 9-10, 417 AR 222.

[99] While not directly in issue here, the Commission's discretion in awarding costs must be exercised in a principled fashion: ***Green, Michaels and Associates Ltd., City of Edmonton and Consumers' Association of Canada (Alberta Branch) v Public Utilities Board*** (1979), 13 AR 574 at paras 20-23, 94 DLR (3d) 641 (Alta SC(AD)) [***Green***]; ***Consumers' Association of Canada (Alberta) and Edmonton v Public Utilities Board*** (1985), 58 AR 72 at paras 18-28 (CA). However, where, as here, a statute grants a tribunal discretion and the ability to pass regulations (which includes guidelines) regarding the exercise of that discretion, "the tribunal is able to mold the exercise of the discretion in any reasonable way that is not inconsistent with the statute": ***Kelly v Alberta (Energy Resources Conservation Board)***, 2012 ABCA 19 at para 17,

[38] This very point was made by the Canadian Association of Petroleum Producers in opposing the claim by the ATCO Utilities for full recovery of their legal costs based on the prudently incurred standard. See para 21 of ARD 69 at F4.

519 AR 284. In this regard, as this Court's decision in ***Green*** itself illustrates, a utility board can exercise its discretion on legal costs in a principled manner by following its own guidelines. Moreover, guidelines passed by tribunals under their grant of jurisdiction to do so are themselves entitled to deference when they are within that grant framework: see ***Parada v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2011 ABCA 44 at paras 26-28, 499 AR 169; and ***Martin v Alberta (Workers' Compensation Board)***, 2014 SCC 25 at para 11, [2014] 1 SCR 546 [***Martin***].[39]

[100] The exercise of discretion can include such considerations as convenience, utility, and savings of expense: ***Green***, *supra* at para 21. That is exactly what the Commission, as the successor to the PUB, provided for here. It set out in s. 11.2 of Rule 022 an extensive list of the considerations that the Commission may take into account in making a costs award. That list, borne out of its own experience and that of its predecessors, the EUB and the PUB, includes considering whether the party claiming costs:

> (a) asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by the relevant witness;
>
> (b) made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by another participant;
>
> (c) made reasonable efforts to cooperate with other parties to reduce the duplication of evidence and questions or to combine its submission with that of similarly interested participants;
>
> (d) presented in oral evidence significant new evidence that was available to it at the time it filed documentary evidence but was not filed at that time;
>
> (e) failed to comply with a direction of the Commission, including a direction on the filing of evidence;
>
> (f) submitted evidence and argument on issues that was not relevant;
>
> (g) needed legal or technical assistance to take part in the hearing or other proceeding;

[39] In *Martin*, *supra*, the Supreme Court confirmed that the proper standard of review for such regulations was reasonableness. In so doing, it applied that standard not merely to the application of the policy guideline adopted by the Workers' Compensation Board, but directly to the policy itself: see paras 47-54.

> (h) engaged in conduct that unnecessarily lengthened the duration of the hearing or other proceeding or resulted in unnecessary costs to the applicant or other participants;
>
> (i) failed to comply with these rules or Rule 001, *Rules of Practice*.

[101] In summary, the Alberta Legislature chose to confer on the Commission, as with its predecessors, a discretionary costs authority coupled with the right on the part of the Commission to create costs guidelines with respect to its proceedings. The Commission passed costs guidelines, namely Rule 022, which it then applied in deciding the amount of the legal costs to be awarded to the ATCO Utilities. Thus, in concluding that it possessed the statutory authority to make the costs orders that it did, the Commission acted reasonably.[40]

2. The Legislation Does Not Provide for Full Recovery of Legal Costs by Alberta Utilities

[102] There is nothing in the relevant legislation that entitles Alberta Utilities to full recovery of their legal costs. The ATCO Utilities point to s. 4(3) of the *Roles, Relationships and Responsibilities Regulation,* AR 186/2003 under the *Gas Utilities Act*, RSA 2000, c G-5, and ss. 102 and 122 of the *Electric Utilities Act*, RSA 2003, c E-5.1 in support of their claim for full recovery of their legal costs as part of their prudent costs.

[103] Section 4(3) of the *Roles, Relationships and Responsibilities Regulation* provides:

> A gas distributor is entitled to recover in its tariffs the prudent costs as determined by the Commission that are incurred by the gas distributor to meet the requirements of subsection (1).

Section 4(1) in turn lists a number of functions of a gas distributor in respect of which it is statutorily entitled to recover its prudent costs. However, legal costs for attending proceedings before the Commission is not one of them. All of the listed functions relate to costs associated with certain functions inherent in gas distribution. Hence, there is nothing in s. 4(1) that would entitle a gas distributor, in this case, ATCO Gas, to its prudent legal costs for participating in hearings or proceedings before the Commission.

[104] With respect to the *Electric Utilities Act*, s. 102(1) requires each owner of an electric distribution system to prepare a distribution tariff for the purpose of recovering the prudent costs "of providing electric distribution service by means of the owner's electric distribution system." Again, s. 102 does not confer on the owner a "right" to recover its legal costs as "prudent costs".

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[40] This being so, the Commission is entitled to deference in respect of its discretionary costs orders: ***Lavesta Area Group v Alberta (Energy and Utilities Board)***, 2009 ABCA 155 at para 22; see also ***Newfoundland & Labrador Hydro v Newfoundland & Labrador Federation of Municipalities*** (1979), 24 Nfld & PEIR 317 at paras 5-7, 24-25 (CA); ***Facility Association v Board of Commissioners of Public Utilities (Nfld and Lab) et al.***, 2004 NLSCTD 81 at paras 56-63, 237 Nfld & PEIR 285, aff'd 2005 NLCA 56 at para 4, 250 Nfld & PEIR 1.

Section 122 is the general section imposing on the Commission the principle it must follow when considering a tariff application. Section 122(1) provides that when considering a tariff application, the Commission must have regard for the principle that a tariff approved by it must provide the owner of an electric utility with a reasonable opportunity to recover a number of costs. It lists several costs from s. 122(1)(a) to (h) inclusive. None relate to legal costs of proceedings before the Commission. All are specific to other matters. The only general one is s. 122(1)(h), which provides:

> any other prudent costs and expenses that the Commission considers appropriate, including a fair allocation of the owner's costs and expenses that relate to any or all of the owner's electric utilities

[105] The logic of this subsection read together with the other subsections in s. 122 is manifest. It is intended to relate to other costs and expenses of providing *services* to ratepayers in addition to those mentioned in subsections (a) to (g) inclusive, not the legal costs of attending regulatory proceedings before the Commission, much less other "generic" proceedings. Had the Alberta Legislature wished to include legal costs as part of those prudently incurred costs to which utilities were entitled, it could have explicitly done so. It did not. It expressly left these in the discretion of the Commission. The existence of that express discretionary authority over costs also contradicts the assertion that legal costs are included within the scope of the general wording in s. 122(1)(h).

3. Policy Reasons Support the Discretion in Favour of the Commission

[106] Policy reasons also strongly favour the Legislature's decision to grant the Commission a general discretion with respect to the awarding of legal costs. Without the ability to regulate legal costs as the Commission considers appropriate, the Commission would be unduly restricted in its ability to govern its proceedings. Without this control, there would be no effective incentive on any party in proceedings before the Commission to minimize their legal costs. If all legal costs (I am here referring to those that meet the prudence standard) can be paid from the ratepayer purse, where is the incentive for a utility to hold legal costs in check and minimize challenges and objections or the scope of the subject proceedings? And if all legal costs are recoverable, where is the incentive not to seek review and variance of every Commission decision adverse to the utility? Finally, if all legal costs of a utility company are recoverable as prudent costs no matter the nature of the proceedings before the Commission, where is the balance between the utility company and the ratepayers?

4. The Regulatory Compact Cannot Trump the Statutory Scheme Adopted by the Legislature

[107] Whatever the scope of the so-called regulatory compact at common law, it cannot trump statutory provisions that define the terms of the regulatory compact in Alberta. The origins of the

regulatory compact can be traced back to American law.[41] It arose out of a belief that efficient competition was not practical for certain utilities. The underlying concept was that the cost of providing parallel distribution systems where infrastructure costs were high was simply not practicable. To encourage utility companies to spend the relatively high capital costs required to put a functioning utility system in place, legislatures granted utilities exclusive rights to serve customers in a given service area. Since this meant a monopoly in favour of the utility, the utility was also required to serve all customers in that area. The obligation to serve is therefore the corollary of the utility having been granted a monopoly.[42]

[108] The common law in Canada imposed a duty to serve on suppliers of gas and electricity from an early stage in our history: see ***Canada (Attorney General) v Toronto (City of)*** (1893), 23 SCR 514.[43] The courts were the ones that initially intervened to prevent abuses of monopoly powers. However, it was not long before various legislatures transferred to regulatory tribunals the responsibility to regulate public utilities. As noted, in Alberta, the earliest body invested with broad regulatory powers over gas and electric utilities was the PUB, beginning in 1915.

[109] It is sometimes said that the regulatory compact means that a utility has a "right" to recover its costs because of its "obligation to serve". However, this is an overstatement of the concept. Even at common law, the regulatory compact did not guarantee full recovery of all costs. It offered an "opportunity" both to earn a reasonable return on its prudent investment – its capital costs – and to recover its prudently incurred expenses – its operating costs. As Kenneth Rose stated in *An Economic and Legal Perspective on Electric Utility Transition Costs* (Columbus, Ohio: National Regulatory Research Institute, 1996) at 43:

> In return for undertaking these obligations [including the obligation to serve, to provide safe and reliable service and not to engage in undue price discrimination], the utility is granted an *opportunity* to earn a reasonable return on its prudent investment and to recover its prudently-incurred expenses. *It does not bestow on the utility a legal right to recover all incurred costs or a return on its investments...* There simply is no absolute guarantee that a reasonable return will be earned or that reasonable costs will be recovered.[Emphasis added]

[110] Further, the specific terms of the regulatory compact were never cast in stone but subject always to whatever limitations might be imposed by the relevant legislature. Put into the context

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[41] See the decision of the United States Supreme Court in ***Munn v Illinois***, 94 US 113 (1876).

[42] To put it as Michael H. Ryan did in "Telecommunications Carriers and the 'Duty to Serve'" (2012) 57:3 McGill LJ 519 [Ryan] at 537: "Public-utility services have historically been provided on a monopoly (or near-monopoly) basis and it seems fair to say that the existence of a monopoly has been one of the defining features of the public utility."

[43] For an excellent discussion tracing the origins of the common law duty to serve, see Ryan, *supra* at 522-534.

of this case, the scope of the regulatory compact falls within the jurisdiction of the Alberta government. In keeping with its right to determine the scope and terms of the regulatory compact, the Legislature has adopted legislation designed to govern its operation in Alberta. That legislation under both the *Electric Utilities Act* and the *Gas Utilities Act* grants regulated utility companies the *opportunity* to recover prudent costs as expressly provided for in the governing legislation.[44] But as noted, neither piece of legislation provides for legal costs to be characterized and treated as prudent costs. To the contrary. As noted, the *Act* expressly confers on the Commission the discretion to decide in an individual case whether the legal costs of proceedings before it will be payable to a regulated utility and it also grants the Commission the right to adopt rules in respect of payment of those costs.

[111] In other words, even if the regulatory compact at common law "guaranteed" recovery of all prudent legal costs, any such claimed "right" to legal costs under the common law must give way to a contrary legislative intent.[45] That contrary legislative intent is manifest in the express provisions adopted by the Alberta Legislature with respect to legal costs. To repeat, the regulatory body governing the utilities sector in this province has had the general discretion to determine to whom and by whom legal costs would be payable in connection with proceedings before that body for almost a century.

[112] In summary, the regulatory compact is governed by the statutory framework under which it operates in Alberta. The Alberta government has the right to decide the shape and terms of that framework unless the legislation it adopts is unconstitutional or void for uncertainty. No such challenge to the legislation has been made in these cases.

5. The Disputed Legal Costs Are Not Legal Costs Incurred in Rate-Setting Hearings

[113] In any event, the legal costs in dispute here do not fall within the scope of regulatory costs incurred in rate-setting hearings. In recent years, the so-called regulatory compact, involving as it does natural monopolies, has increasingly been challenged as the theory of the regulated monopoly has collided with the reality of the inefficiencies embedded in its operation. That has led to reforms of the utility sector in Alberta. In turn, that has resulted in proceedings by the Commission, sometimes characterized as generic proceedings, to deal with the consequences of deregulation and related court decisions. Proceedings in these categories do not involve rate-setting in the historical sense of that term.

[44] Section 122 of the *Electric Utilities Act*, for example, ensures that a utility has a reasonable opportunity to recover certain kinds of prudent costs and expenses only: Decision 2005-053 at p. 5. A reasonable opportunity does not guarantee recovery: Decision 2004-012 at p. 8.

[45] In the United States, where a state chooses to allow for regulatory costs, or what is often called "rate case expenses", an express provision permitting recovery of those costs may be included in the governing legislation. For example, see ***Oncor Electric Delivery Company v Public Utility Commission of Texas***, 406 SW 3d 253 at 263 (Tex App Ct 2013): "The utility's operating expenses may include reasonable rate case expenses", citing s. 36.061(b)(2) of the *Texas Utility Code*, which provides "reasonable costs of participating in a proceeding" (see ***Texas Industrial Energy Consumers v Centerpoint Energy Houston Electric***, 324 SW 3d 95 at 106 (Tex Sup Ct 2010)).

[114] Rate-setting hearings require the Commission to determine whether the rates claimed are "just and reasonable". In discharging this obligation, the Commission must act in the public interest by considering both the customers' right to fair and reasonable rates and the utilities' reasonable *opportunity* to its prudent costs: ***ATCO Electric Limited v Alberta (Energy and Utilities Board)***, 2004 ABCA 215 at paras 131-132, 152, 361 AR 1. However, neither the UAD Proceeding nor the PBR Proceeding dealt with rate-setting in the traditional sense.

[115] In the UAD Proceeding, the period for which ATCO received no legal costs at all related to the time frame when the issues before the Commission were limited to the implications of ***Stores Block***. That was from April 2008 to November 2008. Those issues were not related to providing actual utility services to Alberta consumers. This part of the UAD Proceeding was directed to the ripple effects of ***Stores Block***. ATCO Gas won that case. Having done so, the ATCO Utilities were no doubt very much interested in ensuring that the new issues of concern to the Commission not be decided in a way that was disadvantageous to the ATCO Utilities and their shareholders.

[116] This is perfectly understandable. As Bastarache J correctly pointed out in ***Stores Block***, *supra* at para 78, private companies are run for profit. Indeed, that is what allows them to raise the capital they require for capital intensive utility projects. The Alberta Utilities are not running charities for the benefit of their ratepayers. But equally, Alberta ratepayers are not running charities for the benefit of the Alberta Utilities. The Commission concluded, in essence, that it was not fair to download onto Alberta consumers the legal costs of the Alberta Utilities, including the ATCO Utilities, in making submissions before the Commission as to how the fallout from ***Stores Block*** might, or might not, further benefit them or their shareholders. The Commission gave the ATCO Utilities the gift of standing in the UAD Proceeding. It did not promise that this gift would include allowing them to recover their legal costs from their ratepayers when the issues before the Commission involved the implications of ***Stores Block***. In fact, the Commission initially made it clear – and repeatedly – that none of the parties to the UAD Proceeding would be entitled to claim costs (which would in turn be recoverable from ratepayers).

[117] Moreover, as already noted, for the time period from the resumption of the UAD Proceeding on October 17, 2012 and following, when the focus shifted to stranded assets and production abandonment, the Commission did award the ATCO Utilities a significant portion of their claimed legal costs. This was so despite the fact that these two issues related to the consequences of deregulation.

[118] As for the PBR Proceeding, the Commission awarded the ATCO Utilities their legal costs in accordance with the Scale of Costs plus an additional 20%. The focus of the PBR Proceeding was on the PBR plans proposed by certain Alberta Utilities to replace rate-based regulation. PBR is intended to reward utility companies and their shareholders if performance is improved. The theory behind this is that efficiencies arising therefrom will benefit ratepayers too. The PBR

plans proposed by the ATCO Utilities presumably benefitted them since they designed those plans themselves. In any event, in the result, the ATCO Utilities received the vast majority of their claimed legal costs.

6. Not Awarding or Limiting Legal Costs Does Not Improperly Reduce Rate of Return

[119] Finally, the Commission's decision on legal costs in an individual rate-setting case does not negatively impact on a utility's rate of return in an improper or unfair manner. It has been suggested that if the ATCO Utilities did not receive their prudently incurred legal costs, this would unfairly reduce their rate of return. But this is not so. The Commission is well aware of what its practices and rules are regarding the awarding of legal costs. When it sets a rate of return in an individual case, the Commission knows how it has treated, or will be treating, the issue of legal costs and whether they will be fully or partly recoverable as part of the rate base. Thus, this is necessarily taken into account in determining the rate of return. Put another way, if utilities had a "right" to full recovery of all their legal costs in every proceeding before the Commission, the rate of return set by the Commission in an individual case might well be lower.

D. Conclusion

[120] For all of these reasons, the Commission's interpretation of the relevant legislation is not only reasonable, it is correct. The Commission possesses the statutory authority to decide when, and in what circumstances, it will award legal costs to those appearing in proceedings before it, including regulated utilities, and the amount of those legal costs. In other words, the Commission possesses a separate authority over legal costs apart from its rate-setting authority. In accordance with its discretionary costs authority, the Commission is permitted to treat legal costs differently than other costs, that is operating and capital costs, of regulated utilities. Thus, there is no merit in the assertion that, in exercising that authority, the Commission acted in any kind of arbitrary manner. The Commission's costs discretion is not fettered by some imaginary right not included in the legislative regime in effect in this province. The Commission was authorized by law to make the costs orders that it did.

E. What is Not in Issue Before This Court

[121] It bears pointing out that the issue before this Court does not involve how much the ATCO Utilities choose to pay their legal counsel for proceedings before the Commission but rather who decides how much of those legal costs will be recoverable from Alberta ratepayers and on what basis. The ATCO Utilities contend that there is a difference between recovery of all legal costs (providing they meet the prudently incurred standard) and legal costs awarded in accordance with the exercise of the Commission's discretion. Nothing makes that point clearer than these appeals. The ATCO Utilities argue that the Commission had no authority to deny them their costs for the initial phase of the UAD Proceeding.

[122] The ATCO Utilities also go further. They assert that limiting their costs to the Scale of Costs in the UAD Proceedings (for the period for which they were awarded) means that they received less than what they would have been entitled to recover as prudent legal costs. Similarly, they contend that even a 20% premium in addition to the Scale of Costs in the PBR Proceeding is not enough to meet what they claim they would have been awarded had the Commission awarded them their legal costs under the prudence standard. In other words, the ATCO Utilities reject the proposition that if their prudent legal costs were recoverable in both Proceedings, the costs awarded in accordance with the Commission's exercise of its discretion under Rule 022 would suffice to meet this standard.

[123] However, the focus of these appeals has not been on this issue. Apart from the general claim by the ATCO Utilities that such a difference would exist, we received no argument on this point.[46] The focus was properly on the issue on which leave was granted – whether the Commission possessed a separate authority to award legal costs. No one delved into whether the Commission's awarding of costs in accordance with Rule 022 and its Scale of Costs would, in any event, satisfy the prudence standard. Given the conclusions I have reached, this issue does not arise. However, if I am wrong in determining that the Commission did not err in its interpretation of its statutory authority, it does not necessarily follow that the ATCO Utilities would be entitled to recover additional legal costs. This would simply lead to the next question, namely whether there is a match between prudent legal costs and costs awarded by the Commission under Rule 022 and its Scale of Costs.

[124] In addition, this Court did not receive argument on what limits, if any, would apply to the exercise of the Commission's discretionary costs authority. In particular, would the Commission be acting unreasonably if it denied to a regulated utility its legal costs incurred in rate of return hearings as compared to the type of proceedings in question here? And what other limitations, if any, apply to a costs award by the Commission? These issues would in turn lead to others not before this Court. What has been the past practice in traditional regulatory rate-setting hearings? Should it, or should it not, continue to govern? Who is ultimately responsible for all, or substantially all, of the legal costs in rate of return hearings? How are those costs recovered? Has a proper balance been struck between the regulated utility companies and ratepayers? Leave was not granted on any of these issues and I decline to consider them further.

VI. Disposition

[125] In summary, the Commission did not err in law or jurisdiction by denying or limiting recovery of the ATCO Utilities' claimed legal costs in either the UAD Proceeding or the PBR Proceeding and by treating those costs differently than other costs. This is not a "starting point"

[46] Nor did this Court receive any argument from the Office of the Consumer Advocate of Alberta on the appeal involving the UAD Proceeding.

from which to assess the reasonableness of the legal costs awards themselves. It in fact ends the matter. Accordingly, both appeals are dismissed.

Appeal heard on May 9, 2014

Reasons filed at Calgary, Alberta
this 2nd day of December, 2014

Fraser C.J.A.

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurring in the Result

A. Introduction

[126] There are two related appeals heard together. I will discuss them one at a time.

B. Appeal #1301-0069-AC

[127] In this proceeding, initially the two ATCO companies in advance were denied any costs. Later on that decision was reversed, but not fully retroactively.

[128] For this appeal, I did considerable reading about the traditional model of rate regulation for public utilities. I noted certain Canadian law, including ***Green Michaels & Assoc v Edmonton (City)*** 13 AR 574 (CA 1979) (para. 30); ***Bell Canada v Consumers' Assn of Canada*** [1986] 1 SCR 190, 205-06, 65 NR 1 (para. 27); ***Re National Energy Board Act*** [1986] 3 FC 275, 69 NR 174 (CA) (para. 10); *Gas Utilities Act* RSA 2000 c. G-5 ss 36, 40; *Electric Utilities Act* 2003 c. E-5.1 ss 102 and 121-22. Reading them gives me grave misgivings about whether the respondent Commission's main argument is a satisfactory or sufficient model to deal with rate hearing expenses. That argument is that the matter is simply a question of statutory "discretion" over costs.

[129] However, I have read in draft form the judgment of the Chief Justice about this appeal 0069. She convinces me that the hearing now under appeal is not the typical or traditional rate hearing. In the hearings which are the subject of the present appeal, several things were or are true:

(a) The Commission commenced the hearings now under appeal, and during much of their life, the appellant companies were not acting as, or even acting mostly as, traditional regulated public utilities, because the topic was largely or entirely treatment of assets neither used for nor required or useful for, the regulated utility business.

(b) Toward the end of the process, one appellant was taken out of the traditional type of rate regulation, and placed by the respondent Commission under a new type of rates and billing giving an incentive ("performance based").

(c) Though the total nominal time for this set of hearings was long, much of the gross time between start and finish of the proceeding elapsed during a stay, and it appears likely that nothing was happening then, and so it is

unlikely that legal expenses of any significant amount were incurred by any appellant company on this precise matter.

(d) The respondent Commission later reconsidered its earlier refusal to grant any costs at all for this hearing, and reversed its earlier denial of all costs, retroactive to the end of the stay, and continuing up to the point where any of the appellants' charges ceased to be regulated on the traditional basis. (That distinction about types of regulation was suggested by the utilities themselves.)

[130] The formal record filed by the Commission for this appeal has been carefully checked, and it does not contain any more definite or detailed information about whether any appellant company incurred any relevant legal expenses during the stay. The sort of detailed information found in the Record for the parallel appeal (# 0070) is not found here.

[131] In the event that the Record before us on this appeal is insufficient on the precise amounts submitted or what work was or was not done during the stay, that is not enough to upset the Chief Justice's factual conclusions about points a. to d. above. The respondent Commission appears from its ultimate Reasons to have been of like mind, and those four points are reasonable inferences. The Board is also entitled to use its expertise and take notice of information which it received informally. See ***Northwestern Utilities v Edmonton*** (1929), *infra*.

[132] Therefore, my concerns about the principles to be applied in reimbursing or not reimbursing the rate hearing expenses of a public utility subject to traditional rate setting, become moot or academic in the present appeal (#0069).

[133] So I find it unnecessary to reach any final conclusion about anything else. For example, about how to handle a utility company's hearing expenses in the more ordinary type of rate hearing for a traditionally-regulated public utility. Still less need I comment on any competing view of that topic, such as the respondent Commission's arguments on that topic. To do so might be counterproductive.

[134] In these rather unusual circumstances, the respondent Commission had to use its experience and expertise to craft a fair and reasonable solution to the appellants' request for indemnification of its hearing expenses. Bearing in mind points a. to d. above, I am of the view that the Commission did so properly and reasonably here. That entails no error of law, given these circumstances, and even if there were one, it could not have affected the result.

[135] Mr. Justice Martin's judgment on appeal #69 discusses interesting questions of principle. In an ordinary rate hearing, they would have to be decided. But I am reluctant to go further today than I do in this judgment, because it is only about the unusual Commission hearing in appeal #69. I prefer to leave those questions of principle for another day. That is why I merely concur in the result with the judgment of Chief Justice Fraser (in both appeals).

[136] I do agree with Mr. Justice Martin that the principles which he adopts would not bar use of a tariff of legal fees like that under Rule 22.

[137] I would dismiss this appeal on the narrow ground expressed above.

C. Appeal #1301-0070-AC

[138] Even if one does not adopt the model of "costs" advocated by the Commission in appeal #0069, there is no reason to think that the respondent Commission is obliged to let anyone recover any unreasonable amount or degree of expenses incurred. No counsel before us suggested that the Commission should do that. It is doubtful that any such suggestion could be made, as the Commission's R 022, s 11 expressly adopts a test of reasonableness. So does case law and Commission practice: see Phillips, Regulation of Public Utilities 245 ff (2d ed 1988); Troxel, Economics of Public Utilities 237 ff (1947).

