EB-2008-0411

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Union Gas Limited pursuant to section 43(1) of the Act, for an Order or Orders granting leave to sell 11.7 kilometres of natural gas pipeline between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair, all in the Province of Ontario

AUTHORITIES OF DAWN GATEWAY GP

1. *Natural Gas Act* (section 1(c)) 15 USCS § 717

2. *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 2 Definition of Pipeline; ss. 58.17

3. TransCanada Pipelines Limited and TransCanada Keystone Pipeline GP Ld. (Keystone), MH-1-2006: Chapter 5 – *The Transfer at Net Book Value*, pp. 53-54, and Chapter 6 – *The Board's Views on the Transfer and the Public Interest*, pp. 55-59)

4. ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC4 [Stores Block]

5. ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2008 ABCA 200; SCC leave refused December 4, 2008 [Carbon]

6. ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2009 ABCA 171 [Harvest Hills]

7. ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board,) 2009 ABCA 246 [Salt Caverns]

*** CURRENT THROUGH PL 111-49, APPROVED 08/12/2009 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 USCS § 717

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of *15 USCS §§ 717* et seq. applicable. The provisions of this Act [*15 USCS §§ 717* et seq.] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intra-state transactions exempt from provisions of *15 USCS §§ 717* et seq.; certification from state commission as conclusive evidence. The provisions of this Act [*15 USCS §§ 717* et seq.] shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act [*15 USCS §§ 717* et seq.] by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power of jurisdiction.

(d) Vehicular natural gas jurisdiction. The provisions of this Act [*15 USCS §§ 717* et seq.] shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is--

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

National Energy Board Act, R.S.C. 1985, c. N-7

Definitions

2. In this Act,

. . .

“pipeline”

“pipeline” means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property, or immovable and movable, and works connected to them, but does not include a sewer or water pipeline that is used or proposed to be used solely for municipal purposes;

. . .

Provincial regulatory agency

58.17 The lieutenant governor in council of a province may designate as the provincial regulatory agency the lieutenant governor in council of the province, a provincial minister of the Crown or any other person or a board, commission or other tribunal.

1990, c. 7, s. 23.

National Energy Board | Office national de l'énergie

Reasons for Decision

TransCanada PipeLines Limited and TransCanada Keystone Pipeline GP Ltd.

MH-1-2006

February 2007

Transfer of Facilities

Canada

Chapter 5

The Transfer at Net Book Value

The Applicants proposed that the price for the assets to be transferred from TransCanada to Keystone should be the NBV at the time the transfer is to take place in May 2008. The NBV of the assets is $76.3 million as at 31 December 2005 and would be approximately $65.1 million at the time of transfer. The NBV would be calculated as the book cost of the Facilities of $169.5 million, less the estimated accumulated depreciation of $104.4 million. The Applicants stated that the NBV is a fair and reasonable price from the perspectives of both the purchaser and seller, and that it facilitates cost-based, competitive tolls that have been tested in the market. They also stated that it would be consistent with original cost rate making, Board regulations, and regulatory precedent.

The Open Season process for the Keystone Project was premised on tolls which reflect NBV for the Facilities. The Applicants stated that a higher transfer price and consequent higher tolls could jeopardize the contract commitments that are the basis for the commercial viability of the Keystone Pipeline. In addition, a transfer at NBV from one regulated utility to another ensures that one customer group is not being favoured at the expense of another, and ensures that the consolidated entity is not making an excessive return through the transfer of assets to an affiliate at greater than NBV. The Applicants further stated that the transfer of the Facilities at NBV accords with the National Energy Board *Oil Pipeline Uniform Accounting Regulations* (OPUAR) and the National Energy Board *Gas Pipeline Uniform Accounting Regulations* (GPUAR) which stipulate that where facilities are purchased from an affiliated company, the original cost of the facilities and accumulated depreciation is recorded in the accounts of the purchasing company.

The NBV calculation of $65.1 million assumed no capital cost additions or line replacements from 31 December 2005 until the time of transfer and employed the currently approved depreciation rate for pipeline of 2.8 percent over the same period. The book cost and accumulated depreciation balances applicable to the Facilities were determined by applying a pipeline distance ratio to the book cost and accumulated depreciation balances for the provinces of Saskatchewan and Manitoba. The pipeline distance ratio is the result of dividing the Facilities' segment distance by the total pipeline distance for 864 mm O.D. pipe in each province.