[139] In my view, that test of reasonableness includes whether

- the work was done at all;
- the work done was excessive;
- the people chosen to do the work were too expensive (e.g. too senior);
- too many people were put to work; or
- the charges of those working (e.g. hourly rates) were too high.

That is implied in the nature of rate regulation, and the legislation on regulating "costs" makes it explicit.

[140] One of the obvious purposes of the legislation about "costs" is to advance that same aim. Counsel's concessions that the respondent Commission can police the amounts charged for legal and other expenses of a regulatory hearing, are obviously well-founded in law.

[141] There is no relevant dispute about the standard of appellate review in this appeal #0070. The appellants and respondent disagree on the standard of review as to discrete questions of general law. But no such questions are in issue on this appeal. The respondent Commission found the appellants entitled to some degree of recovery of the expenses they incurred in the Commission hearings leading to this appeal #0070. No one contests that finding, and plainly it is correct.

[142] The only live issue in this appeal is how much the recovery should be. Nor is there any dispute among the parties that the test is reasonableness. The question of whether these particular

legal or similar bills were unreasonably high, is not a question of general law. Plainly (on an appeal) that would be tested on a deferential basis (i.e. reasonableness again). In any event, that is not the question on which leave was given, and is not a question of law or jurisdiction. Maybe the Court of Appeal would never hear such an appeal.

[143] Counsel for the appellants suggests that all expenses actually incurred by the utility companies are presumed to be correct and reasonable, and that the onus lies on the interveners to adduce evidence to the contrary. What is suggested is clearly only a duty on the interveners initially to lead **some** evidence, not a substantive onus of proof, which remains on the utility company: see ***Enbridge Gas Distribution v Ontario Energy Board*** (2006) 210 OAC 4 (CA) (para 11), leave den (2006) 361 NR 397 (SCC). See 9 *Wigmore on Evidence* §§ 2486-87 (Chadbourn rev 1981); *Phipson on Evidence* pp 160-161 (paras 6-02 to 6-03) (18th ed 2013).

[144] As the Commission is expected to use its expertise and experience, in my view it can act when it gets notice of what look to it like unusual or excessive expenses. It can at once require more proof from the utility, and need not wait passively for evidence from the consumers.

[145] The appellants cite ***ATCO Gas & Pipelines v Alberta Energy & Utilities Board***, 2005 ABCA 122, 367 AR 54 (para 66) (Tab 13). The Consumer Advocate's factum correctly points out that the context there and here are different, so it is doubtful that that decision has the wide scope which the appellants suggest. It has nothing to do with rate-hearing expenses, and is about what engineering methods the utility should adopt.

[146] It is difficult fully to reconcile the appellants' suggestion of an onus of proof on the consumers, with two well-established rules of law:

(a) The Commission has expertise and experience in this field, which it is expected to use, and that is an important reason why the Commission gets deference on appeal (or on judicial review). See ***Smith v Alliance Pipelines***, 2011 SCC 7, [2011] 1 SCR 160, 412 NR 66 (paras 26, 28); ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67, [2013] 3 SCR 895, 452 NR 340 (para 21); *Jones & deVillars, Principles of Administrative Law* (5th ed, 2009), p 525, all citing ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190, 372 NR 1 (para 54).

(b) The Commission is not limited to acting on evidence formally put before it by the utility company or an intervener; it can gather information spontaneously, by its own staff: ***Northwestern Utilities v Edmonton (City)*** [1929] SCR 186, [1929] 2 DLR 4, 8-9.

[147] Factual topics recur before the Commission from hearing to hearing, even between different utility companies. The Commission need not shut its eyes to that. If all other Alberta utility companies report paying about $x to buy a residential gas meter, and all treat it as having (say) an average life of 15 years, a utility company which estimated a purchase price of twice as

much per meter and a life half as long, should not be surprised if the Commission notices that and refuses to accept the company's numbers without strong evidence. The Commission would not thereby err.

[148] In any event, it is trite law that onus of proof normally only matters in the rare case where the evidence is evenly balanced. See for example ***ATCO Gas & Pipelines v Alberta Energy & Utilities Board***, 2005 ABCA 122, 367 AR 54, para 72.

[149] The traditional common-law presumption is that he who asserts must prove. Subject to the powers of the respondent Commission to use its own experience and expertise, or gather information for itself, that must be correct and logical. First, it is usually almost impossible to prove a negative.

[150] Second, almost always the utility company will know the facts and have the only records, and no intervener will have either. Forcing interveners to lengthen a rate hearing by purely speculative interrogatories or document production requests, and speculative live cross-examination, would be in no one's interest.

[151] The factum of the intervener Consumer Advocate states that in the hearing which led to appeal #0070, the Commission noted significant differences in the hourly rates claimed by the different participants for indemnity. The Commission therefore issued information requests to the appellant utilities and got argument on the point (paras 12-13). The appellant utilities filed a reply factum (April 10, 2014) to that Consumer Advocate's factum (and to the Commission's factum). But the appellants' reply did not dispute that assertion by the Advocate.

[152] In view of that procedural history, the question of who had the onus of proof of unreasonableness becomes virtually academic in this appeal.

[153] I agree with the Chief Justice that the respondent Commission had legislative power to enact a scale or tariff of fees. I believe that one reason for that was to avoid having to keep relitigating what level was reasonable.

[154] The respondent Commission also had the advantage in seeing the legal bills for all the parties and interveners in the hearing in question and in all related hearings. It knew how much work had been done, and how much of it was reasonable. The Commission could compare hourly rates of different law firms, and to a fair degree could assess the experience and ability of the counsel concerned.

[155] Merely looking at hours or total bills of different parties is not enough, as sometimes in a multi-party hearing one law firm or party does the lion's share of the work for one side, while its allies ride its coattails. But the Commission might well get some idea of who did more work too.

[156] Bills of non-ATCO counsel are not at all a benchmark to be used alone, but they do have some relevance, and reference to them would not disclose any *prima facie* case of the Commission's wandering outside a reasonable range of expenses.

[157] There does not seem to have been any dispute about the number of hours which the appellant companies' counsel worked, nor about whether that amount of work was reasonable. The appellants' counsel now states that the Commission found that the hours claimed were reasonable, citing paras 63-65 of its Reasons (Appeal Digest, p F16). Though the Commission's statement there is not express, that is the only possible interpretation of that passage. The Commission only adjusted the dollar amounts per hour (down to the Scale, then up by 20%). The hourly rates which it awarded were multiplied by the number of lawyer hours claimed. Similarly, the Commission's reasons paras 86 and 92 (in appeal #0070) show the same thing, both for lawyers' fees and consultants' fees. The respondent Commission's own factum (in appeal #0070) supports that conclusion (paras 6-8). So hours spent were reasonable and were accepted, and hourly rates were the only issue.

[158] I see no indication of error in principle in the respondent Commission's assessment of reasonable hearing expenses in this appeal #0070. Nor has anyone alleged that some specific passage in the Commission's reasons in appeal #0070 reveals error in principle, aside from the topics which I have discussed above.

[159] The Commission addressed itself to the right topics, and the numbers chosen by it are not manifest evidence of some lurking error of law. There is no ground to interfere, nor to send the matter back to the Commission to retax in the hope that some error might turn up.

[160] I would also dismiss appeal #0070.

[161] It would assist the court considerably if counsel would follow R 14.31(a) (formerly our Consolidated Practice Directions, Parts C.4 and D.1(b)), and give a citation from a law report (as well as neutral citation), for each case relied on.

Appeal heard on May 9, 2014

Reasons filed at Calgary, Alberta
this 2nd day of December, 2014

Côté J.A.

Reasons for Judgment Reserved of The Honourable Mr. Justice Martin
Dissenting in Part

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[162] I have reviewed the draft judgments of my colleagues. They each dismiss both appeals, albeit for different reasons. While I concur in the result on Appeal No 1301-0070-AC, with respect, I take a different view of their disposition of the other, Appeal No 1301-0069-AC, which I would have allowed in part.

[163] I begin with the question on which leave was granted:

> Did the Commission err in law or jurisdiction by denying or limiting recovery of the appellants' claimed regulatory costs and by treating the costs of or incidental to any hearing or other proceeding of the Commission differently than other costs?

[164] The issue is whether the appellants should be able to recover from their customers, through their rates, prudently incurred legal costs arising from their participation in what has been described as two roundtable discussions. The Chief Justice's reasons provide a full factual background. For ease of reference I will repeat only those facts which I consider particularly material.

[165] As it relates to Appeal No 1301-0069-AC, also referred to as the Utilities Assets Disposition (UAD) appeal, the Commission was concerned that the Supreme Court's decision in ***ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)***, 2006 SCC 4, [2006] 1 SCR 140, ***(Stores Block),*** had serious implications on its regulation of Alberta utilities. Rather than address those matters on a piecemeal basis over an extended period, the Commission determined it would attempt to address them at one time, with input from the utilities. It was in this context that the utilities were "invited" to participate and given standing as parties. While it may be debated whether the utilities were compelled or required to participate, had they elected not to participate, it would have been at their peril; policies and procedures which directly affected them would have been developed without their input, perhaps to their detriment. So participate they did. At the end, they sought to recover the legal expenses they had incurred. As my colleagues have noted, the Commission initially denied recovery of all legal costs, but subsequently allowed legal costs for a significant part, the latter portion, of those proceedings.

[166] The material facts giving rise to Appeal 1301-0070-AC, referred to as the Performance Based Reform (PBR) proceedings, are similar. The Commission asked the appellants and others to attend another roundtable initiative aimed at developing a regulatory framework to create incentives to improve efficiencies of regulated companies, the benefits of which were to be

shared with their customers. At the conclusion of those proceedings, the Commission permitted the appellants to recover a portion of their legal expenses.

[167] The Chief Justice has undertaken a historical review of the Commission's authority to deny or limit recovery and has concluded that the Commission has such authority. That conclusion relies heavily on her interpretation of s 21(1) of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2.

[168] The appellants submit that s 21 merely authorizes the Commission to recover its own costs and any incidental costs from others. I disagree. I prefer the Chief Justice's analysis and conclusion on this point, subject to the qualification discussed below.

[169] The appellants further submit that in any event s 21 does not express the Legislature's intention to displace the fundamental tenet, that a regulated utility is entitled to recover its prudently incurred expenditures. I agree with that submission.

[170] In my opinion, s 21 did not vest the Commission with the authority to arbitrarily deny or limit recovery of parties' legal expenses. Rather, it gave the Commission the authority or discretion to deny recovery of imprudent expenses, legal or otherwise, but no more.

[171] Allowing the recovery of prudently incurred costs has historically been the measure applied to all expenses and I see no justification to depart from that standard in situations of this kind, that is to say, in matters other than rate hearings. The concerns raised by the Chief Justice as to potential abuse or unfairness to the rate-payer may be addressed by the Commission allowing recovery of only prudently incurred expenses. Three examples will illustrate the point. If, in response to the Commission's invitation to participate, the utility assembled lawyers to address hypothetical matters of no assistance to the resolution of the issues at hand; or if counsel's claimed hourly rate was excessive, the Commission could (and should) limit recovery to that which was prudently incurred. Likewise, if counsel refused to co-operate with other counsel in addressing issues and that resulted in duplication of work, the Commission could reduce the expenses claimed to those that were prudent in the circumstances.

[172] But in my opinion, mindful of what the Chief Justice refers to as "the regulatory compact", the Commission may not, as it did here, ask parties to provide input and then arbitrarily decide that their cost of participation, including those that were prudent, would not be recoverable. If such unfettered authority did exist, one might reasonably contemplate a situation where the Commission could compel a party (a utility) to incur millions of dollars in costs at a protracted roundtable, and subsequently deny it the opportunity to recover even those expenditures prudently incurred in the process. As my colleagues have noted, the utility has no other recourse to recover such costs and the impact would be on its shareholders.

[173] In my opinion, the recovery of costs prudently incurred has been and remains an effective standard. It permits the Commission to deny costs associated with dubious applications and other imprudent expenditures. Fair application of that standard provides the necessary

incentive to regulated parties to be restrained in their claimed expenditures while at the same time giving them the security that prudent expenses will be recoverable.

[174] The scale of costs formulated by the Commission (Rule 22) is also implicated by the appellants' argument because it was used by the Commission to fix recoverable costs in one of the appeals. I understand that this scale provides guidance to interveners regarding the legal costs they may be entitled to recover. The appellants argue that recovery of their legal costs should not be fettered or guided by that scale. I disagree. Having developed this flexible scale as a reflection of what it considers to be reasonable legal tariffs associated with participation in regulatory matters by interveners, I see no impediment to the Commission using it to determine the prudence or reasonableness of a utility's legal costs.

[175] In summary, the Commission asked the appellants to assist in resolving matters of serious concern to the regulation of the industry. It was at least wise, if not necessary, for the appellants to participate. Accordingly, I find the appellants are entitled to recover the prudently incurred costs arising from their participation.

[176] I therefore conclude the Commission erred in law by arbitrarily denying all costs, whether prudently incurred or not, as it relates to part of the proceedings referred to in Appeal No. 1301-0069-AC. I would allow that portion of the appeal.

[177] As to Appeal No 1301-0070-AC, the Commission allowed the appellants to recover some of their legal costs, apparently those that the Commission found had been prudently incurred. I would therefore dismiss that appeal.

Appeal heard on May 9, 2014

Reasons filed at Calgary, Alberta
this 2nd day of December, 2014

Martin J.A.

Appearances:

L.E. Smith, Q.C. and
E.B. Mellett
for the Appellants

R.J. Finn
for the Respondent Alberta Utilities Commission

T.A. Shipley
for the Respondent Office of the Utilities Consumer Advocate of Alberta

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2009-0113

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 North Bay Hydro Distribution Limited for an order approving just and reasonable rates to be effective July 1, 2009.

BEFORE: **Ken Quesnelle**
Presiding Member

DECISION AND ORDER

September 8, 2009

North Bay Hydro Distribution Limited (North Bay) filed an application with the Ontario Energy Board on April 21, 2009, under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B), seeking approval for a proposed schedule of rate riders to be effective July 1, 2009. The Board assigned file number EB-2009-0113 to the application.

The Board issued a Notice of Application and Written Hearing on May 26, 2009. The Vulnerable Energy Consumers Coalition (VECC) and Hydro One Networks Inc. (Hydro One) were approved as intervenors.

Procedural Order No. 1 was issued on June 18, 2009. The Board made provision for written interrogatories and for submissions. VECC and Board staff filed interrogatories and made submissions. Hydro One filed interrogatories, but made no submission. North Bay's reply submission was filed on August 11, 2009. The full record is available at the Board's offices.

THE APPLICATION

Background

North Bay requested disposition of a total of $2,029,825 of its Retail Service Variance Account ("RSVA") balances as of December 31, 2008. North Bay also requested the disposition of carrying charges associated with the above balances of $17,149 for the period of January 1, 2009 to through June 30, 2009. The total overall requested disposition is $2,046,974.

In its application, North Bay stated that Board Regulatory Audit staff initiated a review of North Bay's Account 1588 (RSVA Power) in 2008 due to the balances associated with this account being higher than the industry average. On December 2, 2008, following the review, Board Regulatory Audit staff issued a final letter and stated that North Bay should correct the entries in Account 1588 in accordance with the Account Procedures Handbook.

Following the Board Regulatory Audit staff review, North Bay engaged the services of a consultant to conduct a review of all five RSVAs[1]. As a result, North Bay's consultant,

1 Account 1580, Account 1582, Account 1584, Account 1586 and Account 1588

E360, provided the corrected balances which covered the period May 2002 to December 2008 and also recalculated the carrying charges. These corrected RSVA balances and carrying charges had been audited by North Bay's external financial Auditors, BDO Dunwoody LLP.

Board staff had no concerns with the calculations. VECC made no comments on the calculation of the balances; however VECC took the position that an adjustment regarding the allocation for the Account 1588 Global Adjustment sub-account is required.

VECC noted that North Bay proposed to allocate the total balances of Account 1588 to each class. Since the Global Adjustment sub-account is established to track the Global Adjustment for non-RPP customers only, VECC submitted that the balances from the Global Adjustment sub-account should be recovered based on the non-RPP load associated with each class. VECC further submitted that the rate riders should be based on the response to VECC's interrogatory[2] which reflected VECC's proposed form of recovery. In its reply submission, North Bay accepted the rate riders as submitted by VECC.

Significance of the Balance

North Bay submitted that the outstanding balance of $2,029,825.46 is of great significance to it and provided the following comments in that regard[3]:

a) The RSVA balances represent true costs that were incurred by the Applicant but were inadvertently not passed along to customers for recovery;
b) Using deferral accounts to identify and track costs for recovery at a future period is a standard industry practice;
c) The balance of $2,029,825.46 (comprised of $2,110,574 principal less $80,749 in a credit against carrying charges) represents approximately 2 years of net income for the Applicant's business;
d) Put another way, the balance is equivalent to almost 3 months of distribution revenue;
e) The balance, if written off would result in the distribution business reporting a significant net income loss; and

[2] Response to VECC interrogatory # 3 (c)
3 Page 9 of application – Manager's Summary

f) The balance is material and, as discussed below, recovery of the balance will be used to assist in financing the costs of certain major capital projects planned for 2009 and 2010.

Retroactivity

North Bay's evidence included corrections made to its RSVA balances for the period prior to December 31, 2004. Board staff's submission noted that the Board had approved North Bay's request for recovery of regulatory assets as of December 31, 2004 in its 2006 Electricity Distribution Rate (EDR) decision. Board staff submitted that the Board may wish to consider the retroactive nature of North Bay's request. Board staff submitted that in the Board's decision on Northern Ontario Wires' (NOW) 2009 EDR application, the Board had disallowed NOW's requested correction to the balances of its Account 1571 (one of its variance accounts) as of December 31, 2004. Board staff further noted that the Board decision on Lakefront Utilities Inc.'s (Lakefront) 2008 EDR application had stated that the proposed adjustment to its error on Account 1570 would result in significant retroactivity and accordingly denied the adjustment.

In its reply submission, North Bay submitted that it should be permitted to make corrections to the RSVA balances in order to ensure that the costs were properly passed through. North Bay submitted that the RSVAs track the differences between the amounts paid by North Bay to the IESO for items such as electricity, transmission services and wholesale market services and the amounts billed to its customers. Therefore, the amounts tracked in RSVAs are considered to be a pass-through to customers. North Bay further stated that both the Report of the Board on Electricity Distributors' Deferral and Variance Account Review Initiative[4] (EDDVAR Report) and the Report of the Board on Transition to International Financial Reporting Standards[5] (IFRS Report) indicated that pass-through accounts do not require a prudence review. As a result, North Bay submitted that the Board's role should be to ensure North Bay's practices had been corrected and that the corrected balances for these pass-through accounts are recovered.

North Bay further submitted that the cases cited by Board staff did not support staff's position concerning the recoveries sought in its application. The RSVA accounts for which North Bay is seeking adjustments are pass-through accounts which are ongoing

[4] Report of the Board, EB-2008-0046
[5] Report of the Board, EB-2008-0408

and will remain to be used to accrue for ongoing variances. By contrast, in North Bay's view, the cases referenced by Board staff, involve accounts that are neither pass-through nor ongoing in nature (Account 1571 for NOW and 1570 for Lakefront). As such, in North Bay's view these cases are not supportive of an "out-of-period" finding, as suggested by Board staff.

Board staff submitted that if the Board accepted the adjustment for the RSVA balances prior to 2005, this adjustment would, in effect, vary the Board's RP-2005-0020/EB-2005-0397 decision. That decision disposed of North Bay's RSVA balances as of December 31, 2004 on a final basis. Staff noted that the deadline for seeking any variance to that decision had long passed.

North Bay submitted that in the past, the Board had exercised its discretion to vary its own decision after the expiration of the 20-day period. North Bay cited the Board Decision on the Toronto Hydro-Electric System Limited third tranche Conservation and Demand Management Plan in which the Board varied its Decision one and a half years after the original Decision (RP-2004-0203/EB-2004-0485/EB-2006-0145).

Board staff also noted that if the Board decided to allow North Bay's RSVA balances to be disposed for the period January 1, 2005 to December 31, 2008 only, North Bay would refund the amount of $503,506.69 plus interest to its customers.

In its reply submission, North Bay rejected this suggestion on the basis that it would penalize North Bay for its efforts to correct its account practices and urged the Board to approve its application. North Bay submitted that the corrected balances for these pass-through accounts should be recovered.

Recovery period

In its original application, North Bay requested approval for proposed rate riders to be effective July 1, 2009 and a disposition period of three years. VECC submitted that it would be appropriate to change the effective date to November 1, 2009, which would coincide with the change in RPP rates.

In its reply submission, North Bay agreed with VECC's proposal and requested that the proposed rate riders be effective for the period November 1, 2009 to October 31, 2012.

BOARD FINDINGS

For the reasons that follow the Board denies the applicant's request to establish rate riders for the purpose of collecting revenues based on corrected RSVA account balances.

In support of its request, North Bay provided the following:

- A detailed record of the original account balances contrasted against the corrected balances to illustrate the variance that forms the basis of the relief sought as well as the chronology of events that resulted in the corrections.
- Its position regarding the significance of the corrected balances in terms of the quantum in relation to its net income and distribution revenue.
- Details on the intended use of the funds and the concomitant benefits to its customers.

North Bay also noted that due to its stable population base there is little risk of intergeneration cross subsidy.

On the issue of the correction of the account balances, the Board accepts that certain account balances submitted for the purpose of establishing the 2006 rates were incorrect. The record is clear that errors in accounting were made and that a substantial effort has been made to establish accurate balances, based on the correct accounting methodologies and entries. The applicant appears to have taken due care and effort to reform certain accounting procedures to be compliant with the Accounting Procedures Handbook.

As to the significance of the balances, North Bay contends both in its original application and in its reply submission that the money it proposes to collect by way of rate riders is to be applied to needed capital projects within the applicant's service area. At paragraph four of its reply submission North Bay states the following:

"To be clear, the money recovered is not being used to enrich the utility or its shareholder – it is being put back into the system that serves the Applicant's customers."

The Board agrees that the amount proposed to be collected is significant. However, the applicant's position on this point is not clear to the Board. The applicant submits that the

Board should consider the negative impact on the financial status of the utility and at the same time submits that the recovery sought is not to be used to enrich the utility.

These seemingly contradictory contentions may arise from the applicant's understanding, as it is characterized in the application that the corrected account balances represent monies currently owed to the utility.

While no party took issue with the intended use of the sought after money, for reasons that follow the Board will not opine on the appropriateness of the applicant's proposed spending in the context of this application.

The main area contested in the application is the issue of retroactivity. Board staff submitted that the Board may wish to consider the retroactive nature of North Bay's request and cited recent Board decisions where the Board denied requests similar to North Bay's. North Bay responded by noting that the "pass through" nature of the accounts in its application should be considered and that the balances represent its true costs.

In the normal course a utility need not concern itself with the fluctuations in RSVA account balances driven by timing differentials between the incurrence of costs and the collection of offsetting revenues. The purpose of the account is to track the variance with the intent to dispose of the balances in a manner that keeps the applicant whole. However, once the rates, including any associated riders from the clearance of the RSVAs or any other account, have been determined to be final the Board has little, if any, power to alter these rates retroactively.

The applicant has not demonstrated any financial hardship that may have been as a result of the incorrect balances being cleared. The applicant submits that the rationale for allowing the prior period adjustment is that RSVA balances are intended to be a "pass trough" and essentially immune from any retroactivity concern. The Board does not differentiate its treatment of the RSVA accounts from any other component of the approved rates in its consideration of retroactivity. The reasonable rate-payer confidence in the continuation of rates deemed final are diminished equally irrespective of the impetus of the retro-activity.

In support of its request the applicant submits that the intended use of the recovered amounts will be of benefit to the customer due to system improvements. The Board

does not consider the establishment of a future need to be sufficient grounds to warrant a prior period adjustment. There are other more appropriate processes to establish the revenues required for future spending.

A central function of cost of service rate making is the matching of future revenues with anticipated reasonably incurred future costs. In a typical rate setting exercise an applicant determines what its reasonably incurred costs will be in the future period for which the applied for rate will be charged. The applicant provides its rationale for the level of spending that underpins its revenue requirement and the Board sets rates in accordance with what it considers to be just and reasonable. It is a holistic process that considers all expected revenues and all expected costs to determine the appropriate rates.

North Bay's 2006 rates were established on the basis of what was thought to be a true account of its expected future costs and revenues. The fact that for 2006 rates North Bay chose to use a historic test year as a proxy for future costs does not alter the concept that rates were established on a prospective basis to match future revenues against future reasonably incurred costs.

North Bay cited the Board's desire to maintain the use of deferral accounts in support of its claims. It is not rational to conclude that the Board's desire to maintain the use of deferral accounts suggests that the final disposition of deferral accounts is anything less than final.

The Board notes that the 2007 rate setting process was a mechanical process that continued the 2006 rates with some inflation related adjustments. The Board initiated a rate setting framework for the electricity distribution sector that provided an opportunity to distribution companies to apply for rates on a cost of service basis for the 2008 rate year or any subsequent year. North Bay did not elect to seek increases to its rates in 2008 or 2009 to cover the costs of these activities but does intend to apply for new rates for 2010 on a cost of service basis. There is no evidence that North Bay was forced to delay capital spending due to lack of revenue or any evidence as to why North Bay did not apply for a rate increase earlier if it saw a need to increase its spending.

The Board expects North Bay to establish its stated needs in the context of its overall spending in its 2010 cost of service rate application. The disposition of the account

balances for the time period January 1, 2005 to December 31, 2008 would also more appropriately be done in the context of that rate setting proceeding.

As Board staff noted, a decision to allow North Bay's RSVA balances to be disposed for the period January 1, 2005 to December 31, 2008 only would result in North Bay refunding the amount of $503,506.69 plus interest to its customers.

North Bay submitted that a finding of the Board that disallowed the prior period adjustment but required North Bay to dispose of the corrected balance would penalize North Bay for its efforts to correct its account practices. The Board does not agree with North Bay's characterization. The application of sound rate setting principles results in a fair and transparent process that protects the interests of both ratepayers and the utility alike. While North Bay is to be commended for its efforts, there is a basic expectation that a licensed franchise holder will provide the Board with an accurate account of its financial affairs for rate setting purposes.

The Board is not driven by a need for a symmetrical treatment of ratepayers and utilities in situations where correction of utility mistakes is required. The utility has control of its books and records and has the responsibility to ensure mistakes do not occur. For this reason the Board could find in favour of the ratepayer in certain situations and not find in favour of the utility if the utility was in the same situation.

The Board notes that North Bay has identified spending requirements to maintain service to its customers. The Board further notes that North Bay has not considered it necessary to apply for a cost of service rate increase to provide the funds for these requirements before now. The filing of its rate application for 2010 rates provides the appropriate and timely opportunity to seek the revenues it claims are required. In this way North Bay's ratepayers will be afforded the opportunity to provide comments that are informed by North Bay's total spending plan.

North Bay's request to clear the RSVAs using corrected balances for the period prior to January 1, 2005 is therefore denied. The Board has already issued a final decision related to these balances, and it will not retroactively alter these balances. The Board also chooses to not clear the RSVA balances from January 1, 2005 forward at this time. The Board will consider the disposition of these balances either through its quarterly review of commodity deferral accounts pursuant to s. 78(6.1) of the Act, or in North Bay's next rates case. The request for the disposition of the carrying charges

associated with the balances from January 1, 2009 to June 30, 2009 is therefore also denied at this time.

COST AWARDS

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the Ontario Energy Board Act, 1998. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

THE BOARD DIRECTS THAT:

1. VECC shall file with the Board and forward to North Bay its cost claim within 26 days from the date of this Decision.

2. North Bay shall file with the Board and forward to VECC any objections to the claimed cost within 40 days from the date of this Decision.

3. VECC shall file with the Board and forward to North Bay any responses to any objections for cost claims within 47 days of the date of this Decision.

4. North Bay shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, September 8, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Case Name:

Grier v. Metro International Trucks Ltd.

Re Grier and Metro International Trucks Limited et al.

[1996] O.J. No. 538

28 O.R. (3d) 67

133 D.L.R. (4th) 236

89 O.A.C. 36

61 A.C.W.S. (3d) 5

Court File No. 339/95

Ontario Court (General Division), Divisional Court

Mcmurtry C.J.O.C., Feldman and Macpherson JJ.

February 19, 1996

Counsel:

Murray Klein, for applicant.

Mark Geiger and Bill Anderson, for respondents.

The judgment of the court was delivered by

MACPHERSON J.:--

Introduction

1 The principle of functus officio holds that a judicial decision-maker, including an administrative tribunal, does not have the authority to reopen a decision once made. This application raises the question of whether rigour or flexibility should control the application of the principle in a situation where a tribunal's decision was based, at least in part, on a misapprehension of an important fact lying at the heart of the litigation.

Factual Background

2 On May 27, 1993, the applicant Stephen Grier, an employment standards officer ("Grier"), made an order to pay under s. 65 of the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA"), against the respondents Metro International Trucks Limited and Metro Leasing Limited (collectively "Metro"). The order to pay was in the amount of $21,893.65, representing vacation pay owing to former employees of Metro plus administration costs of $2,189.36 for a total of $24,083.01.

3 Metro applied for a review of the order to pay by way of an appeal hearing before a referee in accordance with s. 68 of the ESA. Referee Shari Novick was appointed to preside at the appeal hearing. There was no oral evidence at the hearing; it proceeded on the basis of a written statement of facts prepared by Metro's solicitors and assented to by the solicitor who represented the Ministry of Labour at the hearing.

4 The hearing before Referee Novick related to the question of whether Metro was liable for the vacation pay of certain employees of the previous employer, McCleave Truck Sales Ltd. ("McCleave"). McCleave had been wound up, and its employees were terminated, as of September 19, 1992. Metro purchased certain assets of the insolvent McCleave and commenced business two days later, on September 21, 1992. It rehired some of the McCleave employees, including those who were later the subject of Grier's order.

5 Unfortunately, the agreed statement of facts recorded the date on which Metro commenced operations as September 21, 1993, not 1992. Thus the situation presented to Referee Novick was that Metro had succeeded McCleave as employer a year and two days, rather than two days, after McCleave had been wound up.

6 Before Referee Novick, Metro conceded that it was a successor employer for the purposes of the ESA. However, it disagreed with Grier's decision that it owed the employees the vacation pay that had accrued during their employment with McCleave.

7 Referee Novick released her 12-page decision on August 30, 1994. She reversed Grier's decision. She said, in part, at pp. 9, 10-11 and 12:

> The only issue I must decide is which party should bear the responsibility of paying the amount owing -- the applicants, who have accepted that they are "successor employers" for the purpose of this hearing, or the Ministry, through the Employee Wage Protection Plan.
>
> . . . . .
>
> In my view, the proper way to approach this issue is to determine when the entitlement to the employment standard in question (vacation pay in this case) arose, and identify who the employer was at that moment in time. It follows then that the party employing an employee at the point his or her entitlement crystallized bears the liability for the amounts owing. This approach is not inconsistent with what s. 13(2) provides, and leads to an equitable result. Applying that to the case at hand, the agreed facts submitted to me established that the claimants' employment was terminated by the bank-appointed receiver in September of 1992, and that they were not hired by the applicants until they presumably began operations, approximately one year later. The right to any accrued vacation pay crystallized when their employment was terminated and did not resume with a new employer within a reasonable time afterwards.
>
> . . . . .
>
> I remain seized of the matter to determine any issues which may arise as a result of any of the above.

(Emphasis added)

8 Subsequent to the release of Referee Novick's decision, counsel for the Ministry of Labour contacted Metro's counsel and pointed out the error in the agreed statement of facts. Metro's counsel acknowledged that there was a "typo" with respect to the dates, but stated that the error had no effect on the result.

9 Counsel for the Ministry wrote to Referee Novick and requested that she reconsider her decision. Metro's counsel wrote to referee Novick and opposed this request, in part on the ground that she was functus officio.

10 On January 19, 1995 Referee Novick rendered a second decision in which she declined to reopen the matter. She agreed with Metro's submissions that she was functus officio. She said, in part, at pp. 2-3:

> The Employment Standards Act does not provide a referee hearing an application for review ... with the power to reconsider his or her decision. In the absence of such a power I am functus officio, or without jurisdiction to revisit the matter for the purpose requested. I do not dispute Ministry counsel's suggestion that the authorities support the notion that adjudicators can retain some post-decision powers even if they are not expressly provided in the enabling statute; however, these are restricted to re-opening a matter in situations where either clerical or typographical errors have been made, proper notice of hearing has not been given, or for some other reason a party has been unable to exercise their right to be heard. That is not the case here; I am effectively being asked to change my decision because one of the facts presented, upon which I relied in arriving at the decision, was incorrect.
>
> (Emphasis added)

11 The applicant brings this application for judicial review of Referee Novick's two decisions. It seeks an order quashing those decisions and remitting the matter back to Referee Novick or another referee for determination based upon an agreed statement of facts amended to correct the inadvertent error with respect to the date Metro commenced business as successor to McCleave.

Legal Issues

12 The legal issue on this application is whether Referee Novick was correct in deciding that she could not reconsider her first decision because of the principle of functus officio.

Analysis

13 In her decision of January 19, 1995, Referee Novick decided that the principle of functus officio precluded her from reconsidering her August 30, 1994 decision. The parties agree that the January 19, 1995 decision was one relating to the limits of the referee's jurisdiction. Hence the standard of review on this application is correctness: see Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609.

14 Before turning to the main issue, I will dispose of two preliminary arguments advanced by Metro. Both of these arguments are to the effect that even if the principle of functus officio is not determinative of the application, the matter should nevertheless not be returned to the referee for other reasons. Two such reasons are put forward by Metro.

15 The first argument is that the matter should not be returned to Referee Novick because her decision would have been the same without the error in the agreed statement of facts. In support of this argument, Metro relies on several passages from Referee Novick's decision of August 30, 1994, all of which can be encapsulated by her statement on p. 10: "The right to any accrued vacation pay crystallized when their employment was terminated". In other words, says

Metro, when the employees were terminated on September 19, 1992 their right to vacation pay for their service with McCleave "crystallized" on that date. The fact that Metro purchased the business two days later, or a year and two days later, is irrelevant to Referee Novick's decision.

16 The short answer to this argument is that it is clear from both of Referee Novick's decisions that the error in date was a relevant and important factor in her decision on the merits of the vacation pay issue. The words quoted above from p. 10 of her first decision are in fact not a full sentence; the rest of the sentence concludes with "and did not resume with a new employer within a reasonable time afterwards". She also refers, again at p. 10, to the fact that the employees were not rehired after they left McCleave until "approximately one year later". Finally, and conclusively in my view, in her second decision Referee Novick says that the incorrect date was a fact "upon which I relied in arriving at the decision". This strikes me as a very clear statement. The word "relied" should be given its ordinary meaning; it indicates that the incorrect fact in issue here influenced her decision. It may not have been determinative of the decision; however, it did influence it.

17 The second preliminary argument advanced by Metro is a variation of the first. Metro asserts that even if the referee was influenced by the incorrect date, that is inconsequential because, as a matter of law, the only relevant date is the day on which the employees were terminated by McCleave. Since that date is September 19, 1992, it is irrelevant whether Metro stepped into McCleave's shoes on September 21, 1992 or 1993.

18 The problem with this argument is that it invites this court to interpret several important provisions of the ESA without the advantage of a decision on the merits by the referee. This court's essential role in the domain of administrative law is to perform the function of judicial review of decisions of various administrative tribunals. An ab initio judicial interpretation of provisions of the ESA, cut adrift from the anchor of a tribunal's interpretation of those provisions, would be antithetical to the rationale underlying the roles of both administrative tribunals and this court. Specialized tribunals interpret and decide; this court reviews on limited grounds. Metro's second argument ignores the two-step process that is the foundation of administrative law process in Ontario and in Canada.

19 Turning to the main issue, Metro articulates it in this fashion in its factum:

> 48. At the time of the rendering of Referee Novick's decision there was no statutory authority contained in the Employment Standards Act which permitted a Referee to reconsider, vary or amend his or her decision after it had been issued. As such, Referee Novick was functus officio, and her jurisdiction was exhausted.

In support of its argument, Metro cites several decisions of the Federal Court, including Canada (Minister of Employment & Immigration) v. Nabiye, [1989] 3 F.C. 424, 102 N.R. 390 (C.A.); Canada (Treasury Board) v. Exley, [1985] F.C.J. No. 331 (C.A.); and MTD Products Ltd. v. Tariff Board of Canada, [1987] 2 F.C. 227, 8 F.T.R. 158.

20 In my view, the leading case dealing with the principle of functus officio in the context of administrative tribunals is Chandler v. Alberta Assn. of Architects, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577. In that case the Supreme Court of Canada permitted an Alberta tribunal to continue a hearing after it had made an extensive report in which it made findings of unprofessional conduct against several architects. The court found that the tribunal had not disposed of the matter before it and was not, therefore, functus officio. In particular, the tribunal had not decided whether to make any recommendations which it was required to do by statute.

21 In Chandler, there was nothing in the governing statute, purporting to confer on the tribunal the power to rescind, vary, amend or reconsider a final decision that it had made. Nevertheless, the majority of the court held that the tribunal was not functus. Sopinka J. said, at pp. 861-62 S.C.R., p. 596-97 D.L.R.:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a

> change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. Ross Engineering Corp., supra.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute: see Huneault v. Central Mortgage & Housing Corp. (1981), 41 N.R. 214 (F.C.A.).
>
> In this appeal we are concerned with the failure of the board to dispose of the matter before it in a manner permitted by the Architects Act. The board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision.

22 I believe that the flexibility of which Sopinka J. speaks in this passage is appropriate on the present application. Under the ESA the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties accidentally placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision. Moreover, if there were any doubt about this, Referee Novick expressly confirmed her reliance in her subsequent decision dealing with the request for a rehearing. In these circumstances, I think that a fair conclusion is that her first decision, like the tribunal's decision in Chandler, was a nullity. She intended to make a final disposition; however, that disposition was fatally tainted by her reliance on a crucial fact which both parties agree is incorrect. She should be permitted, as was the tribunal in Chandler, "to reconsider the matter afresh and render a valid decision".

23 Another analogous case, in my view, is a decision of this court in Kingston (City) v. Ontario (Mining & Lands Commissioner) (1977), 18 O.R. (2d) 166 (Div. Ct.). In that case the court permitted a commissioner to reopen a hearing when it turned out that he had made an order which inaccurately reflected a settlement made by the parties. Southey J. said, at p. 169:

> Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out

> that the order, through inadvertence or negligence of one or more of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view, is for the interested party to apply to the tribunal to have its order amended. Such an application was made to the Mining Commissioner in this case by the conservation authority; that application was dismissed in a lengthy and carefully written decision dated February 3, 1977, on the ground that the Commissioner had no authority to make the correcting order. One of the grounds for this decision was that the Commissioner was bound in these circumstances by the doctrine of functus officio and could not reopen his decision in the absence of express statutory authority. With the greatest deference to the view of the Commissioner, the doctrine of functus officio, in our judgment, does not prevent a tribunal from reopening a matter and correcting an order made by it, where a mistake has occurred of the nature alleged in this case.
>
> (Emphasis added)

24 In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.

25 In conclusion, the flexibility in the application of the principle of functus officio articulated by Sopinka J. in Chandler permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts. Accordingly, the two decisions of Referee Novick are quashed.

26 Normally, the matter would be returned to Referee Novick for the rehearing. However, Metro objects to such an order and requests that the matter be referred to a different referee. This submission is based on the final paragraph of Referee Novick's decision refusing the request for a rehearing:

> Finally, and regrettably, I note that had this matter come to my attention after the proclamation of Bill 175, the omnibus government bill which contains several amendments to the Statutory Powers Procedure Act including the provision of a reconsideration power to tribunals to be used in cases "it considers advisable", I would have been able to reconsider the matter.

27 Metro contends that the words "and regrettably" might presage that the referee intends to change her view of the merits of the case if it is returned to her with a correct agreed statement of facts. I do not read those words in this fashion; I think that the referee is expressing regret that she cannot rehear the matter in light of her understanding of functus officio. Nevertheless, the applicant does not object to the matter being referred to a different referee. It is so ordered.

28 The applicant does not seek costs. Accordingly, no order of costs is made.

Re

City of Kingston and Mining and Lands Commissioner et al.

18 O.R. (2d) 166

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

HOULDEN, J.A., CORY AND SOUTHEY, JJ.

22ND AUGUST 1977.

Administrative law -- Judicial review -- Status -- Municipality seeking judicial review of decision permitting placing of fill on lands within area of conservation authority of which municipality contributing member -- Municipality affected by decision -- Municipality has standing -- R.R.O. 1970, Reg. 109, s. 4.

[Re Liverpool Taxi Owners' Ass'n, [1972] 2 All E.R. 589, apld]

Administrative law -- Boards and tribunals -- Powers -- Mining and Lands Commissioner has power to make order giving effect to settlement negotiated between parties interested to place fill on certain lands and to enlarge area if interested parties consent.

Administrative law -- Judicial review -- Mining and Lands Commissioner making order permitting placing of fill by giving effect to settlement between interested parties -- Order covering wider area than intended by one of parties -- Order to be quashed.

Administrative law -- Boards and tribunals -- Decisions -- Power to correct orders -- Mining and Lands Commissioner making order inaccurately reflecting settlement negotiated between interested parties -- Commissioner having jurisdiction to reopen proceedings to correct mistake.

APPLICATION for judicial review of a decision of the Mining and Lands Commissioner granting permission to place fill on certain lands.

D. L. Hardtman, Q.C., for applicant.

D. M. Belch, for respondent, Cataraqui Region Conservation Authority.

T. H. Wickett, Q.C., for Attorney-General for Ontario, appearing on behalf of respondent, Mining and Lands Commissioner.

T. J. Dunne, for respondent, John L. Smith.

The judgment of the Court was delivered by

SOUTHEY, J.:-- This was an application by the Corporation of the City of Kingston, originally brought by notice of motion dated April 20, 1976, for judicial review of a decision of the Mining and Lands Commissioner, dated December 24, 1975, granting permission to the respondent Smith to place fill on certain lands in the County of Frontenac. No grounds were stated in the original notice of motion, and the only persons named as respondents therein were the Mining and Lands Commissioner and G. H. Ferguson, the holder of that office.

Pursuant to leave granted by order of this Court, the applicant served a further notice of motion dated August 10, 1976, in which the name of G. H. Ferguson was deleted as respondent and the names of John L. Smith and Cataraqui Region Conservation Authority were added as respondents along with the Mining and Lands Commissioner. The second notice of motion gave as the grounds for the relief sought that the Commissioner had not made a proper decision on the facts before him, but rather had confirmed a compromise between Smith and the conservation authority and that the Commissioner's order purported to affect lands other than the lands described in the original application to place fill.

Counsel for the conservation authority adopted the position taken in the memorandum of fact and law of the respondent Smith that the applicant the City of Kingston had no status to bring these proceedings.

The City of Kingston is a member municipality in and a contributor to the Cataraqui Region Conservation Authority. The boundary between the City of Kingston and the neighbouring Township of Kingston passes through the lands covered by the decision of the Mining and Lands Commissioner. There is no question that the lands in question are within the areas in which the conservation authority has jurisdiction to grant permits for the placing of fill under s. 4 of R.R.O. 1970, Reg. 109.

In these circumstances, although the City of Kingston was not a necessary party to the proceedings before the Mining and Lands Commissioner, during the course of the hearing we ruled that the city had the status to bring an application for judicial review in respect of the decision of the Mining and Lands Commissioner. In deciding the question of status, we relied on the following passage in the decision of Lord Denning, M.R., in Re Liverpool Taxi Owners' Ass'n, [1972] 2 All E.R. 589 at p. 595:

> The writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved", and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him ...

The Court having rejected the submission that the City of Kingston had no status to bring the motion, counsel for the conservation authority then supported the position taken by the City of Kingston on the application before us, and applied to be joined as a party applicant; we granted this application.

We find no merit in either of the grounds stated by the City of Kingston in its second notice of motion. We can see no reason why the Mining and Lands Commissioner should not make an order giving effect to a settlement negotiated between the parties interested in an application before the Commissioner. Nor can we see any reason why the Commissioner should not enlarge the area to which an application relates, where, as in this case, such enlargement was consented to by the interested parties.

The more serious ground on which the order of the Commissioner was attacked did not become apparent until several months after the second notice of motion of the City of Kingston had been served and filed. In October, 1976, the respondent Smith commenced to place fill on lands which the conservation authority believed were not covered by the settlement agreement which the Commissioner's order was intended to implement; the conservation authority took objection to this being done. The position of the conservation authority in this connection is fully supported by the relevant correspondence between the solicitor for the conservation authority and the respondent Smith both at the time the settlement was reached, and at the time that objection was made to the placing of fill.

In the absence of clear evidence that such correspondence does not accurately reflect the agreement made by the parties through their solicitors, it seems quite obvious that the order of the Commissioner covers a substantially greater area than that which the conservation authority had intended. For this reason, we believe that the order of the Mining and Lands Commissioner dated December 24, 1975, must be quashed.

Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out that the order, through inadvertence or negligence of one or more of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view, is for the interested party to apply to the tribunal to have its order amended. Such an application was made to the Mining Commissioner in this case by the conservation authority; that application was dismissed in a lengthy and carefully written decision dated February 3, 1977, on the ground that the Commissioner had no authority to make the correcting order. One of the grounds for this decision was that the Commissioner was bound in these circumstances by the doctrine of functus officio and could not reopen his decision in the absence of express statutory authority. With the greatest deference to the view of the Commissioner, the doctrine of functus officio, in our judgment, does not prevent a tribunal from reopening a matter and correcting an order made by it, where a mistake has occurred of the nature alleged in this case.

The role of the Mining Commissioner on the application to amend was, no doubt, made very difficult by the fact that no affidavits were delivered in support of the motion; no viva voce evidence was offered at the hearing of the application; and the counsel who appeared were the same solicitors who had written the correspondence referred to above and had made the settlement agreement.

The matter will, therefore, be referred back to the Mining Commissioner for a fresh hearing under s. 4 of R.R.O. 1970, Reg. 109, for permission to place or dump fill on the lands in question. It will be for the Commissioner to determine, after hearing whatever evidence he considers to be appropriate, whether he shall attempt to determine the true nature of the original settlement agreement or to approach the matter afresh and determine on the merits the lands on which and the circumstances in which fill should be placed or dumped. The latter course may be appropriate in view of the fact that a year and a half have passed since the first order of the Commissioner in this matter.

The respondent Smith will be the applicant in and have carriage of the further proceedings before the Mining Commissioner. Notice of the further application will be given to both the Corporation of the City of Kingston and the Cataraqui Region Conservation Authority and they will be entitled to call further evidence, as will the respondent Smith.

We should note that the disposition that we have made of this application is the one requested of this Court by counsel for the Attorney-General of Ontario, who appeared before us on behalf of the Mining and Lands Commissioner.

In the circumstances there will be no order as to costs of this application.

Order accordingly.

Indexed as:

Chandler v. Alberta Association of Architects

**IN THE MATTER of an application for an order for prohibition;
AND IN THE MATTER of the Architects Act, being chapter A-44.1 of the Revised Statutes of Alberta, 1980, as amended;
AND IN THE MATTER of the Practice Review Board of the Alberta Association of Architects
Sheldon Harvey Chandler, S.H. Chandler Architect Ltd., Gordon Gerald Kennedy, G.G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk and Peter J. Dandyk Architect Ltd., appellants;
v.
Alberta Association of Architects, the Practice Review Board of the Alberta Association of Architects, Trevor H. Edwards, James P.M. Waugh and Mary K. Green, respondents.**

[1989] 2 S.C.R. 848

[1989] 2 R.C.S. 848

[1989] S.C.J. No. 102

1989 CanLII 41

File No.: 19722.

Supreme Court of Canada

1989: January 30 / 1989: October 12.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law -- Boards and tribunals -- Jurisdiction -- Continuation of original proceedings -- Functus officio -- Inquiry into the practices of a firm of architects -- Board conducting a valid hearing but issuing ultra vires findings and orders -- Board's findings and orders quashed -- Board failing to consider whether it should make recommendations as

required by legislation -- Whether Board empowered to continue original proceedings -- Architects Act, R.S.A. 1980, c. A-44.1, s. 39(3) -- Alberta Regulation, 175/83, s. 11(1).

Pursuant to s. 39 of the Architects Act, the Practice Review Board of the Alberta Association of Architects conducted a hearing to review the practices of a firm of [page849] architects which went bankrupt and issued a report. Although the hearing was intended to be a practice review, the Board, in its report, made 21 findings of unprofessional conduct against the firm and six of the architects, levied fines, imposed suspensions and ordered them to pay the costs of the hearing. The Court of Queen's Bench allowed appellants' application for certiorari and quashed the Board's findings and orders. The Court of Appeal upheld the decision holding that the Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Under s. 39(3) of the Act, the Board is simply responsible for reporting to the Council of the Alberta Association of Architects and for making appropriate recommendations.

The Board notified the appellants that it intended to continue the original hearing to consider whether a further report should be prepared for consideration by the Council and whether the matter should be referred to the Complaint Review Committee. The Court of Queen's Bench allowed appellants' application to prohibit the Board from proceeding further in the matter. The court found that the Board had completed and fulfilled its function and that it was therefore functus officio. The Court of Appeal vacated the order of prohibition. It held that s. 39(3) of the Act and s. 11(1) of the Regulations require the Board to consider whether or not to make recommendations to the Council or the Complaint Review Committee. The Board did not do so and therefore did not exhaust its jurisdiction.

Held (La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson and Sopinka JJ.: The Board was not functus officio. As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of functus officio applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tribunals [page850] which are subject to appeal only on a point of law must thus be more flexible and less formalistic.

Here, the Board failed to dispose of the matter before it in a manner permitted by the Act. The Board conducted a hearing into the appellants' practices but issued findings and orders that were ultra vires. The Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly. It did not consider making recommendations as required by the Regulations and s. 39(3) of the Act. While the Board intended to make a final disposition of the matter before it, that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the Board, which conducted a valid hearing until it came to dispose of the matter, should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis. On the continuation of the original proceedings, however, either party should [page851] be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulations.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): When an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. In this case, the Board was functus officio when it handed down its decision. Its function was completed when it rendered its final report. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of functus officio.

If the Board had discretion to consider making recommendations, and chose not to do so, it should be the end of the matter. There is no authority in the Act that permits the Board to change its mind on its own initiative. Furthermore,

once a board acts outside its jurisdiction it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a Board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters. Finally, as a general rule, a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations once it had made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

If the Board had a duty to consider making recommendations which it failed to fulfill, it could, depending on the circumstances of the case, be directed to review the entire matter afresh, and could be required to conduct a new hearing. Any re-examination, however, should not be construed as a "continuation of the Board's original proceedings". It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. It would also erode the protection of fairness and natural justice which is expected of administrative tribunals. In the particular circumstances of this case, a rehearing would not be appropriate.

The Court of Appeal erred in applying the principles of mandamus to the present situation.