The Transfer Amount is subject to adjustments for expenditures of a capital nature, less adjustments for depreciation between 31 December 2005 and the closing date. The forecast for capital expenditures relating to pipeline integrity for the years 2006 to 2008 inclusive is $0.9 million. These expenditures would increase the NBV. TransCanada stated that it did not foresee any other circumstances which would affect the Transfer Amount. TransCanada further stated that a change in the NBV of $10.0 million would not have a material effect on shippers.

None of the intervenors objected to the use of the NBV as the transfer price.

The Applicants forecast that the removal of the Facilities would result in a reduction in TransCanada's revenue requirement in the amount of $112.6 million on a NPV basis over a ten year period. The forecast reduction in the revenue requirement is mainly due to lower depreciation, taxes, operations and maintenance costs, lower return on rate base, as well as lower pipeline integrity costs. No parties filed evidence or expressed concern with respect to the forecast reductions to the revenue requirement.

Views of the Board

The Board notes that the proposal to transfer the Facilities at NBV was uncontested. The Board is of the view that NBV is the appropriate transfer amount in this situation as it accords with existing practices and principles and the OPUAR and GPUAR. The Board accepts the Applicants' proposed method to reduce TransCanada's rate base by the NBV of the Facilities on the date of the sale and also is prepared to authorize Keystone's inclusion of the NBV of the Facilities in the Oil Plant Under Construction of the Keystone Pipeline on the date of the transfer, and subsequently in the rate base of the Keystone Pipeline if and when it is placed in oil transmission service.

Chapter 6

The Board's Views on the Transfer and the Public Interest

As determined in Chapter 2, the Board finds that the regulatory standard applicable to the Transfer Application is the public interest. The Board must consider all of the factors that are relevant to the public interest in this case, including, but not limited to, the interests of gas and oil shippers, producers and consumers.

Canada relies on competitive markets to determine prices for oil and natural gas. Since market deregulation in the 1980s, Canadian and United States oil and natural gas markets have increasingly evolved into an integrated North American market. This integrated market is supported by a complex network of interconnecting pipelines between sources of supply and regional markets.

Transportation paths are often determined on the basis of price signals at supply and market regions throughout North America. Producers are continuously seeking to maximize the value received for the commodity they produce, while consumers seek to obtain the lowest cost alternative to meet their requirements. Economically efficient outcomes are achieved when both producers and consumers are able to effectively achieve these goals.

To obtain economically efficient outcomes, there must be adequate transportation infrastructure to connect supply to markets. When there is a lack of sufficient pipeline capacity between two locations, crude oil or natural gas supplies can become “trapped” in one region, causing a disconnect from those prices reflected in the larger integrated market. In a disconnected region, the price of the commodity can be significantly higher or lower than the rest of the market. Prices in a disconnected region will tend to move to the point where the price would be determined based on the available supply and demand in that particular region, rather than the requirements and prevailing price of the larger integrated market.

In Chapters 3 and 4 the Board has clearly established that the Facilities are not required for gas transmission purposes. The Board considers that the detailed analysis done by the Applicants of North American supply and demand demonstrates the Mainline’s ability to meet firm service commitments and that the Mainline will continue to have spare capacity over a wide range of supply and demand estimates. This, in the Board’s view, would be accomplished without causing any disconnect between gas prices of the WCSB from that of premium markets served by the Mainline. The Board notes that even when it became clear that there was a potential that some capacity from the Mainline would be removed, certain BCDENS gas shippers did not contract for firm long-term capacity, although they had the opportunity to do so. Gas shippers are only entitled to service for which they have contracted; they are not entitled to specific facilities. Nonetheless in assessing this application the Board has considered the Mainline's ability to meet both current and projected firm service requirements as well as projected throughput. Having regard to the evidence submitted, the Board concludes that if approval were

to be granted there will remain sufficient capacity for current and projected firm and interruptible gas service requirements.