Cases Cited

By Sopinka J.

Referred to: In re St. Nazaire Co. (1879), 12 Ch. D. 88; Paper Machinery Ltd. v. J. O. Ross Engineering Corp., [1934] S.C.R. 186; Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214; Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637; Ridge v. Baldwin, [1964] A.C. 40; Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232; Posluns v. Toronto Stock Exchange, [1968] S.C.R. 330; Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577.

By L'Heureux-Dubé J. (dissenting)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292 (1964), 44 D.L.R. (2d) 463; Lewis v. Grand Trunk Pacific Railway Co. (1913), 13 D.L.R. 152; M. Hodge and Sons Ltd. v. Monaghan (1983), 43 Nfld. & P.E.I.R. 162; Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214; Lodger's International Ltd. v. [page852] O'Brien (1983), 45 N.B.R. (2d) 342; Slaight Communications Inc. v. Davidson, [1985] 1 F.C. 253 (C.A.), aff'd [1989] 1 S.C.R. 1038; Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577; Cité de Jonquière v. Munger, [1964] S.C.R. 45; Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637; Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232; Canadian Industries Ltd. v. Development Appeal Board of Edmonton (1969), 71 W.W.R. 635; Karavos v. Toronto, [1948] 3 D.L.R. 294.

Statutes and Regulations Cited

Alberta Regulation, 175/83, s. 11.
Architects Act, R.S.A. 1980, c. A-44.1, ss. 9(1)(j.1) [ad. 1981, c. 5, s. 6], 39 [am. 1981, c. 5, s. 16].
Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4).
National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [formerly National Transportation Act], s. 66.
Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42.

Authors Cited

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, "functus officio".
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, "functus officio".
Pépin, Gilles et Yves Ouellette. Principes de contentieux administratif, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

APPEAL from a judgment of the Alberta Court of Appeal (1985), 67 A.R. 255, allowing respondents' appeal from a decision of the Court of Queen's Bench [Alta. Q.B., No. 8501-19113, October 8, 1985 (Brennan J.)], granting appellants' application for an order for prohibition against the Practice Review Board. Appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting.

W.E. Code, Q.C., and B.G. Kapusianyk, for the appellants. No one appearing for the respondents.

Solicitors for the appellants: Code Hunter, Calgary.

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The judgment of Dickson C.J. and Wilson and Sopinka JJ. was delivered by

1 **SOPINKA J.**:-- The issue in this appeal is whether the Practice Review Board of the Alberta Association of Architects was functus officio after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group. The Alberta Court of Appeal allowed an appeal from the decision of the Alberta Court of Queen's Bench granting the appellants' application for an order prohibiting the Practice Review Board from proceeding on the grounds that the Board no longer had jurisdiction to deal with the matter and was functus officio.

Facts

2 As a result of the Chandler Kennedy Architectural Group filing for voluntary insolvency in June 1984, the Practice Review Board of the Alberta Association of Architects decided on its own initiative pursuant to s. 39(1)(b) of the Architects Act, R.S.A. 1980, c. A-44.1, to undertake a review of the practice of the Group and a number of the individual members of the Group. Hearings were commenced on August 14, 1984 and continued for a total of eighteen days. Final submissions were heard on December 17, 1984 and the report of the Board was issued on March 6, 1985.

3 The 71-page report made 21 specific findings of unprofessional conduct against the firm and several of the partners. Fines totalling $127,500 were imposed upon six members of the firm. The same six partners were also issued suspensions from practicing architecture for periods from six months to two years. As well, the appellants were required to pay the costs of the hearing, approximating $200,000.

Proceedings in the Courts Below

4 The appellants filed notice of intention to appeal the decision of the Board to the Council of the Alberta Association of Architects pursuant to s. 55 [page854] of the Architects Act. However, prior to the commencement of the appeal, the appellants brought an application before the Alberta Court of Queen's Bench for an order in the nature of certiorari to quash the findings and order of the Practice Review Board. Kryczka J. granted the order requested and held that the failure to inform the appellants that they were facing any charges or allegations of unprofessional conduct offended the principles of natural justice. Kryczka J. held that the comments of the Chairman of the Board clearly indicated that the

hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

5 This decision was appealed by the Alberta Association of Architects to the Alberta Court of Appeal. In the Court of Appeal (1985), 39 Alta. L.R. (2d) 320, Prowse J.A. speaking for the court, upheld the decision of Kryczka J. but on different grounds. Prowse J.A. held that the Practice Review Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Disciplinary powers were said to be reserved for another body within the Alberta Association of Architects, the Complaint Review Committee. Under s. 39(3) of the Architects Act the Board is simply responsible for reporting to the Council and making whatever recommendations it feels are appropriate. Therefore, the Court of Appeal dismissed the appeal on the grounds that the Architects Act did not give to the Board the powers it purported to exercise.

6 A month after the decision of the Court of Appeal, the Practice Review Board gave notice to the appellants that it intended to continue the original hearing in order that consideration could be given to preparing a further report to the Council of the Alberta Association of Architects and consideration could also be given to referring the matter to the Complaint Review Committee.

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7 The appellants then brought an application before the Court of Queen's Bench to prohibit the Board from proceeding further with the continuation of the matter. Brennan J. held that the Board had completed and fulfilled the function for which it was constituted and it was therefore functus officio and lacked jurisdiction to continue its hearing. This decision was also appealed to the Alberta Court of Appeal.

8 The Court of Appeal (1985), 67 A.R. 255 allowed the appeal and vacated the order of prohibition. Kerans J.A. for the court held that s. 39(3) of the Architects Act and Regulation 175/83, s. 11(1) impose on the Board the duty to consider whether or not to make a recommendation. Kerans J.A. held that the Board did not consider whether to make a recommendation that the matter be referred to the Complaint Review Committee and therefore it did not exhaust its jurisdiction. Functus officio was held not to apply here as there was a failure to consider matters which were part of the Board's statutory duty. It is from this decision that the present appeal arises.

Statutory Powers of the Board

9 In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals. See Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4); Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42; and National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20, s. 66 (formerly the National Transportation Act). It is therefore necessary to consider (a) whether it had made a final decision, and (b) whether it was, therefore, functus officio.

[page856]

10 The Board on its own initiative launched an inquiry into the practices of the appellants pursuant to s. 39 of the Act which provides:

> 39(1) The Board

(a) shall, on its own initiative or at the request of the Council, inquire into and report to and advise the Council in respect of

(i) the assessment of existing and the development of new educational standards and experience requirements that are conditions precedent to obtaining and continuing registration under this Act,
(ii) the evaluation of desirable standards of competence of authorized entities generally,
(iii) any other matter that the Council from time to time considers necessary or appropriate in connection with the exercise of its powers and the performance of its duties in relation to competence in the practice of architecture under this Act and the regulations, and
(iv) the practice of architecture by authorized entities generally,

and

(b) may conduct a review of the practice of an authorized entity in accordance with this Act and the regulations.

(2) A person requested to appear at an inquiry under this section by the Board is entitled to be represented by counsel.
(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.
(4) If it is in the public interest to do so, the Council may direct that the whole or any portion of any inquiry by the Board under this section shall be held in private.

11 It is apparent that s. 39 does not deal with discipline but rather with practices in the profession with a view to their improvement. If, however, in the course of the inquiry into practices it appears to the Board that a matter may require investigation by the Complaint Review Committee, provision is made for referral of that matter to that Committee. Section 9(1)(j.1) of the Act empowers the Council to make regulations:

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(j.1) respecting the powers, duties and functions of the Practice Review Board including, but not limited to, the referral of matters by that Board to the Council or the Complaint Review Committee and appeals from decisions of that Board;

12 Section 11 of Regulation 175/83 passed pursuant to s. 9(1)(j.1) provides as follows:

11(1) The Board may shall [sic] make one or more of the following directions or recommendations:

(a) make one or more recommendations to the authorized entity or licensed interior designer,

the subject of a practice review, respecting desired improvements in the practice reviewed;

(b) direct that a reviewer conduct a follow-up practice review to determine whether or not the Board's recommendations have been adopted and whether they have resulted in the desired improvements being made in the practice of the entity concerned;

(c) if it considers any one or more of the following matters to be of a sufficiently serious nature to require investigation by the Complaint Review Committee, direct that the matter be referred to the Complaint Review Committee for investigation:

(i) the uncooperative manner of an authorized entity or licensed interior designer in the course of a practice review or a follow up review;

(ii) a failure to comply with the Act, Professional Practice Regulation, Code of Ethics, Interior Design Regulation or General By-laws;

(iii) a failure to adopt and implement the recommendations respecting desired improvements in the practice of the entity concerned;

(iv) any apparent fraud, negligence or misrepresentation, or any disregard of the generally accepted standards of the practice of architecture or practice of licensed interior designers;

(d) if the Board determines in the course of its practice review that the conduct of an authorized entity or licensed interior designer constitutes

(i) unskilled practice of architecture or unprofessional conduct or both, or

(ii) unskilled practice of interior design or unprofessional conduct, or both

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the Board shall deal with the matter in accordance with sections 50 to 53 of the Act;

(e) indicate that it has no recommendations to make or that the practice reviewed is satisfactory;

(f) comment on a practice maintained at a high standard and with the consent of the authorized entity or licensed interior designer concerned, publicize the high standard and the persons concerned;

(g) take recommendations to the Council with a view to the establishment of new standards related to specific or general areas of the practice of architecture.

(2) The Board shall not impose any sanction under subsection (1)(d) unless the authorized entity or professional interior designer concerned

(a) has made representations to the Board, or

(b) after a notice under section 42 of the Act has been given, fails to attend the hearing or does not make representations.

13 The Board's inquiry proceeded as an inquiry into practices in accordance with the Act. The following statements made by the Chairman during the course of the inquiry aptly describe the nature of the inquiry:

> The first thing that I would like to make very clear and I believe that you alluded to this in the beginning, that this is not a complaint review, this is a practice review, and as a result we are not dealing with a specific case of wrongdoing which I think you are alluding to and you are obviously experienced in the court. We are dealing with a review of the practice of the various authorized entities and that means a total review. So, as a result, the entire course of this Hearing has been to review the total practice. It has not been a process of reviewing specific points. The Board has been concerned to develop a full and as broad an understanding of the practice of the various entities as is humanly possible under the circumstances.
>
> As a result of the review of those authorized entities, it is our responsibility and our duty to make recommendations and to make findings and we of course are going to be doing that following this.
>
> . . .
>
> Following each and every individual, we have provided an opportunity for questioning. The Board will have to take into consideration all of the evidence that has been put before it and has been spending a great deal of time in making certain it is listening and trying to understand [page859] everything that has taken place. But again, as I said to your counsel, a few minutes ago, this is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result of the fullest extent of which has taken place, make findings and recommendations to the profession. [Emphasis added.]

14 Nevertheless, when it came to issue directions and recommendations, instead of proceeding under s. 39(3) of the Act as amplified by s. 11(1)(a), (b), (c), (e), (f) or (g) of the Regulation, the Board proceeded under s. 11(1)(d) of the Regulation, a provision that the Court of Appeal in the first appeal held to be ultra vires. The Court of Appeal held that ss. 50 to 53 deal with disciplinary matters which are beyond the competence of the Board. This decision of the Court of Appeal has not been challenged. Accordingly, the result of the decision of the Court of Appeal is that the Board conducted a valid hearing into the appellants' practice but issued findings and orders that were ultra vires and have been quashed.

15 In view of the fact that the Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly, it did not consider recommendations under s. 39(3) of the Act or under s. 11(1)(a), (b), (c), (e), (f) or (g), and in particular (c), of the Regulation.

16 Kerans J.A. based his conclusion that the Board was not functus officio on the ground that the Board had a duty to consider whether to make a recommendation. He stated, at p. 257:

> While the board has, under s. 39(3) and perhaps also the regulations, a discretion whether to make any recommendation, we think that the section imposes upon the board the duty to consider whether to make a recommendation. The report does not say that the board did so. If the board did not so consider, then, contrary to the finding of the learned Queen's Bench judge, the board has not exhausted its jurisdiction.

17 In view of the inexplicable use of "may/shall" in Regulation 11(1), it is difficult to determine precisely what the Board was obliged to do. Certainly [page860] it would be strange if the Board were empowered to conduct a lengthy

practice review and had no duty to consider making recommendations, either to the parties or to Council, or to consider a referral to the Complaint Review Committee. Therefore, I agree with Kerans J.A. that the Board had the duty to consider making recommendations pursuant to the Regulation and s. 39(3) of the Architects Act.

18 I am, however, of the opinion that the application of the functus officio principle is more appropriately dealt with in the context of the following characterization of the current state of the Board's proceedings. The Board held a valid hearing into certain practices of the appellants. At the conclusion of the hearing, in lieu of considering recommendations and directions, it made a number of ultra vires findings and orders which were void and have been quashed. In these circumstances, is the decision of the Board final so as to attract the principle of functus officio?

Functus Officio

19 The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in In re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,
2. where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. v. J. O. Ross Engineering Corp., [1934] S.C.R. 186.

In Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal [page861] Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At p. 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In R. v. Development Appeal Board, Ex p. Canadian Industries Ltd., the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the St. Nazaire Company case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

20 I do not understand Martland J. to go so far as to hold that functus officio has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.

[page862]

21 To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.

23 Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.)

24 In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the Architects Act. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In Re Trizec Equities Ltd. [page863] and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (B.C.S.C.); Posluns v. Toronto Stock Exchange et al. (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in Ridge v. Baldwin, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

25 If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as Ridge v. Baldwin, [1964] A.C. 40 (H.L.); Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (S.C.B.C.) and Posluns v. Toronto Stock Exchange, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.

26 In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and [page864] should be entitled to do so. The Court of Appeal so held.

27 On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

28 In the result, the appeal is dismissed, but without costs. The respondents neither appeared on the argument nor filed a factum.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

29 L'HEUREUX-DUBÉ J. (dissenting):-- I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

30 The issues which arise in this appeal are:

(1) Was the Practice Review Board ("Board") of the Alberta Association of Architects functus officio after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group?
(2) If the Board was not functus officio, does it have the jurisdiction to continue the original hearing against the appellants to consider making recommendations to the Complaint Review Committee?
(3) Did the Court of Appeal err in its consideration and application of the principles relating to mandamus?

31 The first two, closely related issues, turn on the construction of s. 39 of the Architects Act, R.S.A. 1980, c. A-44.1, and Regulation 175/83 (passed under authority of the Act), which establish the Board and define its powers.

[page865]

32 Section 39(3) of the Architects Act provides:

> (3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

33 The disputed text is found in Regulation 175/83, s. 11(1):

> 11(1) The Board may shall [sic] make one or more of the following directions or recommendations:
>
> . . .
>
> (c) ... direct that the matter be referred to the Complaint Review Committee for investigation: ...

34 The confusion emanates from the inclusion of both the permissive, discretionary term "may", and the affirmative,

mandatory term "shall", without any indication as to which prevails. However, while I shall discuss the implications of both interpretations, in my view the appeal should be allowed on either construction.

(1) Functus Officio

35 When the Board first undertook to reopen the hearing, appellants sought an order for prohibition, which was granted by Brennan J. In granting the order, the chambers judge of the Court of Queen's Bench stated:

> Unfortunately, the Practice Review Board proceeded to set itself up as having disciplinary functions and made findings and assessed penalties. Mr. Justice Kryczka declared these Findings and Orders a nullity, which decision was upheld by the Alberta Court of Appeal.
>
> In my view, the Practice Review Board has completed and fulfilled the function for which it was appointed and therefore it is functus officio. Such being the case, it had no jurisdiction to continue with any function. Accordingly, the application is granted for an Order to prohibit the Board from proceeding further against these Applicants, and in particular, the Board is hereby prohibited from proceeding with any further hearings on this matter.

36 This decision was reversed by the Alberta Court of Appeal: (1985), 67 A.R. 255. According to Kerans J.A., for the court, the Board was not [page866] functus officio, and should be allowed to "voluntarily ... do the right thing" (at p. 257):

> [T]he board, having mistaken[ly] decided that it had itself the power to deal directly and finally with discipline questions, too quickly rejected any consideration of making recommendations to other bodies. We think that the board, persuaded by its mistaken assumption of these other powers, made such an egregious error about the significance of its powers of recommendation that it cannot be said that it has exercised that jurisdiction.

37 Jowitt's Dictionary of English Law (2nd ed. 1977) defines functus officio as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J. in Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417 (Ch. D.), is well summarized in the headnote:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

38 An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is functus officio, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

39 Black's Law Dictionary (5th ed. 1979) defines functus officio as "a task performed":

> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

[page867]

40 The doctrine of functus officio states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292 (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)). "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine" (appellants' factum, at p. 19).

41 In Re Nelsons Laundries Ltd., Verchere J. cited Lewis v. Grand Trunk Pacific Railway Co. (1913), 13 D.L.R. 152 (B.C.C.A.), at p. 154:

> The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award.

In M. Hodge and Sons Ltd. v. Monaghan (1983), 43 Nfld. & P.E.I.R. 162 (Nfld. C.A.), Morgan J.A. stated that (at p. 163):

> Whether or not the trial judge was in error in the first instance in declaring the proceedings a nullity, and ordering the Writ of Summons and Statement of Claim to be struck out, is not relevant to the issue now before us. The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it. ... Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

42 Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the functus officio doctrine. Perhaps the most concise statement of the doctrine can be found in Pépin and Ouellette, Principes de contentieux administratif (2nd ed. 1982), at p. 221:

> [TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the file [page868] is closed and the government body is "functus officio". The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.

43 In line with that doctrine, if the Board had discretion to consider making recommendations, and chose not to, that should be the end of the matter. The finality of the Board's decision can be ascertained from its own language when it made its orders. The actual report of the Board reveals that the hearings concluded on December 17, 1984. The Board members signed the report under the heading "Conclusions". Furthermore, given that the Council of the Alberta Association of Architects issued a notice of hearing of an appeal from the decision rendered by the Board, it too must have considered the hearing complete. In the actual findings of the Board, they imposed suspensions, effective immediately. The report is entitled "Report of the Practice Review Board", the rendering of which is the function of that tribunal. All these factors indicate that the Board had completed its function and had rendered its final report.

44 It seems to me that there is a fundamental flaw in the reasoning of the Alberta Court of Appeal. If the Board was not functus officio after handing down its decision, at what point does it become so? In this case an appeal was filed,

though not heard because the original ruling was quashed. If the Board is not functus officio when the decision is handed down, it must certainly be so by the time an appeal is filed. If not, then the logical conclusion would be that the Board could sit again to redetermine a matter even after an appeal had been heard, for there is no principled basis on which to say that at some point after the decision has come down the Board becomes functus officio, and there seems no way to rationally define an exception for the rare circumstance where the Board fails to consider the exercise of a discretionary [page869] duty. In my view, this point should be fatal to the respondents.

45 If a tribunal has discretion, i.e. if it may consider making recommendations, and chooses not to, there is no authority in the Architects Act that permits it to change its mind on its own initiative. Furthermore, once a board acts ultra vires, it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters.

46 In most administrative decisions, the tribunal does not address the fact that it has considered all of its discretionary powers but has elected to invoke only a few of those powers. I agree with the holding in Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.), that a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations to Council once it has made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

47 There are, of course, exceptions to the general rule that an arbitrator who has reached a final decision becomes functus officio and cannot afterwards alter his award. For example an adjudicator may correct clerical mistakes or errors arising from an accidental slip or omission (Lodger's International Ltd. v. O'Brien (1983), 45 N.B.R. (2d) 342 (N.B.C.A.); Re Nelsons Laundries Ltd., supra). However, the Board in the present case is [page870] not seeking to correct a slip or clerical error. If it had the option to consider making recommendations, and yet chose not to, that choice does not detract from the finality of the decision.

48 When a decision is rendered with nothing to be completed, there is no doubt that the adjudicator is functus officio: any further action would be entirely without authority (Slaight Communications Inc. v. Davidson, [1985] 1 F.C. 253 (C.A.), affirmed [1989] 1 S.C.R. 1038). Hence, if the Board is seen as having discretion whether or not to consider making recommendations, and the Alberta Court of Appeal decision is left undisturbed, the doctrine of functus officio would be rendered nugatory.

49 In Lodger's International Ltd., supra, the New Brunswick Court of Appeal dealt with a series of orders by the New Brunswick Human Rights Commission. The Commission first ordered an employer to compensate two employees. When the employer did not comply, the Commission renewed the order with a time limit for payment. Section 21(2) of the Human Rights Act provided that the orders were "final". The court held that the second order was improper and that the Commission was functus officio after the first order, because s. 21 did not authorize subsequent orders. La Forest J.A. (now of this Court), writing for the court, addressed the issue of whether the Commission was empowered to make such a series of orders and concluded that (at p. 352):

> It would take strong words indeed to convince me that the legislature ever intended to give this kind of power to an administrative body, however lofty its goals and however liberally we are expected to construe the statute to facilitate the achievement of these goals.

50 Unlike the enabling statute in Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577, where the Immigration Appeal Board had statutory jurisdiction to hold a rehearing under [page871] s. 15 of the Immigration Appeal Board Act, there is no authority in the Architects Act for the Board to hold a rehearing. Cité de Jonquière v. Munger, [1964] S.C.R. 45, also supported a policy favouring the finality of decisions unless the statute dictates

otherwise. Upholding the unanimous decision of the Quebec Court of Appeal, Cartwright J., for the Court, held that (at p. 48):

> I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous.

51 Furthermore, I agree with the holding in M. Hodge and Sons Ltd., supra, that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of functus officio (at p. 163):

> The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it.

(2) The Board's Jurisdiction to Rehear

52 The Alberta Court of Appeal interpreted the Architects Act, and Regulation 175/83, as imposing a duty on the Board to consider whether to make a recommendation to the Governing Council or Complaint Review Committee.

53 Despite the ambiguous language, my colleague, Sopinka J., concludes that the Act imposes a duty on the basis that "it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations (p. 860)". Given that "the Board conducted a valid hearing until it came to dispose of the matter" (p. 863), my colleague suggested that "[o]n the continuation of the Board's original proceedings ... either party should be allowed to supplement the evidence and make further representations which are pertinent to the disposition of the matter" (p. 864). Hence, while it would [page872] provide for the presentation of supplementary evidence, the rehearing itself would not be conducted afresh, but rather as a "continuation of the Board's original proceedings".

54 This analysis does have a certain intuitive appeal: given that a Practice Review Board does exist, and has a certain function to fulfill, it should be allowed, or rather required, to perform that function. However, the issue here is precisely that the Board did exercise that function, albeit illegally.

55 There is no dispute that when making the final orders it did, the Board clearly exceeded its jurisdiction. The Chairman of the Board himself set out the Board's functions and explicitly recognized that:

> [T]his is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result if the fullest extent of which has taken place, make findings and recommendations to the profession.

56 Following this introduction, the Board embarked on an adjudicatory path which the courts found to be wholly ultra vires. If it had a duty to consider whether to make a recommendation to the Complaint Review Committee, it did not do so.

57 Even though the Board was wrong in its initial decision, the question is whether that precludes the Board from now attempting to correctly carry out its function. According to my colleague, as the Board's disposition was a nullity, it amounts to no disposition at all in law: "a tribunal which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision" (p. 862) (emphasis added), relying on Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. [page873] (3d) 637 (B.C.S.C.), where McLachlin J. (now of this Court) wrote, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a

> decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (B.C.S.C.); Posluns v. Toronto Stock Exchange et al. (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in Ridge v. Baldwin, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid. [Emphasis added.]

58 These precedents distinctly indicate that whenever special circumstances do warrant reconsideration by an administrative tribunal, such is to take place "afresh", not merely as a continuation of the tainted process now sought to be corrected.

59 Furthermore, Re Trizec dealt with a procedural error by the Court of Revision. While acting wholly within the domain of its substantive jurisdiction, the Court of Revision increased an assessment against a taxpayer before allowing the taxpayer to be heard. Two days later, at the request of the taxpayer, the court reconvened and a hearing was conducted. Hence, this case is distinguishable on at least three grounds:

> (1) the court in Re Trizec was instructed to consider the matter afresh and conduct a proper hearing; the Alberta Court of Appeal in Chandler allowed the Board to continue its original proceeding;
>
> (2) the court, acting within its jurisdiction, made a procedural error which it subsequently corrected; the Board in Chandler was not [page874] empowered at the substantive level to make any of the findings it did; and
>
> (3) the taxpayer itself requested a hearing, whereas the Board in Chandler reopened the proceedings on its own initiative.

60 The issues in Lange v. Board of School Trustees of School District No. 42 (Maple Ridge) (1978), 9 B.C.L.R. 232 (B.C.S.C.), relied upon in Re Trizec, were almost identical. A teacher was dismissed on three grounds of misconduct, yet was heard on only two of those grounds. He was then heard on the third ground and the dismissal was upheld.

61 The suggestion that the Board's original proceedings be continued is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals. The original hearing was conducted under the mistaken belief by the Board that it could make certain orders, despite the Chairman's introductory words. The Chairman's comments, reproduced above, clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

62 Kryczka J. of the Alberta Court of Queen's Bench held that, given the failure to inform the appellants that they were facing any such discipline charges or allegations, "it is difficult for me to conceive how the eventual result could be characterized as anything other than a travesty of justice". It might be that the appellants would have entered into a different course or line of defense at the hearing had they suspected that they were being investigated with respect to matters entirely outside the scope of the Board's jurisdiction. Unaware and not informed of the discipline charges that were in fact contemplated by the Board, appellants were not legally in a position [page875] to prepare a full defense to

the allegations and orders ultimately made against them.

63 Appellants further contend that, if upheld, the decision of the Alberta Court of Appeal must be taken as overturning the judgment of the same court in Canadian Industries Ltd. v. Development Appeal Board of Edmonton (1969), 71 W.W.R. 635, cited with approval in Grillas, supra, at pp. 588-89. Canadian Industries dealt with a board that held a hearing without giving notice to the appellant who was entitled to such notice as an interested party. The Board then held a rehearing of which proper notice was given, and decided, after hearing submissions, that its previous order should not be changed. Johnson J.A., for the Court of Appeal held that both orders had to be set aside. The first was a nullity as the appellant was not notified. The second was a nullity as well in the absence of clear statutory authority to conduct a rehearing.

64 As mentioned previously, there is no clear statutory language enabling the Board to conduct a rehearing. If the Board has a duty which it failed to fulfill, it can, depending on the circumstances of the case, be directed to review the entire matter afresh, and can be required to conduct a new hearing. Re Trizec and Lange, supra. However, if it sets out to do one thing and winds up doing something entirely different, any reexamination should not be construed as a "continuation of the Board's original proceedings".

65 I would like to briefly address the prima facie apprehension that a direction to the Board to conduct a new hearing is tantamount to "double adjudication". That would be a valid concern if the Board is seen as having discretion. It would then be making orders subsequent to its being rendered functus officio. However, if it has an imposed duty, a rehearing would only be required if the original hearing is determined to be a total nullity, [page876] and the case so warrants. In that case, the apprehension of allowing a tribunal to make a series of orders, Lodger's International Ltd., supra, would not arise. In the particular circumstances of this case, a rehearing would not be appropriate in my view.

Mandamus

66 As the Court of Appeal twice referred to the principles of mandamus, I will address them as well. However, I agree with appellants that these principles have nothing to do with this appeal.

67 Laidlaw J.A. set out the requirements for mandamus in Karavos v. Toronto, [1948] 3 D.L.R. 294 (Ont. C.A.), at p. 297:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" ...; (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief ..."; (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"; (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy ....

68 Hence, mandamus appears to be a remedy that would apply against a tribunal or authority, and not one to be invoked by it. If the Board declined to exercise jurisdiction, then mandamus would lie. However, that is not the case here. Quite the contrary; the Board took it upon itself to exercise more jurisdiction than in fact it had. That alone would undermine the Court of Appeal's application of mandamus to this case. Furthermore, if we are to follow the requirements set out above, none appear to be satisfied by the facts here:

[page877]

(1) There is no clear legal right in issue.

(2) The Board may have had discretion whether or not to make recommendations.
(3) Whether or not the Regulation confers discretion upon the Board is still an open question, and if the Board has a duty to consider making recommendations, it certainly has discretion whether or not to make them, and which ones to make, if any.
(4) There has been no demand by the appellants or refusal by the Board to perform, as is required by mandamus.

Conclusion

69 On either interpretation of the ambiguous language in the Regulation, I am of the view that the appeal should succeed. If the Board had discretion, and decided to act in a certain manner, it is now functus officio. If it had an imposed duty which it did not perform, it cannot continue with a tainted hearing. For the reasons discussed above, mandamus is not a controlling factor in this appeal.

70 Therefore, I would allow the appeal, vacate the order of the Court of Appeal and restore the judgment of Brennan J. prohibiting the Board from acting any further in this matter, the whole with costs throughout.

Statutory Powers Procedure Act, RSO 1990, c S.22

Current version: in force since Jun 1, 2011

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From June 1, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 87.

Interpretation

1. (1) In this Act,

"electronic hearing" means a hearing held by conference telephone or some other form of electronic technology allowing persons to hear one another; ("audience électronique")

"hearing" means a hearing in any proceeding; ("audience")

"licence" includes any permit, certificate, approval, registration or similar form of permission required by law; ("autorisation")

"municipality" has the same meaning as in the *Municipal Affairs Act*; ("municipalité")

"oral hearing" means a hearing at which the parties or their representatives attend before the tribunal in person; ("audience orale")

"proceeding" means a proceeding to which this Act applies; ("instance")

"representative" means, in respect of a proceeding to which this Act applies, a person authorized

Notice of filing

(2) A party who files an order under subsection (1) shall notify the tribunal within 10 days after the filing. 1994, c. 27, s. 56 (35).

Order for payment of money

(3) On receiving a certified copy of a tribunal's order for the payment of money, the sheriff shall enforce the order as if it were an execution issued by the Superior Court of Justice. 1994, c. 27, s. 56 (35); 2006, c. 19, Sched. C, s. 1 (1).

Record of proceeding

20. A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

(a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;

(b) the notice of any hearing;

(c) any interlocutory orders made by the tribunal;

(d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;

(e) the transcript, if any, of the oral evidence given at the hearing; and

(f) the decision of the tribunal and the reasons therefor, where reasons have been given. R.S.O. 1990, c. S.22, s. 20.

Adjournments

21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. S.22, s. 21.

Correction of errors

21.1 A tribunal may at any time correct a typographical error, error of calculation or similar error made in its decision or order. 1994, c. 27, s. 56 (36).

Power to review

21.2 (1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order. 1997, c. 23, s. 13 (20).

Time for review

(2) The review shall take place within a reasonable time after the decision or order is made.

Conflict

(3) In the event of a conflict between this section and any other Act, the other Act prevails. 1994, c. 27, s. 56 (36).

27A.4(b)(ii) — Accidental Slip or Omission

The term "accidental slip or omission" has a slightly broader meaning than clerical error. This type of mistake is one in which the decision as recorded does not reflect the intent of the decision-maker. The purpose of the "corrected" decision is always simply to put the order in the form the decision-maker originally intended it to be. If the order accurately reflects the original intent no rehearing power exists under this heading.[123]

In *Debret v. Debret*,[124] the Sask. Supreme Court had to consider the ability of an arbitrator to issue a second order including in it a provision which the arbitrator had intended to include in the original order but had neglected to do so. The Court stated (at page 503 W.W.R.):

> . . . the failure of the arbitrator to include in his award the 1/6th share of the crop for 1916 was an error arising from an accidental slip or omission within the meaning of the statute. The subsequent addition of this share to the written award did not necessitate any new determination of judgment on his part as in *re Stringer and Riley Brothers*, [1901] 1 Q.B. 105; 70 L.J.K.B. 19, and in those cases where the arbitrator misapprehended the facts and subsequently sought to make a new award upon the true facts. The finding in this case had already been made by the agreement of the parties, but that finding was omitted from the report.

A similar conclusion was reached by the Federal Court of Appeal in *Montreal Fast Print (1975) Ltd. v. Polylok Corporation*[125] where the power to correct accidental slips and omission was held (at page 223 N.R.):

> to enable the court to amend so as to make a judgment conform to what was intended when it was pronounced, but that it cannot and should not be used to authorize a judge to review or rescind his judgment or to alter it so as to reflect a change of mind as to what the judgment should have been.[126]

In *Lodger's International Ltd. v. O'Brien*,[127] the New Brunswick Court of Appeal found that the failure to include a date by which an amount of money to be paid was not an accidental error or omission as the decision-maker in question had not originally intended to include such a date in its order. This was to be contrasted with *Calvert v. Forbers (No. 1)* (1984), 3 Terr. L.R. 282 where the failure to include a date in the order rendered the order meaningless.

In *Chessum & Sons v. Gordon*, [1901] 1 K.B. 694 (C.A.), the accidental slip rule was applied to allow a taxing master to issue a second taxation assessment when by error *the applicant* had failed to include in his expenses being assessed one expense item. Two earlier decisions were cited in support of this ruling, *Fritz v. Hobson* 14 Ch. D. 542 and *Barker v. Pruvis* 56 L.T. 131, where the accidental slip rule had been applied to cases where the applicant had accidently mislead or failed to provide a decision-maker with the correct facts. It is important to note that in these cases the substance of the decision-maker's decision was not being changed. In each case it could be argued that the decision-maker had intended to, or had, awarded the thing in question which had been omitted from the implementation of the court's intention by error. In *Chessum* the Court expressly noted that the accidental slip rule was not to be applied where an applicant had further information which showed the original decision to be wrong and was seeking a change. This aspect of the accidental slip exception was more recently applied in the decision of the Ontario Divisional Court *Grier v. Metro International Trucks Ltd.*[128]

27A.4(b)(iii) — Ambiguity

It is not uncommon for decision-makers to be asked to clarify a decision which is ambiguous and the parties are unable to determine what the decision-maker was

PART III - PROCEEDINGS

15. Commencement of Proceedings

15.01 Unless commenced by the Board, a proceeding shall be commenced by filing an application or a notice of appeal in compliance with these Rules, and within such a time period as may be prescribed by statute or the Board.

15.02 A person appealing an order made under the market rules shall file a notice of appeal within 15 calendar days after being served with a copy of the order, or within 15 calendar days of having completed making use of any provisions relating to dispute resolution set out in the market rules, whichever is later.

15.03 An appeal of an order, finding or remedial action made or taken by a standards authority referred to in section 36.3 of the *Electricity Act* shall be commenced by the Independent Electricity System Operator by notice of appeal filed within 15 calendar days after being served with a copy of the order or finding or of notice of the remedial action, or within 15 calendar days of receipt of notice of the final determination of any other reviews and appeals referred to in section 36.3(2) of the *Electricity Act*, whichever is later.

16. Applications

16.01 An application shall contain:

(a) a clear and concise statement of the facts;

(b) the grounds for the application;

(c) the statutory provision under which it is made; and

(d) the nature of the order or decision applied for.

16.02 An application shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Ontario Energy Board
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Ontario

BY E-MAIL ONLY

May 3, 2018

Michel Poulin
Manager
Hydro Hawkesbury Inc.
850 Tupper Street
Hawkesbury ON K6A 3S7

michelpoulin@hydrohawkesbury.ca

Dear Mr. Poulin:

Re: Correction to Rate Order
Hydro Hawkesbury. (Hydro Hawkebury Inc.)
Application for Rates
OEB File Number EB-2017-0048

The Ontario Energy Board (OEB) issued a revised Rate Order in the above-noted proceeding on March 27, 2018. On May 1, 2018 Hydro Hawkesbury informed the OEB that it noted a calculation error in the Rate Order. A refund totaling $104,455.81 was to have been paid out to Residential customers over a 12-month period in monthly instalments of $1.80 per customer per month. The Rate Order showed the fixed Rate Rider for Disposition of the Station Refund for the Residential customer class at -$21.60 per customer per month (the annual refund per customer) instead of -$1.80 per customer per month. Hydro Hawkesbury noted that in calculating the rate rider on an annual basis instead of a monthly basis, Hydro Hawkesbury had refunded the entire balance due to the Residential rate class over a one-month period instead of a twelve-month period.

Today, the OEB is reissuing the Rate Order with a sunset date of March 31, 2018 for the Rate Rider for the Station Refund applicable to the Residential customer class. The OEB is satisfied that all outstanding amounts were refunded to residential customers. Pursuant to Rule 41.02 of the *Rules of Practice and Procedure,* the OEB may at any time, without notice or a hearing of any kind, correct typographical errors, errors of calculation or similar errors made in its orders or decisions. The OEB considers this an error of calculation. The Revised Rate Order is not otherwise changed in any way.

Yours truly,

Original Signed By

John Pickernell
Assistant Board Secretary

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Ontario

BY E-MAIL

April 26, 2018

Jane Donnelly
Ottawa River Power Corporation
283 Pembroke St. West.
PO Box 1087
Pembroke ON K8A 6Y6
jdonnelly@orpowercorp.com

Dear Ms. Donnelly:

Re: Correction to Tariff of Rates and Charges
Ottawa River Power Corporation
Application for Rates
OEB File Number EB-2017-0070

The Ontario Energy Board (OEB) issued a Decision and Rate Order in the above-noted proceeding on March 22, 2018. OEB staff has discovered that the monthly service charges for the Sentinel Lighting, Street Lighting and USL classes were rounded to four decimal places instead of two decimal places.

Today, the OEB is reissuing the Tariff of Rates and Charges. Pursuant to Rule 41.02 of the *Rules of Practice and Procedure,* the OEB may at any time, without notice or a hearing of any kind, correct typographical errors, errors of calculation or similar errors made in its orders or decisions. The OEB considers this a typographical error. The Decision and Rate Order is not otherwise changed in any way.

Yours truly,

Original signed by

John Pickernell
Manager, Applications Administration

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Ontario

BY E-MAIL

April 26, 2018

Sarah Hughes
Energy+ Inc.
1500 Bishop Street
P.O. Box 1060
Cambridge ON N1R 5X6
shughes@energyplus.ca

Dear Mrs. Hughes:

Re: Correction to Tariff of Rates and Charges
Energy+ Inc.
Application for Rates
OEB File Number EB-2017-0030

The Ontario Energy Board (OEB) issued a Decision and Rate Order in the above-noted proceeding on March 22, 2018. On April 25, 2018 Energy+ Inc. informed the OEB, via e-mail, that for some classes in Cambridge and North Dumfries Hydro servie area the rate rider for disposition of capacity based recovery account should be billed on kW and not kWh as presented in the Tariff of Rates and Charges.

Today, the OEB is reissuing the Tariff of Rates and Charges. Pursuant to Rule 41.02 of the *Rules of Practice and Procedure,* the OEB may at any time, without notice or a hearing of any kind, correct typographical errors, errors of calculation or similar errors made in its orders or decisions. The OEB considers this a typographical error. The Revised Decision and Rate Order is not otherwise changed in any way.

Yours truly,

Original signed by

John Pickernell
Manager, Applications Administration

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2014-0291

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a review of the capital contribution costs paid by Integrated Grain Processors Co-operative Inc. to Natural Resource Gas Limited pursuant to Sections 19 and 36 of the Act.

AND IN THE MATTER OF a hearing on the Board's own motion.

BEFORE: Christine Long
Presiding Member

Allison Duff
Board Member

DECISION AND ORDER
May 7, 2015

Natural Resource Gas Limited (NRG) is a privately owned utility regulated by the Ontario Energy Board (OEB) that sells and distributes natural gas within southern Ontario to approximately 7,000 customers. In 2008, NRG built a dedicated pipeline to serve the Integrated Grain Processors Co-operative Inc. (IGPC) ethanol plant after receiving leave to construct from the OEB (the Pipeline).

In a decision dated February 27, 2014 (the Original Decision)[1], the OEB awarded IGPC $150,000 for additional costs related to a letter of credit for the Pipeline. NRG wrote to

[1] EB-2012-0406/EB-2013-0081 Decision and Order dated February 27, 2014

the OEB asking it to review this award. The OEB decided to commence a review of the Original Decision by way of a motion to review (the Motion).

Background

The Pipeline required a capital contribution that was paid by IGPC to NRG. Under the terms of the Pipeline Cost Recovery Agreement (PCRA) between NRG and IGPC, IGPC was required to post a letter of credit matching the capital cost of the pipeline minus the capital contribution. The PCRA specified that the value of the letter of credit would be lowered every year to account for the depreciating value of the pipeline.

IGPC disputed some of the capital costs for the Pipeline identified by NRG and brought the issue before the OEB (the Original Proceeding)[2]. In that decision, the OEB determined the capital costs of the Pipeline for ratemaking purposes, adjusted the capital contribution from IGPC and the letter of credit amount accordingly. However, NRG did not adjust the letter of credit from 2008 to 2013.

IGPC claimed that it had to incur additional costs of approximately $150,000 to maintain the unadjusted letter of credit for five years[3]. In the Original Decision, the OEB awarded IGPC $150,000, to be paid by NRG, for the additional costs of maintaining the unadjusted letter of credit.

After receiving the Original Decision, NRG filed a letter asking that the OEB reverse its Original Decision regarding the $150,000 award to IGPC. NRG claimed that IGPC had not provided a detailed breakdown of the $150,000 in additional costs and that the OEB did not have the evidentiary basis to make its finding.

The OEB decided that revisiting the $150,000 award to IGPC would amount to a substantive change. Revisiting the dollar amount of the award could not be considered a typographical error, error of calculation or similar error contemplated by Rule 41.02 of the Board's *Rules of Practice and Procedure.* As a result, the OEB determined that it would re-hear the issue by way of a motion to review[4]. The OEB accepted all intervenors and adopted the evidence filed in the Original Proceeding. The Motion was

[2] EB-2012-0406/EB-2013-0081
[3] IGPC Pre-filed Evidence EB-2013-0081/EB-2012-0406, June 3, 2013, paragraph 152
[4] EB-2014-0291 Procedural Order No. 1

heard in writing and included argument-in-chief by NRG, submissions by parties and reply submission by NRG. The OEB indicated that submissions were not to include or refer to any new evidence that was not part of the evidentiary record of the Original Proceeding.

Motion to Review the $150,000 award

NRG submitted that the $150,000 award to IGPC was not supported by any evidence, was excessive to the point of being punitive and the cost was partially the responsibility of IGPC. NRG provided a calculation, based on a 1% interest rate for 19.5 months, and submitted that IGPC's carrying costs should have been approximately $20,000.

OEB staff submitted there was no doubt that IGPC had to incur some costs to maintain the unadjusted letter of credit. OEB staff did not agree with the $20,000 calculation but submitted that the award be reduced to $81,958 based on a 1.5% interest rate for 38 months. OEB staff indicated that the letter of credit was not a significant issue in the Original Proceeding, perhaps the reason why NRG did not counter IGPC's $150,000 estimate during that proceeding.

IGPC submitted that the OEB should not alter its Original Decision regarding the $150,000 award. According to IGPC, NRG did not object to the requested costs and OEB staff did not question the reasonableness of the $150,000 claim in the Original Proceeding yet both parties had ample opportunity to test the evidence and make submissions. IGPC submitted that NRG's motion was simply an attempt to re-litigate a decision which it did not like.

In reply argument, NRG dismissed the claim that it had ample opportunity to test the evidence in the Original Proceeding. NRG submitted that IGPC never provided a detailed breakdown of the incurred costs or any additional evidence. NRG submitted that IGPC had abandoned its position regarding the cost of maintaining letter of credit because it did not provide any additional evidence to support its $150,000 claim.

Board Findings

The Board has considered the submissions of all parties and has determined that the Original Decision stands. The Board will not vary the $150,000 award.

Rule 42.01of the Board's *Rules of Practice and Procedure* provides the following grounds for a motion to review: an error in fact, change in circumstances, new facts

which have arisen or facts not in evidence that could not have been discovered by reasonable diligence at the time. Although this list is not exhaustive, the Board regards it as a good guide to the types of matters that are generally suitable for a motion to review. A motion to review should not be viewed as an opportunity to simply re-argue a case.

The Board has determined that none of criteria established in Rule 42.01 have been met. The Board finds that the calculations provided by NRG and OEB staff could have been provided or discovered by reasonable diligence in the original proceeding. There was a full discovery process in the Original Proceeding, and a motion to review is not meant to be an opportunity to ask questions on, or make submissions on, issues that could have been addressed in the first instance. If NRG had concerns about IGPC's claimed costs of $150,000, the appropriate time to pursue those concerns was in the Original Proceeding. Instead, IGPC's evidence (i.e. its claim that it had incurred costs of $150,000) went unchallenged. The Board can dismiss the motion for this reason alone.

The Board has also reviewed the evidence in the Original Proceeding. The $150,000 estimate of "additional costs" appears to have included both financing and legal costs, not just the carrying costs for the letter of credit. IGPC indicates it incurred "legal and other costs" in its interrogatory response #2 filed on October 28, 2013 and filed copies of letters, which in turn referred to telephone conversations, between IGPC's lawyer and NRG[5]. Although proposed award calculations were provided in the submissions of NRG and OEB staff, those calculations relate only to financing costs for carrying the letter of credit, not the legal costs of IGPC trying to resolve the issue with NRG.

Further, this panel does not find merit in NRG's comparison of the $150,000 award to the insurance costs claimed by NRG for the capital cost of the Pipeline. The Original Decision disallowed the recovery of insurance costs as the Board was not convinced that any additional insurance costs had been incurred. In contrast, the Board had no doubt that IGPC had incurred additional costs to maintain the unadjusted letter of credit for 5 years.

Costs of Proceeding

In its argument-in-chief, NRG requested costs to participate in this proceeding. IGPC in its submission also sought costs for this proceeding. OEB staff argued that no party

[5] Eb-2012-0406 / EB-2013-0081, IGPC interrogatory response #2

should be awarded costs. OEB staff indicated that the dispute arose because NRG did not adjust the letter of credit in accordance with the PCRA. If NRG had adjusted the letter of credit, no additional costs would have been incurred by IGPC and the matter would not have been brought forward to the Board.

In reply argument, NRG submitted that OEB staff had conflated the issues in the original proceeding with the issues in the Motion. NRG did not dispute its obligation regarding the letter of credit; NRG disputed the quantum of the IGPC award. NRG submitted that its dispute was made on a principled basis in an attempt to correct an error made by the Board.

NRG indicated that if IGPC had provided a detailed breakdown in the Original Proceeding, all parties would have had the opportunity to assess the appropriateness of the claim and the Motion would not have been necessary.

Board Findings

The Board finds that NRG and IGPC will be responsible for their own costs of participating in the Motion. No cost awards will be made. The Board finds both parties participated equally in the Original Proceeding by filing evidence and submissions and both parties participated equally in the Motion.

As the Board initiated the Motion, there is no applicant in this proceeding to pay cost awards, the standard practice at the OEB. Accordingly, the Board will absorb its own incidental costs in the Motion and will not invoice either party.

ADDRESS

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Attention: Board Secretary

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DATED at Toronto May 7, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0206

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 Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2011;

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the accuracy of the calculation of margin sharing related to Deferral Account 179-70 - Short-Term Storage and Other Balancing Services.

NOTICE OF MOTION TO REVIEW, NOTICE OF MOTION HEARING AND PROCEDURAL ORDER NO. 1
May 2, 2012

Union Gas Limited ("Union") filed an application dated April 18, 2011 with the Ontario Energy Board (the "Board") under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B, for an order of the Board amending or varying the rate or rates charged to customers as of October 1, 2011 in connection with the sharing of 2010 earnings under the incentive rate mechanism approved by the Board as well as final disposition of 2010 year-end deferral account and other balances (the "Application"). The Board assigned file number EB-2011-0038 to the Application.

On September 19-21 2011, the Board held a hearing on all matters in that proceeding and the Board issued its Decision and Order on January 20, 2012. The Board directed Union to file a Draft Rate Order which reflected the Board's findings in its Decision.

The Board received submissions from parties contesting Union's Draft Rate Order with respect to the Short-Term Storage and Other Balancing Services Deferral Account ("Short-Term Storage Account"). The Board issued its Decision and Order on the Draft

Rate Order on February 29, 2012, directing Union to file a revised Draft Rate Order reflecting the Board's determination on the matter. The Board noted that it would review the revised Draft Rate Order to confirm that all the necessary changes were made and would subsequently issue a Final Rate Order.

Union filed a revised Draft Rate Order on March 2, 2012. The Board issued its Final Rate Order on March 8, 2012 approving Union's Draft Rate Order as filed.

By letter dated March 27, 2012, Canadian Manufacturers & Exporters ("CME") (an intervenor in the proceeding) noted that an issue had arisen in the EB-2011-0038 proceeding regarding the calculation of margin sharing in the Short-Term Storage Account. CME indicated that the correct amount to be credited to ratepayers should be $3.824 million (as opposed to the $0.831 million credit approved by the Board in the EB-2011-0038 Final Rate Order). CME requested that the Board address this error by making an adjustment to the margin sharing calculation under Rule 43.02 of the Board's *Rules of Practice and Procedure*. Union filed a letter responding to CME's letter on April 5, 2012, CME filed a subsequent letter on April 16, 2012, and Union filed a final letter on April 19, 2012.

The Board has determined that the correction requested by CME in regards to the margin sharing calculation in the Short-Term Storage Account would not, if substantiated, be allowable under Rule 43.02 of the Board's *Rules of Practice and Procedure* (the "Rules"). The Board is, however, of the view that issues have been raised with respect to the calculation of short-term storage margin sharing which warrant further review by the Board. The Board has therefore determined that it will commence a review proceeding on its own motion pursuant to Rule 43.01 of the Rules to review its EB-2011-0038 Decision and Rate Order as it relates to the issue of calculating the amount of margin sharing in the Short-Term Storage Account. The Board has assigned Board File No. EB-2012-0206 to this proceeding.

The Board adopts the intervenors in the EB-2011-0038 proceeding as intervenors in this proceeding. Intervenors that were eligible for costs in that proceeding are deemed eligible for costs in this proceeding. A list of intervenors for EB-2012-0206 is attached as Appendix A to this order.

The Board will incorporate the four letters noted above (two from CME and two from Union) as submissions in this proceeding. All intervenors and Union will be given an opportunity to make additional submissions on this single issue.

Accordingly, the Board will make provisions for the following procedural matters. Please be aware that further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT

1. All parties (Board staff, intervenors, and Union) shall file any submissions on the calculation of margin sharing in the Short-Term Storage Account on or before **May 11, 2012**.

All filings to the Board must quote file number **EB-2012-0206**, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

All parties must also provide the Case Manager, Lawrie Gluck, Lawrie.gluck@ontarioenergyboard.ca with an electronic copy of all comments and correspondence related to this case.

ISSUED at Toronto, May 2, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

EB-2016-0066

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 E.L.K. Energy Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2017.

E.L.K. ENERGY INC.

SETTLEMENT PROPOSAL

Original Submitted: June 29, 2017

Revised: October 5, 2017

E.L.K. Energy Inc.