While Mainline gas shippers will benefit from the removal of capacity through a reduction in revenue requirement they will continue to be responsible for costs due to changes in system configuration or possibly higher fuel prices as is normally the case. Shippers are not protected from higher than forecast fuel prices, whether or not the Facilities remain in service.

None of the hearing participants disputed the need for additional oil pipeline capacity. There was also a general consensus that western Canadian crude oil production will continue to grow significantly due to the development of the oil sands while there would likely be limited growth in the western Canadian refining industry. The Board concludes, therefore, that exports will also grow significantly. The Board notes that the rapid development of the oil sands has fundamentally transformed Canada's oil industry. High oil prices coupled with technological advancements have made oil sands extraction economically possible but, among other challenges, this strong growth has led to stress on the pipeline sector. It has become clear that, to facilitate market efficiency, more crude oil pipeline capacity is needed to provide new market access for growing oil sands output. Since they went into service in early 2006, the high capacity utilization of both Enbridge Pipelines Inc.'s Spearhead pipeline, which delivers to Cushing, Oklahoma, and that of Exxon Mobil Pipeline Company, which delivers heavy Canadian crude oil to the United States Gulf Coast, testify to this.

The Board has considered a number of factors in its assessment of the oil-related aspects of the Application. These include the level of shipper support, growing oil sands production, availability of markets for the increasing supply, and timeliness of market access. The Board observes the willingness of shippers to sign long-term transportation service agreements on the Keystone Pipeline, totalling 54.1 thousand m^3/d (340.0 thousand bpd) with an average contract duration of 18 years. This is strong evidence that they are willing to make financial commitments to support their assessment and identification of potential profitable markets for western Canadian crude oil.

The Board is of the view that incremental oil pipeline capacity will be needed as early as late 2009 to accommodate the forecast growth in oil sands production. The Board recognizes that if there is insufficient pipeline capacity to connect the growing crude oil supply to potential markets, the risk of apportionment (which is currently happening on some pipelines) and shut-in oil is increased. In addition, constrained access to markets capable of processing the heavier Canadian grades could exert downward pressure on heavy oil prices thus widening the light-heavy price differential, leading to economically inefficient outcomes.

For much of its operating history, the TransCanada Mainline has been the major transporter of gas from the WCSB to eastern markets in Canada and the United States. As supply continued to grow, TransCanada received approval from the Board to expand the Mainline a number of times. In the 1990s, the regulatory environment encouraged competition and market-based outcomes. The commencement of service in 2000 on the Alliance and Vector pipelines created a new and competitive path to take significant WCSB gas to markets that had traditionally been served by the Mainline.

A critical aspect of the approval of the Alliance pipeline was the conclusion that off-loading of the incumbent pipelines would be temporary and that supply growth would refill them. During this proceeding, the Applicants stated that the Mainline had, in fact, lost about 42.5 million m^3/d (1.5 Bcf/d) of contracted volumes, which have not come back. In the RH-1-2001[36] Decision, the Board suggested that a review of TransCanada's business and regulatory framework was necessary. The message the Applicants correctly took from the RH-1-2001 Decision was that TransCanada needed to become more competitive in the future.

Since the end of 2001, TransCanada has come to the Board with various proposals to increase its competitiveness. Some were successful in getting Board approvals while others were not. All demonstrate TransCanada's attempt to respond to competition. For example, TransCanada filed a request for discretion in IT pricing[37,] which was opposed by stakeholders, and was denied by the Board. TransCanada filed the Southwest Zone application[38] and the North Bay Junction application[39] for a new receipt and delivery point, both of which were approved by the Board. Also, an application to increase depreciation rates[40], so that tolls could be more competitive in the future, was approved by the Board. The Board approved biddable FT-NR[41] (non-renewable firm transportation), although the biddable aspect was later overturned on review[42]. The recent application for Firm Transportation-Short Notice and Short Notice Balancing[43] services was approved in general (although not the tolling proposal for Short Notice Balancing).