EB-2016-0066

Settlement Proposal

Table of Contents

APPENDICES

Appendix "A" – 2017 Annual IR Index Model for E.L.K. Energy (Updated)
Appendix "B" – Intervenor Concerns and E.L.K. Plans in light of Intervenor Concerns
Appendix "C" – 1595 Rate Riders

LIVE EXCEL MODELS

In addition to the Appendices listed above, the following live excel models have been filed together with and form an integral part of this Settlement Proposal:

- Appendix A 2017 Annual IR Index Model for ELK FINAL 10032017
- GA Rate Design for Settlement Agreement_ FINAL

ADDITIONAL EVIDENCE

Concurrently with the filing of this Settlement Proposal, E.L.K. Energy is filing its responses to the pre-ADR interrogatory questions together with additional evidence on the remaining issue in dispute (being the request for disposition of amounts included in Account 1595).

The Parties agree this material should be added to the evidentiary record, subject to the OEB allowing a further round of written discovery to give the Intervenors and OEB staff an opportunity to fully test and clarify the additional evidence and issues related to Account 1595.

E.L.K. Energy Inc.

EB-2016-0066

Settlement Proposal

Original Filed with OEB: June 29, 2017

Revised Filed with OEB: October 5, 2017

E.L.K. Energy Inc. (the "Applicant" or "E.L.K. Energy") filed a complete cost of service application with the Ontario Energy Board (the "OEB") on November 1, 2016 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B) (the "Act"), seeking approval for changes to the rates that E.L.K. Energy charges for electricity distribution and other charges for 2016, with such rates and charges to be effective May 1, 2017 (OEB Docket Number EB-2016-0066) (the "Application").

The OEB issued and published a Notice of Hearing dated February 6, 2017, and Procedural Order No. 1 on March 9, 2017, the latter of which required the parties to the proceeding to develop a draft issues list and attend a Settlement Conference. The OEB later issued Procedural Order No. 2 on March 31, 2017 which established the Settlement Conference dates to be May 15, 2017 to May 17, 2017 and a deadline of May 5, 2017 was set for the draft issues list to be filed by Ontario Energy Board staff ("OEB staff").

E.L.K. Energy filed its interrogatory responses with the OEB on April 21, 2017. On May 3, 2017, OEB staff filed a proposed issues list which was agreed to by all parties. On May 4, 2017, the OEB issued its decision on the proposed issues list, approving the list submitted by OEB staff (the "Issues List"). This Settlement Proposal is filed with the OEB in connection with the Application and is organized in accordance with the Issues List.

Further to the OEB's Procedural Order No. 2, a settlement conference was convened on May 15, 2017, in accordance with the OEB's *Rules of Practice and Procedure* (the "Rules") and the OEB's *Practice Direction on Settlement Conferences* (the "Practice Direction"). Chris Haussmann acted as facilitator for the settlement conference which lasted three days.

E.L.K. Energy and the following intervenors (the "Intervenors"), participated in the settlement conference:

Association of Major Power Consumers in Ontario ("AMPCO")
School Energy Coalition ("SEC"); and
Vulnerable Energy Consumers Coalition ("VECC").

E.L.K. Energy and the Intervenors are collectively referred to below as the "Parties".

OEB staff also participated in the settlement conference. The role adopted by OEB staff is set out in page 5 of the Practice Direction. Although OEB staff is not a party to this Settlement Proposal, as noted in the Practice Direction, OEB staff who did participate in the settlement conference are bound by the same confidentiality requirements that apply to the Parties to the proceeding.

This document is called a "Settlement Proposal" because it is a proposal by the Parties to the OEB to settle the issues in this proceeding. It is termed a proposal as between the Parties and the OEB. However, as between the Parties, and subject only to the OEB's approval of this Settlement Proposal, this document is intended to be a legal agreement, creating mutual obligations, and binding and enforceable in accordance with its terms. As set forth later in this Preamble, this agreement is subject to a condition subsequent, that if it is not accepted by the OEB in its entirety, then unless amended by the Parties it is null and void and of no further effect. In entering into this agreement, the Parties understand and agree that, pursuant to the Act, the OEB has exclusive jurisdiction with respect to the interpretation and enforcement of the terms hereof.

The Parties acknowledge that this settlement proceeding is confidential in accordance with the Practice Direction. The Parties understand that confidentiality in that context does not have the same meaning as confidentiality in the OEB's Practice Direction on Confidential Filings, and the rules of that latter document do not apply. Instead, in this settlement conference, and in this Agreement, the Parties have interpreted "confidential" to mean that the documents and other information provided during the course of the settlement proceeding, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly privileged and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception, the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal. Further, the Parties shall not disclose those documents or other information to persons who were not attendees at the settlement conference. However, the Parties agree that "attendees" is deemed to include, in this context, persons who were not physically in attendance at the settlement conference but were a) any persons or entities that the Parties engage to assist them with the settlement conference, and b) any persons or entities from whom they seek instructions with respect to the negotiations; in each case provided that any such persons or entities have agreed to be bound by the same confidentiality provisions.

This Settlement Proposal provides a brief description of each of the settled and partially settled issues, as applicable, together with references to the evidence. The Parties agree that references to the "evidence" in this Settlement Proposal shall, unless the context otherwise requires, include (a) additional information included by the Parties in this Settlement Proposal, and (b) the Appendices to this document. The supporting Parties for each settled and partially settled issue, as applicable, agree that the evidence in respect of that settled or partially settled issue, as applicable, is sufficient in the context of the overall settlement to support the proposed settlement, and the sum of the evidence in this proceeding provides an appropriate evidentiary record to support acceptance by the OEB of this Settlement Proposal.

There are Appendices to this Settlement Proposal which provide further support for the proposed settlement. The Parties acknowledge that the Appendices were prepared by E.L.K Energy. While the Intervenors have reviewed the Appendices, the Intervenors are relying on the accuracy of the underlying evidence in entering into this Settlement Proposal.

Outlined below are the final positions of the Parties following the settlement conference.

This Settlement Proposal differs from other settlements. Specifically, this Settlement Proposal is premised, in part, on an agreement among the Parties that rates should be established for the test

year using the "Annual IR Index" methodology as defined in the Report of the Board titled *Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* dated October 18, 2012. Because of the use of the Annual IR Index to set rates for the test year, many of the issues in the Issues List (which assume that a cost of service methodology will be used) are no longer relevant. The Parties have reflected this in this Settlement Proposal by adding an additional category of "Not Relevant", as further described below. The Parties are pleased to advise the OEB that they have reached a complete agreement with respect to the settlement of the issues in this proceeding. Specifically:

"Complete Settlement" means an issue for which complete settlement was reached by all Parties, and if this Settlement Proposal is accepted by the OEB, the Parties will not adduce any evidence or argument during the oral hearing in respect of these issues.	# issues settled: **3**
"Partial Settlement" means an issue for which there is partial settlement, as E.L.K. Energy and the Intervenors who take any position on the issue were able to agree on some, but not all, aspects of the particular issue. If this Settlement Proposal is accepted by the OEB, the Parties who take any position on the issue will only adduce evidence and argument during the hearing on those portions of the issues not addressed in this Settlement Proposal.	# issues partially settled: **0**
"Not Relevant" means an issue which the Parties agree is no longer relevant if this Settlement Proposal is accepted by the OEB. If this Settlement Proposal is accepted by the OEB, the Parties will not adduce any evidence or argument during the oral hearing in respect of these issues.	# issues not relevant: **9**
"No Settlement" means an issue for which no settlement was reached. E.L.K. Energy and the Intervenors who take a position on the issue will adduce evidence and/or argument at the hearing on the issue.	# issues not settled: **None**

According to the Practice Direction (p. 3), the Parties must consider whether a Settlement Proposal should include an appropriate adjustment mechanism for any settled issue that may be affected by external factors. These adjustments are specifically set out in the text of the Settlement Proposal.

The Parties have settled the issues as a package, and none of the parts of this Settlement Proposal are severable. If the OEB does not accept this Settlement Proposal in its entirety, then there is no settlement (unless the Parties agree in writing that any part(s) of this Settlement Proposal that the OEB does accept may continue as a valid settlement without inclusion of any part(s) that the OEB does not accept).

In the event that the OEB directs the Parties to make reasonable efforts to revise the Settlement Proposal, the Parties agree to use reasonable efforts to discuss any potential revisions, but no Party

will be obligated to accept any proposed revision. The Parties agree that all of the Parties who took on a position on a particular issue must agree with any revised Settlement Proposal as it relates to that issue prior to its resubmission to the OEB.

Unless stated otherwise, the settlement of any particular issue in this proceeding and the positions of the Parties in this Settlement Proposal are without prejudice to the rights of Parties to raise the same issue and/or to take any position thereon in any other proceeding, whether or not E.L.K. Energy is a party to such proceeding.

Where in this Agreement, the Parties "Accept" the evidence of E.L.K. Energy, or the Parties or any of them "agree" to a revised term or condition, including a revised budget or forecast, then unless the Agreement expressly states to the contrary, the words "for the purpose of settlement of the issues herein" shall be deemed to qualify that acceptance or agreement.

SUMMARY

In reaching this settlement, the Parties have been guided by the Report of the Board titled *Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* dated October 18, 2012, the Filing Requirements for 2017 rates, the approved Issues List attached as Schedule A to the OEB's Issues List Decision of May 4, 2017.This Settlement Proposal reflects a complete settlement.

E.L.K. Energy takes pride in having the second lowest distribution rates in the Province of Ontario and in being a Group 1 utility in the OEB's benchmarking of utility cost performance, however, this does not represent the condition of the distribution system. This Settlement Proposal reflects a unique plan created jointly by the Parties to leverage this record of good cost performance with a focus on improving incrementally the internal processes and procedures of E.L.K. Energy to better align with RRFE outcomes. The Parties do not believe that setting rates on a cost of service basis, based on E.L.K. Energy's evidence in this proceeding, would be the best way to achieve this objective. In particular:

- due to concerns regarding the accuracy and consistency of certain underlying data in the evidence, as described below, E.L.K. Energy is willing to undertake to complete a detailed regulatory audit to satisfy such concerns going forward and as discussed further below, as part of an operational review, ensuring that E.L.K. Energy has proper accounting procedures and practices;

- due to concerns regarding E.L.K. Energy's resourcing requirements, as described below, E.L.K. Energy is willing to undertake a detailed operational review to help create a plan to address those requirements going forward; and

- due to concerns regarding E.L.K. Energy's lack of information about its assets, as described below, E.L.K. Energy is willing to undertake a formal independent asset condition assessment.

Instead, in addition to the three undertakings outlined above and further described below, E.L.K. Energy agrees to withdraw the Application (except for the request for disposition of Account 1595, as further described in issue 4.2 below) and the Parties agree that rates for the test year should be established using the OEB's Annual IR Index methodology rather than a standard 4th Generation forward test-year cost of service basis. Going forward, rates will be set using the OEB's Annual IR Index in a manner consistent with the RRFE until such time as E.L.K. Energy brings forward a new forward test-year cost of service rebasing application.

E.L.K. Energy agrees that this will generate sufficient revenue to allow E.L.K. Energy to operate its business over the near term. The intervenors encourage E.L.K. Energy to bring in a new cost of service rebasing application as soon as is practical after E.L.K. Energy completes the three requirements identified below.

Unless the OEB requests that E.L.K. Energy apply for cost of service rates earlier than 2022, prior to bringing its next cost of service rebasing application, the Parties agree that E.L.K. Energy will undertake to:

a. ***Regulatory Audit***. cooperate with and participate in an audit of its regulatory and accounting practices. The scope of the audit will be determined with the assistance of OEB staff, in their sole and absolute discretion. OEB staff's assistance with the scoping of the audit will not in any way limit the OEB from undertaking a new or different audit pursuant to their statutory mandate and powers, which shall remain in the sole and absolute discretion of the OEB. If OEB staff choose not to perform the audit, E.L.K. will retain a qualified, independent third-party auditor to complete the audit. Upon conclusion of the audit, E.L.K. Energy will prepare a reporting letter, attaching a copy of the audit report, which will be delivered to the Parties and to the OEB under this EB-2016-0066 file number. A further reporting letter will be delivered to Parties and filed after all recommended changes have been implemented.

b. ***Operations Review***. undertake an independent third-party review and risk assessment of its operations, which will comprise an examination of E.L.K. Energy's:

   (i) accounting procedures and practices;

   (ii) budgeting processes, business planning processes, and management oversight;

   (iii) distribution system planning information, processes and procedures;

   (iv) information technology systems, data control, and privacy and security procedures; and

   (v) human, fleet and financial resources compared to an organization of its size and revenue requirement.

   This requirement may be satisfied if the OEB elects to undertake this assessment as part of its public interest function. The review will include a comparison of E.L.K. Energy's data and records, practices and procedures against industry best practices, and recommendations for improvements where possible. Upon conclusion of the operational review, E.L.K. Energy will prepare a reporting letter attaching copies of the aforementioned reviews which will be delivered to the Parties and to the OEB under this EB-2016-0066 file number. The letter will include an explanation from management about how the findings and recommendations of these reviews will inform the E.L.K. Energy business plan going forward.

c. ***Asset Condition Assessment.*** undertake an independent third-party asset condition assessment of its distribution system infrastructure, which will form an input into E.L.K. Energy's distributions system plan, and for the purposes of building an asset registry. This requirement may be satisfied if the OEB elects to undertake this assessment as part of its public interest function. The Parties agree that E.L.K. Energy staff may be utilized to collect information and data to inform the asset condition assessment. E.L.K. Energy will file this independent asset condition assessment when completed and delivered to the Parties and the OEB under EB-2016-0066 file number.

Finally, E.L.K. Energy will be required to file its next cost of service rebasing application for rates for 2022 rates, by no later than the last date the OEB would accept a cost of service application for

2022 as specified in the OEB's filing requirements for that year. A cost of service rebasing application may be filed by E.L.K. Energy at any time prior to this deadline, provided the conditions in (a)-(c) above are satisfied prior to filing the application.

The requirement to file a cost of service application for 2022 rates at the latest, in no way restricts the OEB's ability to require on its own initiative, as in the normal course, for E.L.K. Energy to file an early application.

In addition, the Parties agree that nothing in this Settlement Proposal will in any way bind, limit or restrict the Ontario Energy Board in any way from exercising its public interest mandate in accordance with the *Ontario Energy Board Act, 1998.* For greater clarity, and without limiting the generality of the foregoing, the completion of the regulatory audit as contemplated in paragraph (a), the operational assessment as contemplated in paragraph (b), or the asset condition assessment as contemplated in paragraph (c) will not in any way bind, limit or restrict the Ontario Energy Board from undertaking a new or different audit or assessment pursuant to its statutory powers and functions.

E.L.K. Energy will perform conditions agreed to in this Settlement Proposal in a way that is commensurate with an organization of its size and revenue requirement. The Parties agree that if due to an unforeseen change in circumstances, E.L.K. Energy is unable, or it becomes unreasonable, to meet any of the conditions agreed to in this Settlement Proposal, it may bring a motion pursuant to Rule 40 of the *OEB Rules of Practice Procedure*, on notice to the Intervenors, to request the Board vary the Settlement Proposal. Intervenors are free to take any position they deem appropriate regarding the appropriateness of any such required relief. If an Intervenor chooses not to participate in such a motion, after being adequate notice (as determined by the OEB) and afforded full procedural rights to participate, including cost eligibility, it shall be deemed to take no position on the requested relief.

On August 24, 2017, the Board issued its Decision and Procedural Order No. 4 in respect of the Application. The Parties have made best efforts to revise this settlement proposal in accordance with the Board's Decision and Procedural Order No. 4 dated August 24, 2017 ("**PO#4**").

Specifically, in Appendix "B" the Intervenors have undertaken to provide the Board with examples of specific operational concerns identified, supported by examples where applicable, in each of the following three general areas:

- the accuracy and consistency of certain underlying data in the evidence;
- the lack of detailed plans to address E.L.K. Energy's resourcing requirements; and
- the lack of information about E.L.K. Energy's assets.

In Appendix "B", E.L.K. has provided a response to those concerns and a description of its plans to address each of these concerns, should the Board approve this proposed settlement.

In addition, in accordance with PO#4, the Parties are pleased to report that following best efforts all issues associated with Account 1595 have been settled as more fully detailed in Issue 4.2 below.

Based on the foregoing, and the evidence and rationale provided below, the parties agree that this Settlement Proposal is appropriate and recommend its acceptance by the OEB. Please refer to Appendix A for the completed Annual IR Index model, including a schedule of draft tariffs resulting if this settlement is accepted by the OEB. E.L.K. Energy consulted with OEB staff to validate the Annual IR Index model and supporting details in accordance with PO#4. The revised model and schedule of draft tariffs has been included in this amended settlement proposal.

1. Planning

1.1 Capital

Is the level of planned capital expenditures appropriate and is the rationale for planning and pacing choices appropriate and adequately explained, giving due consideration to:

- *customer feedback and preferences;*
- *productivity;*
- *compatibility with historical expenditures;*
- *compatibility with applicable benchmarks;*
- *reliability and service quality;*
- *impact on distribution rates;*
- *trade-offs with OM&A spending;*
- *government-mandated obligations;*
- *the objectives of E.L.K. Energy and its customers; and*
- *distribution system plan.*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

1.2 OM&A

Is the level of planned OM&A expenditures appropriate and is the rationale for planning choices appropriate and adequately explained, giving due consideration to:

- *customer feedback and preferences;*
- *productivity;*
- *compatibility with historical expenditures;*
- *compatibility with applicable benchmarks;*
- *reliability and service quality;*
- *impact on distribution rates;*
- *trade-offs with capital spending;*
- *government-mandated obligations; and*
- *the objectives of E.L.K. Energy and its customers.*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

2. Revenue Requirement

2.1 *Are all elements of the revenue requirement reasonable, and have they been appropriately determined in accordance with OEB policies and practices?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

2.2 *Has the revenue requirement been accurately determined based on these elements?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

3. Load Forecast, Cost Allocation and Rate Design

3.1 *Are the proposed load and customer forecast, loss factors, CDM adjustments and resulting billing determinants appropriate, and, to the extent applicable, are they an appropriate reflection of the energy and demand requirements of E.L.K Energy's customers?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

3.2 *Is the proposed cost allocation methodology, and are the allocations, and revenue-to-cost ratios appropriate?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

3.3 *Are E.L.K. Energy's proposals for rate design appropriate?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology. For greater clarity, rate

design has been addressed in a manner consistent with the Annual IR Index methodology, as further detailed in Appendix A.

Evidence: Not applicable.

Supporting Parties: All

3.4 *Are the proposed Retail Transmission Service Rates and Low Voltage Service Rates appropriate?*

Complete Settlement: The Parties agree that the Retail Transmission Service Rates should be updated to reflect 2017 Hydro One rates, if available at the time of a final rate order.

The Parties agree that the question of whether the proposed Low Voltage Service Rates are appropriate is not relevant in light of the Parties agreement to set rates using the Annual IR Index methodology. Low Voltage Service Rates are not traditionally updated under the OEB's Annual IR Index methodology.

Evidence:

Application: Exhibit 8

IRRs: None applicable

Appendices to this Settlement Proposal: Appendix A

Settlement Models: 2017 Annual IR Index Model for E.L.K. Energy Inc.

Supporting Parties: All

4. Accounting

4.1 *Have all impacts of any changes in accounting standards, policies, estimates and adjustments been properly identified and recorded, and is the rate-making treatment of each of these impacts appropriate?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

In addition, as described in the Summary section above, E.L.K. Energy has agreed to undertake to, *inter alia*, cooperate with and participate in an audit of E.L.K. Energy's regulatory accounting practices..

Evidence: Not applicable.

Supporting Parties: All

4.2 *Are E.L.K. Energy's proposals for deferral and variance accounts, including the balances in the existing accounts and their disposition, requests for new accounts and the continuation of existing accounts, appropriate?*

Complete Settlement: E.L.K. Energy applied for approval for disposition of its Group 1 deferral and variance account balances as at December 31, 2015 and the forecasted interest through April 30, 2017. Table 9-1 of Exhibit 9-1 contains the account balances from E.L.K. Energy's 2015 audited financial statements as at December 31, 2015. Exhibit 9 further provides an explanation of any variances between Table 9-1 balances and E.L.K. Energy's E2.1.7 RRR trial balance filed as of April 30, 2016.

Account 1595As explained further in the response to 9-Staff-54, E.L.K. Energy was seeking recovery of $2,785,175 from account 1595. Following a detailed review of all underlying accounting records with the assistance of OEB staff, E.L.K. Energy acknowledges this amount should be reduced to $2,684,083 (the "**Recoverable Amount**").

There are three components to the Recoverable Amount:

1. **The GS 50-4,999 Under-recovery.** First, as part of preparing this application, E.L.K. discovered that with respect to the General Service 50 to 4,999 Service Classification (the two rate riders called Disposition of Global Adjustment)—effective until April 30, 2014 and April 30, 2015—were incorrectly used in E.L.K.'s CIS system through a misinterpretation of the description of the rate rider. This rate rider is applicable for only non-RPP customers. E.L.K. originally applied this to retailer accounts only, but should have applied it to all non-RPP customers, which includes both retailers and non-retailers (i.e. weighted average price customers). The balance of this uncollected amount remains in Account 1595. Recovering this amount will impact non-RPP customers.

2. **The Embedded Distributor Misallocation.** Second, for the Embedded Distributor class, the two rate riders called Disposition of Global Adjustment – effective until April 30, 2014 and April 30, 2015 were not applied since this class is in reality handled similar to a class A customer and a true-up between preliminary and actual GA costs are done on a monthly basis. This means there is no GA variance for this class. The balance of this uncollected amount remains in Account 1595.

3. **Normal Variances.** Third, the amount includes normal variances between the amounts received from rate riders charged to ratepayers, and the approved disposition amount in 1595.

If the Board were to deny recovery of the Recoverable Amount, this would threaten the ongoing financial viability of E.L.K. Energy. This is more fully detailed in Appendix B of the E.L.K. Energy additional evidence filed June 29, 2017.

In consideration of PO#4 and in light of the material adverse effects should E.L.K. be unable to collect the Recoverable Amount, the Parties agree that:

(a) The Recoverable Amount should be reduced by 10%.

The Parties agree that this amount reflects an appropriate penalty on E.L.K. for its role in the issues noted above.

(b) E.L.K. Energy confirms that the Recoverable Amount includes no interest after the amounts were booked into Account 1595.

The Parties agree that this waiver of interest reflects a further penalty on E.L.K. which is appropriate given its role in the issues noted above.

(c) Subject to (a) and (b) above, E.L.K. can recover the amounts associated with "The GS 50-4,999 Under-recovery" on a going forward basis from all non-RPP GS 50-4,999kW customers, excluding Embedded Distributor and customers who paid the Disposition of Global Adjustment rate rider for a minimum of 12 months between May 1, 2013 to April 30, 2015.

(d) Subject to (a) and (b) above, E.L.K. can recover the amounts associated with "The Embedded Distributor Misallocation" together with the "Normal Variances" from all non-RPP customers excluding Embedded Distributor, since these customers should be responsible for these amounts.

(e) The disposition period will be 4.5 years, commencing on the implementation date (see also issue 5.2).

The relevant rate riders have been calculated and included at Appendix "C". See also spreadsheet titled "GA Rate Design for Settlement Agreement_ FINAL".

The Parties agree with E.L.K. Energy's request for approval for disposition of the balance of its Group 1 deferral and variance accounts with the exception of accounts 1588 and 1589. These 2 accounts (being accounts 1588 and 1589) will be included as part of the regulatory audit discussed in the Summary above prior to disposition. The parties also agree that the disposition of all other Group 1 deferral and variance account balances (excluding accounts 1595, 1588 and 1589) be over 6 months.

The Parties note that this agreement is consistent with the Annual IR Index methodology.

Evidence:

Application: Exhibit 9

IRRs: 9-Staff-39 to 9-Staff-49

Appendices to this Settlement Proposal: Appendix B

Supporting Parties: All

5. Other

5.1 *Is the proposed adjustment to the specific service charge for service call – customer owned equipment appropriate?*

Not Relevant: The Parties agree that this issue is not relevant in light of the Parties' agreement to set rates using the Annual IR Index methodology.

Evidence: Not applicable.

Supporting Parties: All

5.2 *What is the appropriate effective date for 2017 rates?*

Complete Settlement: The Parties agree that the appropriate effective date for 2017 rates is the date that E.L.K. Energy can first implement those rates following the OEB's final decision and order in respect of this Application.

Evidence: Not Applicable.

Supporting Parties: All

Appendix "A"
2017 Annual IR Index model for E.L.K. Energy (Updated)

Please see attached an updated Annual IR Index model. This model reflects input received from OEB Staff in accordance with PO#4.

Appendix "B"

Together, pursuant to the Board's direction in PO#4, the Parties are providing more information regarding the nature of the operational concerns, supported by examples, as well as an overview of the plans to address them. Specifically, below, the Intervenors are providing examples of specific concerns they had with the application, supported by evidentiary references where applicable, in the three general areas identified on p.8 of the Settlement Proposal and referenced on p.5 of PO#4. E.L.K. Energy has in turn provided its plan to address those concerns.

A. The accuracy and consistency of certain underlying data in the evidence

Concerns

- Accuracy and consistency with certain data provided in interrogatory pre-settlement and settlement questions resulted in low confidence in data, for example:

    - 3 different versions of 2016 OM&A actuals were presented in 3 different appendices in response to 2-SEC-28 (updated). (See Appendices 2-JA, 2-JB and 2-JC).
    - Significant issues with continuity schedules – required considerable efforts to reconcile (See 2-Staff-50, 2-Staff-91)
    - Unexplained negative values in historic and bridge year 2-JC OM&A program table (See 2-SEC-28 (updated), Appendix J-JC)
    - ELK did not update 2-AA correctly: pulled out specific projects without reconciling final numbers, resulting in inaccurate 2016 actuals (2-SEC-28 updated).
    - FTE numbers contained in Appendix 2-K not correct, as the amount contains non-employee corporate directors.
    - Double counting of application related one-time regulatory costs. 2016 application related regulatory costs include in 2016 OM&A budget, but also includes as part of overall application one-time costs that are amortized over the proposed 5 year IRM life. This has the effect of understating the proposed 2017 OM&A increase.

  While the example above are illustrative of the concerns, it is more the cumulative and ongoing nature of them as many data issues were discovered late in the process, and the possibility that others may not be identified, that result in a low confidence in the underlying data in the application.

- Inability to provide a comparison between forecast 2016 capital project costs and 2016 actual capital project costs. ELK said it was unable to provide full updates for 2-AA and 2-AB: as it would require project-by-project paper review.

- ELK does not maintain sufficient granular level of detail to appropriately respond to interrogatories. For example:
    - ELK unable to reconcile PP&E additions as shown in Appendix 2-BA with capital projects shown in Appendix 2-AA (2-VECC-8)
    - ELK unable to provide overtime cost details (4-VECC-39)
    - ELK unable to provide annual storm repair costs (4-AMPCO-12 (e))

- ELK does not record level of detail on total compensation allocated to Capital and OM&A (4-SEC-24)
- ELK unable to provide tree trimming details and unit accomplishments (4-AMPCO-12 (c))

- Significant concerns throughout the proceeding regarding the appropriate amounts that have been recorded in 1595. (For example see, 9-Staff-54(c-d)). The Parties are satisfied that all of these concerns have now been addressed with this settlement.

Plan

E.L.K. Energy regrets any inadvertent errors that may have been made that led to questions about the accuracy and consistency of certain data in the evidence.

Each of the specific discrepancies identified by the Intervenors in this Appendix are explainable by E.L.K. Energy on a case-by-case basis. For example, as part of the settlement, the Parties were able to address all outstanding concerns regarding the appropriate balance in Account 1595 However, this approach would not address the more general concern regarding "low confidence in data".

By setting rates using the Annual IR Index methodology, which is much simpler than the cost of service models, and which have been reviewed in detail by OEB staff, the Board can be confident that it is setting just and reasonable rates using good data.

Going forward, E.L.K. Energy is committed to ensuring that it collects and maintains good data in accordance with prudent utility and accounting practices.

Specifically, E.L.K. Energy is willing to cooperate with and participate in an audit of its regulatory and accounting practices. The scope of the audit will be determined with the assistance of OEB staff, in their sole and absolute discretion. If OEB staff choose not to perform the audit, E.L.K. Energy will retain a qualified, independent third-party auditor to complete the audit.

Upon conclusion of the audit, E.L.K. Energy will prepare a reporting letter, attaching a copy of the audit report, which will be delivered to the Parties and to the OEB under this EB-2016-0066 file number.

By filing and distributing the audit conclusions, as agreed to in the settlement proposal, the Board and the Intervenors will know what remaining concerns have been raised during the audit.

E.L.K. Energy is committed to addressing these concerns (if there are any found) and implementing any recommended changes. This commitment is demonstrated by E.L.K. Energy's agreement in the settlement proposal to deliver a further reporting letter to Parties and filed after all recommended changes have been implemented.

B. The lack of detailed plans to address E.L.K. Energy's resource requirements

Concerns

- Historic underspending as compared to budget, while at the same time maintaining a regulatory ROE at or above the deemed amount (2-VECC-11(c):

    - ELK has underspent on planned capital on average 19.17% over the previous 5 year period (2-SEC-28 (updated), Appendix 2-AB). 2016 actual OM&A was approximately 14.7% below 2016 forecast (2-SEC-28 (updated), Appendix 2-JA, compared to originally filed Appendix 2-JA)
    - ELK does not track the level of detail required to provide its Plan capital budget amounts for the years 2012 to 2016 by capital categories: System Access, System Renewal, System Service and General Plant, making it impossible to assess plan vs actual spending trends by category (2-AMPCO-9).
    - ELK was seeking an OM&A increase of approximately 36% in the 2017 test year as compared to 2016 actuals (2-SEC-28 (updated), Appendix 2-JA). No adequate business plan and evidence to support such a significant increase in spending**.**
    - Lack of asset condition (2-SEC-14; 2-VECC-14a; 2-AMPCO-7) information does now allow for the proper scrutiny of the reasons for the underspending to determine if the issue is insufficient resources being allocated to the utility.

- ELK was requesting 4 additional FTEs, an increase of 21% in the test period, yet neither had an adequate resourcing or succession plan in place. Resource needs are under review: As of June 12, 2017, one of the four positions have been filled and E.L.K. is currently in the process of reviewing all positions of the company and these four requested staff positions (1-Staff-4 (c)).

- Intervenors feel that while ELK maintains a top cohort productivity ranking (OEB PEG benchmarking) and coming in below budget annually in its spending, it may be not providing sufficient funding to the utility. It has consistently over-earned, while issues that have arisen during the proceeding regarding questions about planning, data quality, and asset management reveal there may be some long-term issues that need to be addressed before ELK should be provided significant additional funding.

- ELK does not have a Corporate Scorecard to measure success (1-SEC-5).

- Significant concerns with information technology systems and information management: ELK unable to provide full updates or explanations at ADR without key personnel having to return to physical premises and review physical records.

Plan

As a small utility that consistently performs as one of the most efficient utilities in the Province of Ontario according to the Board's PEG benchmarking, E.L.K. Energy does not have the same resources available to complete more formalized business planning exercises which some of the larger LDCs can do. Similarly, E.L.K. Energy does not have expensive IT systems (or an expensive IT department) and must occasionally review physical records to respond to particular questions that arise during the discovery process.

E.L.K. Energy relies on the experience and judgement of its executive team to establish its business plan and needs. In the Application, this included hiring 4 additional FTEs and increasing capital expenditures in the test year. E.L.K. Energy believes that its plan was the best approach given what was currently known about operational requirements and risks.

However, E.L.K. Energy recognizes that the evidentiary record does not include any independent third party evidence that Intervenors or the Board can use to validate that what management is proposing to do in the test year is the best approach in light of both known and unknown operational risks and known industry best practices.

In this context, if the Board approves the proposed settlement, in the spirit of continuous improvement E.L.K. Energy is willing to undertake an independent third-party review and risk assessment of its operations, which will comprise an examination of E.L.K. Energy's:

(i) accounting procedures and practices;

(ii) budgeting processes, business planning processes, and management oversight;

(iii) distribution system planning information, processes and procedures;

(iv) information technology systems, data control, and privacy and security procedures; and

(v) human, fleet and financial resources compared to an organization of its size and revenue requirement.

The review will include a comparison of E.L.K. Energy's data and records, practices and procedures against industry best practices, and recommendations for improvements where possible taking into consideration the size of ELK.

E.L.K. Energy is willing to make recommended improvements. This is illustrated by E.L.K. Energy's commitment to publically file and deliver a results of the operational review, and to provide an explanation from management about how the findings and recommendations of these reviews will inform the E.L.K. Energy business plan going forward.

C. The lack of information about E.L.K. Energy's assets

Concerns

- ELK has never completed an asset condition assessment and so does not sufficiently know the condition of its assets for the purpose of preparing an appropriate DSP and capital plan. (2-SEC-14; 2-VECC-14a; 2-AMPCO-7). ELK does not have a Health Index and Probability of Failure database (2-VECC-14**)**. Evidence is that it will only begin to determine health indices of its assets in the future (2-VECC-14b).

- ELK does not have data to determine what assets have previously been replaced, when and at what cost (2-AMPCO-8).

- ELK has changed its asset management practice since its last Cost of Service application, and is transitioning to Typical Useful Life (TUL) replacements from a run to fail plan (2-Staff-14, 2-Staff-15, 2-Staff-16, 2-Staff-17, 4-AMPCO-10) and ELK intends to increase its replacement rate of infrastructure gradually over time, largely based on asset age. ELK does not have sufficient data on current asset condition and past replacements to support accelerated asset replacement.

Plan

Unlike larger utilities, E.L.K. Energy relies on the detailed first-hand knowledge, expertise and experience of its operations manager, who has been directly involved in the ongoing operations and maintenance of the E.L.K. Energy distribution system (and that of its predecessor) since August 1988. E.L.K. Energy's operations manager does know the condition of the distribution system and has prepared an appropriate DSP and capital plan.

However, in the absence of sufficient asset condition information data and readily accessible records the Intervenors do not have confidence in the E.L.K. Energy proposed DSP and capital plan.

If the Board approves the proposed settlement, E.L.K. Energy is willing to undertake an independent third-party asset condition assessment of its distribution system infrastructure.

E.L.K. Energy is committed to utilizing the results of this asset condition assessment as an input into its future distributions system plan and for the purposes of building an asset registry.

This commitment is illustrated by E.L.K. Energy commitment to file the independent asset condition assessment when completed and delivered to the Parties and the OEB under EB-2016-0066 file number.

Appendix "C" – 1595 Rate Riders

The parties have agreed that there will be two rate riders:

1. Rate Rider for the disposition of Account 1595 Part A (2017) - effective until XXXX XX, 201X, applicable only to Non-RPP Customers excluding Embedded Distributor and those customers who paid a Rate Rider for the Disposition of Global Adjustment for a minimum of 12 months between May 1, 2013 to April 30, 2015; and

2. Rate Rider for the disposition of Account 1595 Part B (2017) – effective until X, applicable only to Non-RPP Customers excluding Embedded Distributor.

Please see enclosed spreadsheet titled "GA Rate Design for Settlement Agreement_ FINAL" for the calculations of the relevant rate riders.

The GS > 50 kW tab looks at the 2015 actual bill demand of 197,597.09 kW and subtracts from that amounts associated with Embedded Distributor and customers who paid the Disposition of Global Adjustment rate rider for a minimum of 12 months between May 1, 2013 to April 30, 2015. It also subtracts from that the demand associated with a multi-residential unit that is classified as GS > 50 kW but is paying commodity charges to the IESO. All of that is used to calculate a weighing factor of 72.6%, which is then used in the Rate Analysis tab to apply against the forecasted consumption in the test year for the relevant customers.

The sunset dates for the two riders will be established as the date that is 4.5 years after the implementation date established in accordance with the settlement of issue 5.2.

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0166

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 or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2012.

BEFORE: Karen Taylor
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

Introduction

Essex Powerline Corportation ("Essex"), a licensed distributor of electricity, filed an application with the Ontario Energy Board (the "Board") on November 4, 2011 under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that Essex charges for electricity distribution, to be effective May 1, 2012.

Essex is one of 77 electricity distributors in Ontario regulated by the Board. The *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* (the "IR Report"), issued on July 14, 2008, establishes a three year plan term for 3rd generation incentive regulation mechanism ("IRM") (i.e., rebasing plus three years). In its October 27, 2010 letter regarding the development of a Renewed Regulatory Framework for Electricity ("RRFE"), the Board announced that it was extending the IRM plan until such time as the RRFE policy initiatives have been substantially completed.

As part of the plan, Essex is one of the electricity distributors that will have its rates adjusted for 2012 on the basis of the IRM process, which provides for a mechanistic and formulaic adjustment to distribution rates and charges between cost of service applications.

To streamline the process for the approval of distribution rates and charges for distributors, the Board issued its IR Report, its *Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* on September 17, 2008 (the "Supplemental Report"), and its *Addendum to the Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* on January 28, 2009 (collectively the "Reports"). Among other things, the Reports contain the relevant guidelines for 2012 rate adjustments for distributors applying for distribution rate adjustments pursuant to the IRM process. On June 22, 2011, the Board issued an update to Chapter 3 of the Board's *Filing Requirements for Transmission and Distribution Applications* (the "Filing Requirements"), which outlines the application filing requirements for IRM applications based on the policies in the Reports.

Notice of Essex's rate application was given through newspaper publication in Essex's service area advising interested parties where the rate application could be viewed and advising how they could intervene in the proceeding or comment on the application. No letters of comment were received. The Notice of Application indicated that intervenors would be eligible for cost awards with respect to Essex's proposed revenue-to-cost ratio adjustments and its request for lost revenue adjustment mechanism ("LRAM") recoveries. The Vulnerable Energy Consumers Coalition ("VECC") applied and was granted intervenor status in this proceeding. The Board granted VECC eligibility for cost awards in regards to Essex's request for LRAM recoveries and any revenue-to-cost ratio matters that go beyond the implementation of previous Board decisions. Board staff also participated in the proceeding. The Board proceeded by way of a written hearing.

While the Board has considered the entire record in this proceeding, it has made reference only to such evidence as is necessary to provide context to its findings. The following issues are addressed in this Decision and Order:

- Price Cap Index Adjustment;
- Rural or Remote Electricity Rate Protection Charge;
- Revenue-to-Cost Ratio Adjustments;

- Shared Tax Savings Adjustments;
- Retail Transmission Service Rates;
- Review and Disposition of Group 1 Deferral and Variance Account Balances;
- Review and Disposition of Account 1521: Special Purpose Charge;
- Review and Disposition of Account 1562: Deferred Payments In Lieu of Taxes.
- Review and Disposition of Lost Revenue Adjustment Mechanism; and
- Billing Determinants used for Shared Tax Savings and Revenue to Cost Ratio Adjustments

Price Cap Index Adjustment

As outlined in the Reports, distribution rates under the 3rd Generation IRM are to be adjusted by a price escalator, less a productivity factor (X-factor) of 0.72% and a stretch factor.

On March 13, 2012, the Board announced a price escalator of 2.0% for those distributors under IRM that have a rate year commencing May 1, 2012.

The stretch factors are assigned to distributors based on the results of two benchmarking evaluations to divide the Ontario industry into three efficiency cohorts. In its letter to Licensed Electricity Distributors dated December 1, 2011 the Board assigned Essex to efficiency cohort 2 and a cohort specific stretch factor of 0.40%.

On that basis, the resulting price cap index adjustment is 0.88%. The price cap index adjustment applies to distribution rates (fixed and variable charges) uniformly across customer classes that are not eligible for Rural or Remote Electricity Rate Protection.

The price cap index adjustment will not apply to the following components of delivery rates:

- Rate Riders;
- Rate Adders;
- Low Voltage Service Charges;
- Retail Transmission Service Rates;
- Wholesale Market Service Rate;
- Rural or Remote Rate Protection Charge;
- Standard Supply Service – Administrative Charge;

- Transformation and Primary Metering Allowances;
- Loss Factors;
- Specific Service Charges;
- MicroFIT Service Charges; and
- Retail Service Charges.

Rural or Remote Electricity Rate Protection Charge

On December 21, 2011, the Board issued a Decision with Reasons and Rate Order (EB-2011-0405) establishing the Rural or Remote Electricity Rate Protection ("RRRP") benefit and charge for 2012. The Board amended the RRRP charge to be collected by the Independent Electricity System Operator from the current $0.0013 per kWh to $0.0011 per kWh effective May 1, 2012. The draft Tariff of Rates and Charges flowing from this Decision and Order will reflect the new RRRP charge.

Revenue-to-Cost Ratio Adjustments

Revenue-to-cost ratios measure the relationship between the revenues expected from a class of customers and the level of costs allocated to that class. The Board has established target ratio ranges (the "Target Ranges") for Ontario electricity distributors in its report *Application of Cost Allocation for Electricity Distributors*, dated November 28, 2007 and in its updated report *Review of Electricity Distribution Cost Allocation Policy,* dated March 31, 2011.

Pursuant to the Settlement Agreement approved by the Board in its decision in Essex's 2010 cost of service application (EB-2009-0143), Essex proposed to increase the revenue-to-cost ratio for General Service Less Than 50 kW, Street Lighting and Sentinel Lighting rate classes.

The additional revenues from these adjustments would be used to reduce the revenue-to-cost ratio for the General Service 50 to 2,999 kW and General Service 3,000 to 4,999 kW rate classes.

The table below outlines the proposed revenue-to-cost ratios.

Table 1

Rate Class	Current 2011 Ratio	Proposed 2012 Ratio	Target Range
Residential	100.00	100.00	85 – 115
General Service Less Than 50 kW	80.00	100.00	80 – 120
General Service 50 to 2,999 kW	131.00	106.48	80 – 180
General Service 3,000 to 4,999 kW	131.00	106.48	85 – 180
Street Lighting	50.70	60.37	70 – 120
Sentinel Lighting	54.00	60.00	70 – 120
Unmetered Scattered Load	120.00	120.00	80 – 120

Board staff and VECC submitted that the proposed revenue-to-cost ratio adjustments were in accordance with the Board's decision in Essex's 2010 cost of service proceeding.

The Board approves the revenue to cost ratio adjustments as filed. The Board notes that the adjustments are in accordance with the Settlement Agreement in EB-2009-0143, approved by the Board April 1, 2010.

Shared Tax Savings Adjustments

In its Supplemental Report, the Board determined that a 50/50 sharing of the impact of currently known legislated tax changes, as applied to the tax level reflected in the Board-approved base rates for a distributor, is appropriate.

The calculated annual tax reduction over the IRM plan term will be allocated to customer rate classes on the basis of the Board-approved base-year distribution revenue. These amounts will be refunded to customers each year of the plan term, over a 12-month period, through a volumetric rate rider using annualized consumption by customer class underlying the Board-approved base rates.

Essex's application identified a total tax savings of $160,931 resulting in a shared amount of $80,466 to be refunded to rate payers.

The Board approves the disposition of the shared tax savings of a credit of $80,466 over a one year period, May 1, 2012 to April 30, 2013, via rate riders for each class.

Retail Transmission Service Rates

Electricity distributors are charged the Ontario Uniform Transmission Rates ("UTRs") at the wholesale level and subsequently pass these charges on to their distribution customers through the Retail Transmission Service Rates ("RTSRs"). Variance accounts are used to capture timing differences and differences in the rate that a distributor pays for wholesale transmission service compared to the retail rate that the distributor is authorized to charge when billing its customers (i.e. variance Accounts 1584 and 1586).

On June 22, 2011 the Board issued revision 3.0 of the *Guideline G-2008-0001 - Electricity Distribution Retail Transmission Service Rates* (the "RTSR Guideline"). The RTSR Guideline outlines the information that the Board requires electricity distributors to file to adjust their RTSRs for 2012. The RTSR Guideline requires electricity distributors to adjust their RTSRs based on a comparison of historical transmission costs adjusted for the new UTR levels and the revenues generated under existing RTSRs. The objective of resetting the rates is to minimize the prospective balances in Accounts 1584 and 1586. In order to assist electricity distributors in the calculation of the distributors' specific RTSRs, Board staff provided a filing module.

On December 20, 2011 the Board issued its Rate Order for Hydro One Transmission (EB-2011-0268) which adjusted the UTRs effective January 1, 2012, as shown in the following table:

Table 2
2012 Uniform Transmission Rates

Network Service Rate	$3.57 per kW
Connection Service Rates	
Line Connection Service Rate	$0.80 per kW
Transformation Connection Service Rate	$1.86 per kW

No submissions were filed on this matter in this proceeding. The Board acknowledges that, with the exception of using 2011 UTRs as a placeholder, the RTSR model was correctly completed by Essex.

The Board finds that the 2012 UTRs outlined in the table above are to be incorporated into the filing module. The Board approves the resulting adjustments to the RTSR Network and Connection Service rates as calculated using the updated UTRs.

Review and Disposition of Group 1 Deferral and Variance Account Balances

The *Report of the Board on Electricity Distributors' Deferral and Variance Account Review Initiative* (the "EDDVAR Report") provides that, during the IRM plan term, the distributor's Group 1 account balances will be reviewed and disposed if the preset disposition threshold of $0.001 per kWh (debit or credit) is exceeded. The onus is on the distributor to justify why any account balance in excess of the threshold should not be disposed.

Essex's 2010 actual year-end total balance for Group 1 Accounts including interest projected to April 30, 2012 is a credit of $3,452,443. This amount results in a total credit claim of $0.00590 per kWh, which exceeds the preset disposition threshold. Essex proposed to dispose of this credit amount over a one-year period.

In its submission, Board staff noted that the principal amounts to be disposed as of December 31, 2010 reconcile with the amounts reported as part of the *Reporting and Record-keeping Requirements*. Board staff had no issues with Essex's request to dispose of its Group 1 Deferral and Variance Accounts over a one-year period.

The Board notes that the EDDVAR disposition threshold of $0.001/kWh has been exceeded. The Board approves the disposition, on a final basis, of a credit balance of $3,452,443 representing principal as of December 31, 2010 and carrying costs to April 30, 2012, over a one year period, from May 1, 2012 to April 30, 2013.

The table below identifies the principal and interest amounts approved for disposition for Group 1 Accounts.

Table 3

Account Name	Account Number	Principal Balance A	Interest Balance B	Total Claim C = A + B
LV Variance Account	1550	-$18,134	-$2,515	-$20,649
RSVA - Wholesale Market Service Charge	1580	-$995,694	-$2,594	-$998,288
RSVA - Retail Transmission Network Charge	1584	$1,142,986	$45,254	$1,188,240
RSVA - Retail Transmission Connection Charge	1586	-$340,358	$6,473	-$333,885
RSVA - Power (excluding Global Adjustment)	1588	$1,710,819	-$70,318	$1,640,471
RSVA - Power – Global Adjustment Sub-Account	1588	-$3,248,056	-$62,091	-$3,310,147
Recovery of Regulatory Asset Balances	1590	-$1,580,292	-$37,923	-$1,618,215
Disposition and Recovery of Regulatory Balances (2008)	1595	-	-	-
Disposition and Recovery of Regulatory Balances (2009)	1595	-	-	-
Group 1 Total		**-$3,328,759**	**-$123,714**	**-$3,452,473**

For accounting and reporting purposes, the respective balance of each Group 1 Account approved for disposition shall be transferred to the applicable principal and interest carrying charge sub-accounts of Account 1595 pursuant to the requirements specified in Article 220, Account Descriptions, of the *Accounting Procedures Handbook for Electricity Distributors*. The date of the journal entry to transfer the approved account balances to the sub-accounts of Account 1595 is the date on which disposition of the balances is effective in rates, which generally is the start of the rate year (e.g. May 1). This entry should be completed on a timely basis to ensure that these adjustments are included in the June 30, 2012 (3rd Quarter) RRR data reported.

Review and Disposition of Account 1521: Special Purpose Charge

The Board authorized Account 1521, Special Purpose Charge Assessment ("SPC") Variance Account in accordance with Section 8 of *Ontario Regulation 66/10* (*Assessments for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs*) (the "SPC Regulation"). Accordingly, any difference between (a) the amount remitted to the Minister of Finance for the distributor's SPC assessment

and (b) the amounts recovered from customers on account of the assessment were to be recorded in “Sub-account 2010 SPC Assessment Variance” of Account 1521.

In accordance with Section 8 of the SPC Regulation, distributors are required to apply no later than April 15, 2012 for an order authorizing the disposition of any residual balance in sub-account 2010 SPC Assessment Variance. The Filing Requirements state the Board’s expectation that requests for disposition of this account balance would be heard as part of the proceedings to set rates for the 2012 year.

In the Manager’s Summary of its application, Essex did not request the disposition of Account 1521. In response to Board staff interrogatory #7, Essex provided a table identifying the principal balance of Account 1521 as of December 31, 2010, including the amount recovered from customers in 2011, plus projected carrying charges as of April 30, 2012. This total balance is a debit of $10,737. Essex stated that it did not request disposition of Account 1521 because applying for recovery of unaudited balances was unnecessary. Essex submitted that it would be agreeable to the disposition of unaudited balances if the Board would accept unaudited balances as at December 31, 2011.

Board staff submitted that despite the usual practice, the Board should authorize the disposition of Account 1521 as of December 31, 2010, including carrying charges, plus the amount recovered from customers in 2011, including carrying charges, because the account balance does not require a prudence review and electricity distributors are required by regulation to apply for disposition of this account.

The Board approves, on a final basis, the disposition of Account 1521 as of December 31, 2010 including carrying charges plus the amounts recovered in 2011, plus projected carrying charges to April 30, 2012, for a total of $10,737. Consistent with the Board’s findings on the disposition of Group 1 Account balances, the Board approves a disposition period of one year. The Board directs that Account 1521 be closed effective May 1, 2012.

For accounting and reporting purposes, the balance of Account 1521 shall be transferred to the applicable principal and interest carrying charge sub-accounts of Account 1595 pursuant to the requirements specified in Article 220, Account Descriptions, of the *Accounting Procedures Handbook for Electricity Distributors*. The date of the journal entry to transfer the approved account balances to the sub-accounts

of Account 1595 is the date on which disposition of the balances are effective in rates, which generally is the start of the rate year (e.g. May 1). This entry should be completed on a timely basis to ensure that these adjustments are included in the June 30, 2012 (3rd Quarter) RRR data reported.

Review and Disposition of Account 1562: Deferred Payments in Lieu of Taxes

In 2001, the Board approved a regulatory payments in lieu of taxes proxy approach for rate applications coupled with a true-up mechanism filed under the RRR to account for changes in tax legislation and rules and to true-up between certain proxy amounts used to set rates and the actual amount of taxes paid. The variances resulting from the true-up were tracked in Account 1562 for the period 2001 through April 30, 2006.

On November 28, 2008, pursuant to sections 78, 19 (4) and 21 (5) of the *Ontario Energy Board Act, 1998*, the Board commenced a Combined Proceeding (EB-2008-0381) on its own motion to determine the accuracy of the final account balances with respect to Account 1562 Deferred Payments in Lieu of Taxes ("Deferred PILs") (for the period October 1, 2001 to April 30, 2006) for certain electricity distributors that filed 2008 and 2009 distribution rate applications.