The Board recognizes that TransCanada's efforts were driven by the new competitive environment. They were attempts to make the Mainline more competitive and to maximize utilization of facilities. The proposed project is no exception. The concept for the Keystone Pipeline Project originated in late 2003, when a group of oil shippers requested TransCanada to explore the potential of using a portion of the capacity on its Alberta natural gas system and the Mainline, for conversion to oil service. The Applicants stated that they were seeking the highest and best use for Facilities that currently provide excess capacity. They indicated that while such facilities are used and useful they are no longer necessary and that their transfer would provide much needed oil capacity and hence would provide a higher value.

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36 TransCanada PipeLines Limited, Tolls and Tariff, 2001 and 2002 Tolls and Tariff Application, Reasons for Decision dated November 2001, p.14

37 RH-1-99, TransCanada PipeLines Limited, Tolls and Tariff, Interruptible Transportation and Short Term Firm Transportation Tariff Amendments, Reasons for Decision dated April 2000

38 RH-1-2002, TransCanada PipeLines Limited, Tolls and Tariff, 2003 Tolls and Tariff Application, Reasons for Decision dated July 2003

39 RH-3-2004, TransCanada PipeLines Limited, North Bay Junction Application, Application for approval to establish a new receipt and delivery point, the North Bay Junction, and for the corresponding tolls for services to and from the point, Reasons for Decision dated December 2004

40 RH-1-2002, *supra* note 38

41 RH-2-2004 Phase I, TransCanada PipeLines Limited, Tolls and Tariff, 2004 Mainline Tolls and Tariff Application, Reasons for Decision dated September 2004

42 RH-R-1-2005, Canada Association of Petroleum Producers, Review of RH-2-2004 Phase I Decision, Application dated 12 November 2004 requesting a review of Board Decision RH-2-2004 Phase I, Reasons for Decision dated May 2005

43 RH-1-2006, TransCanada PipeLines Limited Application for approval of Short Notice Service and related tolls, Reasons for Decision dated November 2006

The Applicants argued that this application would provide an opportunity for TransCanada to right-size its Prairies section for expected flows and to respond to the impact of the competition it faces. TransCanada and Keystone maintained that it would be economically efficient to transfer Line 100-1 from gas service to oil service, and that this was an opportunity to deal with the issue of excess capacity in a manner consistent with the move to a more market-oriented and lighter regulation. They also expressed the view that the oil and gas industry would benefit by letting TransCanada respond to competitive market situations by reducing unnecessary capacity and moving it into a service that is in the greater public interest. They submitted that the transfer is what would have happened in an unregulated, competitive market.

The Board is supportive of the oil and gas industry exploring innovative solutions to address issues such as insufficient pipeline capacity. At the same time, the Board is cognizant that the potential adverse effects on the gas shippers need to be examined before determining the benefits of conversion. The Board believes that regulation should not be an impediment to achieving benefits that otherwise would have been reached in the absence of regulation in a well-functioning market. In fact the Board believes that regulation should emulate competition and should encourage actions and decisions that would enhance efficiency, improve competition, respond to market needs but in doing so should also be in keeping with the public interest.

The Board realizes that its decision does not come without certain risks. However, in exercising its mandate it is the duty of the Board to consider all factors and to ensure that potential risks are carefully measured in order to satisfy itself that the outcome of assuming such risks is superior to the alternative. Circumstances that could have a negative impact on the transfer include a steep decline in oil prices and consequent reduced oil sands production resulting in underutilization of Keystone. Significant volumes of northern gas coming on sooner than forecast, WCSB supply substantially higher than forecast, the absence of operating LNG terminals in eastern Canada, and fewer LNG imports than expected to supply eastern United States markets could also be unfavourable, resulting in additional capacity required to transport gas volumes. However, the Board is of the view that these events are not likely to occur in a combination such that there is a reasonable probability that the pipeline will be required in gas service.

The Board believes that there is a high probability of positive consequences arising from the approval of the Application. The Board is of the view that the transfer of Facilities with the proposed rate base treatment is in the public interest for several reasons. The Board notes the broadly held view that additional oil pipeline capacity is needed in the near future. Also, the Board recognizes that the transfer could provide a productive alternate use of underutilized assets. If the underutilization is not dealt with now, it may have to be dealt with later, perhaps at a cost to gas shippers rather than providing the small benefit projected by TransCanada in this case. The Board does not believe that it would be in the public interest to direct TransCanada to continue to keep the Facilities in gas service when the Applicants have demonstrated that they are not necessary and has proposed an alternative use for them which the Board has found to be in the public interest.

Thus, having regard to the finding that the appropriate test in this case is the public interest and having weighed the potential benefits of the transfer against the potential negative impacts, the Board is of the view that it is in the public interest to approve the transfer of the Facilities to oil service.

However, if the Board is incorrect in construing the applicable regulatory standard as the Canadian public interest rather than as the no harm test, the Board finds, on a careful review of the evidence before it, that the Transfer Application will not cause harm to the gas shippers. The Applicants demonstrated to the Board's satisfaction that the Mainline would be able to meet firm service commitments over a ten year period, and that there is a high likelihood of ongoing sufficient spare capacity. However, passing the no harm test is not the same as the Application passing a no **risk** of harm test as Ontario suggested, which would be impossible and could result in no regulatory approvals ever being granted. Approving this Application, as with any application, is not risk free.

The Board notes that this approval of the Transfer Application, including the rate base treatment, has no effect unless further regulatory approvals, including those required for the section 52 and 21 applications by TransCanada Keystone Pipeline GP Ltd. are received.

SUPREME COURT OF CANADA

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

DATE: 20060209
DOCKET: 30247

BETWEEN:

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

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

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

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

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

v.

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

and

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

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

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

on appeal from the court of appeal for alberta

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

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

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

resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

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

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

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

law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

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

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for

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

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the

legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

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

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's

discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

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

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

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By Bastarache J.

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

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

By Binnie J. (dissenting)

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

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

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

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

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

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

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

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

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

BASTARACHE J. —

1. Introduction

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

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

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

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

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

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

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

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

1.1 *Overview of the Facts*

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

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

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Analysis

2.1 *Issues*

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

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

2.2 *Standard of Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

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

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

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

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

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

GUA

26. . . .

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

. . .

(d) without the approval of the Board,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

PUBA

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

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

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

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

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

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

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

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

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

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

2.3.3 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.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

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

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

2.3.3.1 *Historical Background and Broader Context*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.3.2 *Rate Setting*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when 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 U.S. 548 (1945).

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

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

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

2.3.3.3 *The Power to Attach Conditions*

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

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

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

> * [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
>
> * [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

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

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

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

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

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

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

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

3. It specifically seeks to prevent favoritism toward investors.

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

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

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

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

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

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

2.4 *Other Considerations*

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

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

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

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

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

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

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

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

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

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

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

3. Conclusion

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

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

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

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

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

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

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

I. Analysis

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

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

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

A. *The Board's Statutory Authority*

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

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

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

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

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

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

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

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

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

B. *The Board's Decision*

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

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

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

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

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

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

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

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services 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. [Underlining and italics added.]
>
> (Decision 2002-037, at para. 13)

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

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

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

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

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

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

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

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

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

C. *Standard of Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109 "Patent unreasonableness" is a highly deferential standard:

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

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

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

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

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

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

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

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

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

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

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

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

> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. 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; p. 26.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *ATCO's Arguments*

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

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

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

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

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

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

1. <u>The Confiscation Issue</u>

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

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

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

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

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

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

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

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

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy

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

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. 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; p. 361.]

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

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

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

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

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

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

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

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

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

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

2. The Regulatory Compact

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

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

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

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

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

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

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

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

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

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

3. Land as a Non-Depreciable Asset

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Conclusion

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

III. Disposition

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

APPENDIX

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

Jurisdiction

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

Powers of the Board

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

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

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

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

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

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

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

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

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

Appeals

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

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

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

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

. . .

Exclusion of prerogative writs

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

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

Supervision

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

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

Investigation of gas utility

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

. . .

Designated gas utilities

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

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

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

. . .

Prohibited share transactions

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

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

. . .

Powers of Board

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

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

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

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

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

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

Rate base

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

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

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

(b) to necessary working capital.

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

Excess revenues or losses

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

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

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

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

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

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

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

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

(d) the Board shall by order approve

(i) the method by which, and

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

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

General powers of Board

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

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

Jurisdiction and powers

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

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

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

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

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

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

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

General power

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

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

Investigation of utilities and rates

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

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

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

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

Supervision by Board

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

. . .