The Notice in the Combined Proceeding included a statement of the Board's expectation that the decision resulting from the Combined Proceeding would be used to determine the final account balances with respect to Account 1562 Deferred PILs for the remaining distributors. In its decision and order, the Board stated that, "[e]ach remaining distributor will be expected to apply for final disposition of Account 1562 with its next general rates application (either IRM or cost of service)."[1]

Essex initially applied to dispose of a debit balance in Account 1562 of $101,760 including carrying charges projected to April 30, 2012 over a one-year period. In response to Board staff interrogatories and submission, Essex filed a revised balance of a credit of $47,568 consisting of a principal credit amount of $62,417 minus debit carrying charges of $14,849. This balance reflected Board staff's submission that the true-up variance calculations of Ontario Capital Tax and Large Corporation Tax on Essex's 2001 SIMPIL sheet should be prorated by 92/365 due to the short tax year.

In its submission, Board staff noted that Essex seems to have understated the billing

[1] EB-2008-0381 Account 1562 Deferred PILs Combined Proceeding, Decision and Order, p. 28

determinants in 2003 through 2006. For example, the billing determinants used by Essex for the GS>50 kW class for 2003 were 432,524 kW while the statistics filed in the 2006 Electricity Distribution Rate ("EDR") application for 2003 were 528,197 kW. There were similar inconsistencies for the GS>50 kW class for 2004, 2005, and 2006. Board staff submitted that the 2006 EDR billing determinants for the GS>50 kW class are more reliable than the statistics submitted in the PILs collection worksheets by Essex. Board staff submitted that Essex should use the 2006 EDR billing determinants for 2002, 2003 and 2004 to calculate the PILs billed to customers in the GS>50 kW class.

Essex submitted that it used the actual PILs collected through the billing system and recorded in the general ledger, and divided the dollars by the approved rates to derive the billing determinants. This was necessary since the billing data for 2003 to 2004 was not accessible due to a hardware failure that supported the prior billing system that was used up to March 31, 2005. Essex also acknowledged that the billing determinants for 2005 and for the period January 1 to April 30, 2006 as originally filed were incorrect and submitted revised values for these.

The Board directs Essex to use the 2006 EDR volumetric billing determinants for the GS>50 kW Class in order to calculate the PILs collections for 2003, 2004, 2005 and the four months of 2006. The Board agrees with the submission of Board staff that the 2006 EDR billing determinants in the GS>50 kW class are more reliable than the statistics submitted in the PILs collection worksheets.

The Board directs Essex to re-file the ED Disposition 1562 Balance Excel Worksheets and an updated continuity schedule in active Excel format, reflecting the determinations of the Board in this Decision. Subject to the filing of this information, the Board approves the disposition of the balance in account 1562 on a final basis, over a one year period, May 1, 2012 to April 30, 2013.

For accounting and reporting purposes, the balance of Account 1562 shall be transferred to the applicable principal and interest carrying charge sub-accounts of Account 1595 pursuant to the requirements specified in Article 220, Account Descriptions, of the *Accounting Procedures Handbook for Electricity Distributors*. The date of the journal entry to transfer the approved account balances to the sub-accounts of Account 1595 is the date on which disposition of the balances is effective in rates, which generally is the start of the rate year (e.g. May 1). This entry should be

completed on a timely basis to ensure that these adjustments are included in the June 30, 2012 (3rd Quarter) RRR data reported.

Review and Disposition of Lost Revenue Adjustment Mechanism ("LRAM")

The Board's *Guidelines for Electricity Distributor Conservation and Demand Management* (the "CDM Guidelines") issued on March 28, 2008 outline the information that is required when filing an application for LRAM or SSM.

Essex requested the recovery of an LRAM claim of $508,029.80. In response to interrogatories from Board staff and intervenors, Essex updated its LRAM claim to $509,319.25 to reflect the Ontario Power Authority's ("OPA") 2010 final results. Essex's LRAM claim consists of the effect of 2010 programs in 2010, persisting effects of 2006 to 2009 programs in 2010, and the persisting effects of 2006 to 2010 programs in 2011 and up to April 30, 2012. Essex proposed to recover the LRAM claim over a one-year period.

Board staff submitted that it supports the recovery of lost revenues from 2006 to 2009 CDM programs in those years. With the exception of 2006, Essex was under IRM for these years. In 2006, Essex rebased on a historical test year basis and there was no opportunity for Essex to account for CDM activity in its rates. However, Board staff did not support the recovery of lost revenues from 2006 to 2010 CDM programs in 2010 and beyond since these should have been reflected in Essex's 2010 load forecast when it last rebased.

VECC supported the approval of the lost revenues requested by Essex for the years 2006, 2007, 2008 and 2009 from the impact of OPA CDM programs implemented from 2006 to 2009, as these energy savings occurred prior to rebasing and have not been claimed. Regarding Essex's remaining LRAM claim, VECC submitted that energy savings from CDM programs deployed between 2006 to 2010 are not accruable in the 2010 through April 30, 2012 as the savings should have been incorporated in the 2010 load forecast at the time of rebasing.

Essex referred to the Settlement Agreement for EB-2009-0143 which stated that, "(t)he Parties agree to the Load Forecast submitted with the following added as a comment: "Due to data limitations, we accept the methodology as the best currently available and the forecast appears to be reasonable." In Essex's view, one could conclude that

Essex's forecast was developed with the expectation of making LRAM claims in future years to compensate it for any subsequent CDM initiatives it undertook. Therefore, Essex submitted that its LRAM application is indeed appropriate.

The Board approves an LRAM claim of $297,952.72, representing lost revenues from 2006 to 2009 CDM programs, including persistence. With the exception of 2006 Essex was under IRM during this 2006-2009 period and did not otherwise receive LRAM compensation. The Board acknowledges that the 2006 load forecast would not have reflected CDM activity. The Board approves a one year disposition period from May 1, 2012 to April 30, 2013.

The Board will not approve LRAM from: (i) persistence from the 2006 to 2009 CDM programs in 2010 (ii) lost revenues from 2010 CDM programs in 2010; and (iii) lost revenues from 2006 to 2010 CDM programs in 2011 and 2012, as these claims are contrary to the 2008 CDM Guidelines. The 2008 CDM Guidelines state that lost revenues are only accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be incorporated in the load forecast. Absent specific language in the Settlement Agreement in EB-2009-0143 or the decision of the Board accepting the Settlement stating otherwise, there is no reasonable basis for the Board to deviate from the 2008 Guidelines.

Billing Determinants used for Shared Tax Savings and Revenue to Cost Ratio Adjustments

In accordance with the Filing Requirements a distributor is required to file completed Rate Generator and supplementary workforms, provided by the Board, as a part of an IRM application. These filing models assist the distributor in calculating appropriate rate adjustments. The Shared Tax Savings and Revenue to Cost Ratio Adjustment models require the distributor to use the billing determinants established in its last cost of service application to calculate the revenue requirement and subsequently calculate associated rate riders.

Board staff interrogatory #1 identified that the load and customer forecast numbers for Street Lighting and Sentinel Lighting classes used by Essex to complete the Shared Tax Savings, Revenue to Cost Ratio, and Rate Generator models were not consistent with their 2010 COS application. The figures Board staff identified from the 2010 cost of

service proceeding were as follows:

Table 4

Load Forecast for 2010

	Connections	kWh	kW
Sentinel Lighting	325	382,018	1,051
Street Lighting	7,681	5,929,159	18,021

VECC submitted that the figures approved by the Board were those outlined by Board staff and that these should be used to populate the models.

Essex submitted that the figures outlined by Board staff in interrogatory #1 were not the final figures for the Street Lighting and Sentinel Lighting classes approved by the Board. In the 2010 COS proceeding, in response to Energy Probe's interrogatory #17, Essex stated that the 2010 forecast data for Lighting classes which appears on page 14 of the Report attached to Exhibit 3 / Tab 1 / Schedule 2 (the figures outlined by Board staff's table in this proceeding) is incorrect. The correct values appear in Exhibit 3 / Tab 1 / Schedule 1 / Attachment 1.

Table 5

EB-2009-0143 – Exhibit 3/Tab 1/Sched. 1/ Attach. 1

	Connections	kWh	kW
Sentinel Lighting	168	390,941	1,076
Street Lighting	2643	5,292,910	18,024

The Board accepts Essex's submission that the correct values to be used as the billing determinants for the Sentinel Lighting and Street Lighting classes are those outlined in EB-2009-0143, Exhibit 3/Tab 1/ Schedule 1/ Attachment 1. These values were approved by the Board in Essex's 2010 cost of service application.

IMPLEMENTATION

The Board has made findings in this Decision which change the 2012 distribution rates from those proposed by Essex.

The Board expects Essex to file a draft Rate Order, including all relevant calculations showing the impact of this Decision on Essex's determination of the final rates. Supporting documentation shall include, but not be limited to, filing completed versions of the 2012 IRM Rate Generator model, updated SIMPIL models and continuity tables

to support the claim for disposition of account 1562 Deferred PILs and LRAM calculations showing the derivation of the final rate riders to recover the approved LRAM amount.

A Rate Order will be issued after the steps set out below are completed.

THE BOARD ORDERS THAT:

1. Essex shall file with the Board, and shall also forward to intervenors, a draft Rate Order that includes revised models in Microsoft Excel format and a proposed Tariff of Rates and Charges reflecting the Board's findings in this Decision by **7 days** from date of issuance of Decision and Order.

2. Board staff and intervenors shall file any comments on the draft Rate Order including the revised models and proposed rates with the Board and forward to Essex within **7 days** of the date of filing of the draft Rate Order.

3. Essex shall file with the Board and forward to intervenors responses to any comments on its draft Rate Order including the revised models and proposed rates within **4 days** of the date of receipt of intervenor comments.

Cost Awards

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit its cost claims no later than **7 days** from the date of issuance of the final Rate Order.

2. Essex shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of the final Rate Order.

3. VECC shall file with the Board and forward to Essex any responses to any objections for cost claims within **28 days** from the date of issuance of the final Rate Order.

4. Essex shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2011-0166,** be made through the Board's web portal at, www.errr.ontarioenergyboard.ca and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available parties may email their document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 2 paper copies.

DATED at Toronto, April 4, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0128

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 just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.

BEFORE: Marika Hare
Presiding Member

Allison Duff
Member

DECISION and RATE ORDER

March 13, 2014

Essex Powerlines Corporation ("Essex") filed an application with the Ontario Energy Board (the "Board") on September 27, 2013 under section 78 of the Act, seeking approval for changes to the rates that Essex charges for electricity distribution, effective May 1, 2014 (the "Application").

The Application met the Board's requirements as detailed in the *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (the "RRFE Report") dated October 18, 2012 and the *Filing Requirements for Electricity Distribution Rate Applications* (the "Filing Requirements") dated July 17, 2013. Essex selected the Price Cap Incentive Rate-Setting ("Price Cap IR") option to adjust its 2014 rates. The Price Cap IR methodology provides for a mechanistic and

formulaic adjustment to distribution rates and charges in the period between cost of service applications. Essex last appeared before the Board with a full cost of service application for the 2010 rate year in the EB-2009-0143 proceeding. In this proceeding, Essex also seeks approval for Lost Revenue Adjustment Mechanism Variance Account ("LRAMVA") balances.

The Board conducted a written hearing and Board staff participated in the proceeding. The Vulnerable Energy Consumers Coalition ("VECC") applied for and was granted intervenor status and cost eligibility with respect to the proposed recovery of revenue losses due to conservation programs. One letter of comment was received. The letter of comment requested non-consolidated financial statements from Essex's holding company and affiliates. The Board provided a response to the letter, indicating that the Board's Yearbook of Electricity Distributors contains financial information on Essex, but that it does not have regulatory jurisdiction over Essex's holding company and affiliates and therefore does not have the information requested.

While the Board has considered the entire record in this proceeding, it has made reference only to such evidence as is necessary to provide context to its findings. The following issues are addressed in this Decision and Rate Order:

- Price Cap Index Adjustment;
- Rural or Remote Electricity Rate Protection Charge;
- Shared Tax Savings Adjustments;
- Retail Transmission Service Rates;
- Review and Disposition of Group 1 Deferral and Variance Account Balances; and
- Review and Disposition of LRAMVA Balance.

Price Cap Index Adjustment

The Board issued the *Report on Rate Setting Parameters and Benchmarking under the Renewed Regulatory Framework for Ontario's Electricity Distributors* (the "Price Cap IR Report") which provides the 2014 rate adjustment parameters for distribution companies selecting either the Price Cap IR or Annual IR Index option.

Distribution rates under the Price Cap IR option are adjusted by an inflation factor, less a productivity factor and a stretch factor. The inflation factor for 2014 rates is 1.7%. Based on the total cost benchmarking model developed by Pacific Economics Group

Research, LLC, the Board determined that the appropriate value for the productivity factor is zero percent. The Board also determined that the stretch factor can range from 0.0% to 0.6% for distributors selecting the Price Cap IR option, assigned based on a distributor's cost evaluation ranking. In the Price Cap IR Report, the Board assigned Essex a stretch factor of 0.15%.

As a result, the net price cap index adjustment for Essex is 1.55% (i.e. 1.7% - (0% + 0.15 %)). The price cap index adjustment applies to distribution rates (fixed and variable charges) uniformly across all customer classes. The price cap index adjustment does not apply to the components of delivery rates set out in the list below.

- Rate Riders;
- Rate Adders;
- Low Voltage Service Charges;
- Retail Transmission Service Rates;
- Wholesale Market Service Rate;
- Rural or Remote Electricity Rate Protection Charge;
- Standard Supply Service – Administrative Charge;
- Transformation and Primary Metering Allowances;
- Loss Factors;
- Specific Service Charges;
- MicroFit Charge; and
- Retail Service Charges.

Rural or Remote Electricity Rate Protection Charge

The Board issued a Decision and Rate Order (EB-2013-0396) establishing the Rural or Remote Electricity Rate Protection ("RRRP") benefit and charge for 2014. The Board determined that the RRRP charge to be paid by all rate-regulated distributors and collected by the Independent Electricity System Operator ("IESO") shall be increased to $0.0013 per kWh effective May 1, 2014, from the current $0.0012 per kWh. The draft Tariff of Rates and Charges flowing from this Decision and Rate Order reflects the new RRRP charge.

Shared Tax Savings Adjustments

In its *Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors,* the Board determined that a 50/50 sharing of the impact of legislated tax changes between shareholders and ratepayers is appropriate.

The tax reduction will be allocated to customer rate classes on the basis of the last Board approved cost of service distribution revenue.

The Application identified a total tax savings of $157,696 resulting in a shared amount of $78,848 to be refunded to rate payers.

The Board approves the disposition of the shared tax savings of $78,848 based on a volumetric rate rider using annualized consumption for all customer classes over a one-year period from May 1, 2014 to April 30, 2015.

Retail Transmission Service Rates

Electricity distributors are charged for transmission costs at the wholesale level and then pass on these charges to their distribution customers through the Retail Transmission Service Rates ("RTSRs"). Variance accounts are used to capture differences in the rate that a distributor pays for wholesale transmission service compared to the retail rate that the distributor is authorized to charge when billing its customers (i.e. variance Accounts 1584 and 1586).

The Board issued revision 3.0 of the *Guideline G-2008-0001 - Electricity Distribution Retail Transmission Service Rates* (the "RTSR Guideline") which outlines the information that the Board requires electricity distributors to file to adjust their RTSRs for 2014. The RTSR Guideline requires electricity distributors to adjust their RTSRs based on a comparison of historical transmission costs adjusted for the new Uniform Transmission Rates ("UTR") levels and the revenues generated under existing RTSRs. Similarly, embedded distributors, such as Essex, must adjust their RTSRs to reflect any changes to the applicable Sub-Transmission RTSRs of their host distributor(s), which in this case is Hydro One Networks Inc.

The Board approved new rates for Hydro One's Sub-Transmission class, including the applicable RTSRs, effective January 1, 2014 (EB-2013-0141), as shown in the following

table.

2014 Sub-Transmission RTSRs

Network Service Rate	$3.23 per kW
Connection Service Rates	
Line Connection Service Rate	$0.65 per kW
Transformation Connection Service Rate	$1.62 per kW

The Board finds that these 2014 Sub-Transmission class RTSRs are to be incorporated into the filing module.

Review and Disposition of Group 1 Deferral and Variance Account Balances

The *Report of the Board on Electricity Distributors' Deferral and Variance Account Review Initiative* provides that, during the IRM plan term, the distributor's Group 1 account balances will be reviewed and disposed if the preset disposition threshold of $0.001 per kWh (debit or credit) is exceeded. The onus is on the distributor to justify why any account balance in excess of the threshold should not be disposed.

Essex's 2012 actual year-end total balance for Group 1 accounts including interest projected to April 30, 2014 is a credit of $4,592,942. This amount results in a total credit claim of $0.0080 per kWh, which exceeds the preset disposition threshold. Essex proposed to dispose of this credit amount over a one-year period.

In its submission, Board staff noted that the principal amounts as of December 31, 2012 reconcile with the amounts reported as part of the *Reporting and Record-keeping Requirements*. Board staff submitted that the amounts should be disposed on a final basis.

The Board approves the disposition of a credit balance of $4,592,942 as of December 31, 2012, including interest as of April 30, 2014 for Group 1 accounts. These balances are to be refunded to customers over a one-year period from May 1, 2014 to April 30, 2015.

The table below identifies the principal and interest amounts approved for disposition for Group 1 accounts.

Group 1 Deferral and Variance Account Balances

Account Name	Account Number	Principal Balance A	Interest Balance B	Total Claim C = A + B
LV Variance Account	1550	$708,191	$19,695	$727,886
RSVA - Wholesale Market Service Charge	1580	-$3,573,954	-$147,000	-$3,720,954
RSVA - Retail Transmission Network Charge	1584	$347,134	$31,682	$378,816
RSVA - Retail Transmission Connection Charge	1586	-$1,267,076	-$45,501	-$1,312,577
RSVA - Power	1588	$9,554,493	$49,174	$9,603,667
RSVA - Global Adjustment	1589	-$8,731,842	-$54,573	-$8,786,415
Recovery of Regulatory Asset Balances	1590	-$1,684,689	$201,324	-$1,483,365
Total Group 1 Excluding Global Adjustment – Account 1589				**$4,193,473**
Total Group 1				**-$4,592,942**

The balance of each Group 1 account approved for disposition shall be transferred to the applicable principal and interest carrying charge sub-accounts of Account 1595 pursuant to the requirements specified in Article 220, Account Descriptions, of the *Accounting Procedures Handbook for Electricity Distributors*. The date of the transfer must be the same as the effective date for the associated rates, generally, the start of the rate year. Essex should ensure these adjustments are included in the reporting period ending June 30, 2014 (Quarter 2).

Review and Disposition of LRAMVA Balance

The 2012 CDM Guidelines established the Lost Revenue Adjustment Mechanism Variance Account to capture, at the customer rate-class level, the difference between actual results from authorized CDM activities and the reduction for forecasted CDM activities included in the distributor's last Board-approved load forecast.

Distributors must apply for the disposition of the balance in the LRAMVA as part of their cost of service applications. Distributors may apply for the disposition of the balance in

the LRAMVA on an annual basis, as part of their IRM rate applications, if the balance is deemed significant by the distributor.

Essex requested the recovery of an LRAMVA claim of $109,212, consisting of lost revenues in 2011 from CDM programs delivered in 2011 and persistence of 2011 programs in 2012 and lost revenues in 2012 from 2012 CDM programs.

Board staff noted that Essex had an updated load forecast approved as part of its 2010 cost-of-service application and that none of the lost revenues included in this request were subject to any previous approvals. Board staff submitted that the applied-for lost revenues are eligible for recovery.

VECC noted that for Essex's GS>50 kW rate class, the net demand (kW) reported for the Demand Response 3 ("DR3") program on a monthly basis is 1,749 kW, which accounts for approximately 94% of the class total of 1,852 kW. VECC submitted that the lost revenues from the GS>50 kW customers' participation in DR3 programs should not be included for recovery. VECC submitted that there was no evidence to indicate the program was activated, or if the program had been activated, there was no evidence to indicate the program had any significant effect on Essex's load, billing demand or distribution revenues.

In its reply submission, Essex stated that it has relied upon the final program results provided by the Ontario Power Authority ("OPA"), which is the best information available to calculate its lost revenues in the absence of access to DR3 activation data. Essex noted that any information related to the actual activations of DR3 programs is not provided by the OPA, nor is Essex provided with information about which customers are under contract. Essex submitted that its entire LRAMVA claim is related to OPA-Contracted Province-Wide CDM Programs and that all of the programs included in its LRAMVA claim have been reviewed and verified by the OPA. Essex submitted that the LRAMVA claim applied for, including the amounts for its DR3 program, is appropriate and ought to be approved by the Board as the best means to balance regulatory efficiency and the pursuit of perfection.

The Board approves the LRAMVA claim as submitted. Essex availed itself of OPA programs, and the results have been verified by the OPA. These claims shall be recovered over a one-year period from May 1, 2014 to April 30, 2015.

Rate Model

With this Decision and Rate Order, the Board is providing Essex with a rate model, applicable supporting models and a draft Tariff of Rates and Charges (Appendix A). The Board also reviewed the entries in the rate model to ensure that they were in accordance with the 2013 Board-approved Tariff of Rates and Charges and the rate model was adjusted, where applicable, to correct any discrepancies.

THE BOARD ORDERS THAT:

1. Essex's new distribution rates shall be effective May 1, 2014.

2. Essex shall review the draft Tariff of Rates and Charges set out in Appendix A and shall file with the Board, as applicable, a written confirmation of its completeness and accuracy, or provide a detailed explanation of any inaccuracies or missing information, within **7 days** of the date of issuance of this Decision and Rate Order.

3. If the Board does not receive a submission from Essex to the effect that inaccuracies were found or information was missing pursuant to item 2 of this Decision and Rate Order, the draft Tariff of Rates and Charges set out in Appendix A of this Decision and Rate Order will become final. Essex shall notify its customers of the rate changes no later than the delivery of the first bill reflecting the new rates.

4. If the Board receives a submission from Essex to the effect that inaccuracies were found or information was missing pursuant to item 2 of this Decision and Rate Order, the Board will consider the submission of Essex prior to issuing a final Tariff of Rates and Charges.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit their cost claims no later than **7 days** from the date of issuance of the final Rate Order.

2. Essex shall file with the Board and forward to (intervenor) any objections to the claimed costs within **21 days** from the date of issuance of the final Rate Order.

3. VECC shall file with the Board and forward to Essex any responses to any objections for cost claims within **28 days** from the date of issuance of the final Rate Order.

4. Essex shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2013-0128,** be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/ and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available parties may email their document to BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 2 paper copies.

DATED at Toronto, March 13, 2014
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

Accounting Procedures Handbook

For

Electricity Distributors

Issued: December 2011
Effective: January 1, 2012

Other Assets & Deferred Charges

B. Carrying charges shall apply to this account. These amounts shall be calculated using simple interest applied to the monthly opening balances in the account (exclusive of accumulated interest) and shall be recorded monthly in a separate carrying charges sub-account of this account. The interest rate shall be the rate prescribed by the Board.

C. Records shall be maintained at a detail level to support entries in this account. Disposition of the account balance will be subject to Board review.

Note: For Account 1592, additional Board instructions include the PILs requirements of Chapter 7 of the Board's *2006 Electricity Distribution Rate Handbook, Report of the Board* (on the handbook), applicable accounting guidance (i.e. Frequently Asked Questions) and other requirements the Board may specify. Account 1562 relates to the rate-year periods that ended on or before April 30, 2006.

1592 PILs and Tax Variances for 2006 and Subsequent Years, Sub-account HST / OVAT Input Tax Credits (ITCs)

Effective on July 1, 2010, distributors shall record the incremental ITC they receive on distribution revenue requirement items that were previously subject to PST and become subject to HST. Tracking of these amounts will continue in this deferral account until the effective date of distributors' next cost of service rate order. 50 per cent of the confirmed balance in this account shall be returnable to the ratepayers.

Carrying charges shall apply to this account. These amounts shall be calculated using simple interest applied to the monthly opening balances in the account (exclusive of accumulated interest) and shall be recorded monthly in a separate carrying charges sub-account of this account. The interest rate shall be the rate prescribed by the Board.

Note: Further guidance is provided in the December 2010 Accounting Procedures Handbook-Frequently Asked Questions.

1595 Disposition and Recovery/Refund of Regulatory Balances Control Account

This control account shall be used to record the disposition of deferral and variance account balances for electricity distributors receiving approval to recover (or refund) account balances in rates as part of the regulatory process. This control account structure has three generic Sub-accounts for each rate year starting in 2008. For each

year that the deferral or variance account balances are approved for disposition by the Board, distributors are required to set-up under this control account, three sub-accounts for the purposes and in the format outlined below (i.e., a vintage year classification consisting of three sub-accounts in relation to the particular year in which the account balances are approved).

1595 Disposition and Recovery/Refund of Regulatory Balances, Sub-account Principal Balances Approved in "20yy"

This account shall be used to record the approved principal account balances on the transfer to Account 1595 of the Board-approved deferral or variance account balances. This account shall also include the amounts recovered (or refunded) in rates through regulatory asset or deferral and variance accounts rate riders.

1595 Disposition and Recovery/Refund of Regulatory Balances, Sub-account Carrying Charges Approved in "20yy"

This account shall be used to record cumulative carrying charge account balances on the transfer to Account 1595 of the Board-approved deferral or variance account balances. No additional carrying charges shall be applied or added to these carrying charge balances transferred to this account (i.e., no interest on interest is applicable).

1595 Disposition and Recovery/Refund of Regulatory Balances, Sub-account Carrying Charges for Net Principal in "20yy"

This account shall be used to record the carrying charges calculated on the opening monthly net principal balance (i.e., transferred account principal balances less recoveries) recorded in "Sub-account Principal Balances Approved in "20yy". The interest rate shall be the rate prescribed by the Board.

Go to TOC A220