Investigation of public utility

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

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

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

Fixing of rates

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

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

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

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

(d) repealed;

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

Determining rate base

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

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

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

(b) to necessary working capital.

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

Revenue and costs considered

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

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

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

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

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

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

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

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

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

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

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

Designated public utilities

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

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

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

Prohibited share transaction

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

. . .

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

Enactments remedial

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

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

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

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

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

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

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

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

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2008 ABCA 200

Date: 20080527
Docket: 0501-0102-AC
0501-0171-AC
0701-0048-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Energy and Utilities Board

Respondent

- and -

The City of Calgary and Utilities Consumer Advocate

Interested Parties

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeals from Decisions of the
Alberta Energy and Utilities Board:
U2005-133 Dated the 25th day of March, 2005
2005-063 Dated the 15th day of June, 2005
2007-005 Dated the 5th day of February, 2007

Memorandum of Judgment

The Court:

[1] The appellant was granted leave to appeal on certain issues arising from three decisions of the respondent Board: Decisions U2005-133, 2005-063 and 2007-005. Those decisions all relate to the Carbon storage facility owned by the appellant, which has for decades been a part of the appellant's regulated gas business. That business is operated through a division of the appellant known as ATCO Gas South ("AGS"). The fundamental issue is whether the Carbon storage facility continues to be used or required to be used to provide service in the context of the appellant's regulated business given the changes that have occurred in the industry, and in the facility's function.

Facts

[2] The appellant's gas storage facility located near Carbon, Alberta started out as a producing gas field. From 1959 to 1967 the Carbon field was used to supply gas to the appellant's customers.

[3] In 1967 the Carbon field was converted to a storage reservoir. From time to time gas was injected into the Carbon storage reservoir under high pressures. Later on, the gas would be withdrawn from the storage reservoir to meet demand. Gas could be purchased for injection into the reservoir in the summer months when prices were typically lower, and withdrawn in the winter months as needed. The storage reservoir was also used to manage peak utility supply requirements, for utility risk mitigation, and for system load balancing.

[4] The appellant has seldom, if ever, needed or been able to use the total storage capacity of the Carbon reservoir in its regulated gas business. From time to time the excess capacity was leased to third parties, and the capacity of the reservoir was even increased at times for the sole purpose of leasing the new capacity to other users. For example, between 1986 and 1991 the appellant used approximately 25% of the capacity. After 1992 its use of the capacity increased to 38%. However, in the 2001, 2005 and 2006 storage seasons all the capacity was leased to ATCO Midstream Ltd., an affiliate of the appellant.

[5] All the capital costs associated with the Carbon storage reservoir have been included in the appellant's rate base since the storage reservoir was first developed. Revenues received from the leasing of excess storage capacity to third parties were used to offset the overall revenue requirements of the appellant, thereby reducing the amount that would otherwise be recovered from customers through rates. Thus the revenue earned from leasing out parts of the Carbon storage facility has always been included by the Board in the calculation of the appellant's rates.

[6] In more recent years, the structure of the Alberta gas utility business has been changed by legislation. The previously integrated gas utilities (that provided gas services from the gas field to the retail customer) were divided, and different entities were assigned different functions in the overall gas system. The appellant was required to divest itself of its retail gas supply business, and in 2004 Direct Energy Regulated Service ("DERS") took over that service as the default supplier. The appellant no longer sells gas to customers, but now only operates a gas distribution business, consisting of the transportation of gas for third parties. As a result, the appellant no longer needs a gas storage facility as a part of its regulated

business, and indeed it even argues that it is prohibited by legislation from operating any gas storage facility. The Board has determined that the Carbon storage facility is no longer required for utility operational purposes related to the appellant's regulated gas distribution business. The gas storage business itself is not regulated.

[7] Since about 2000, the appellant has taken the position that the Carbon storage facility is no longer "used or required to be used to provide a service to the public", and is therefore not properly part of its rate base under s. 37 of the *Gas Utilities Act*, R.S.A. 2000, c. G-5. Its various efforts to obtain confirmation from the Board to that effect led eventually to the orders that are now under appeal.

[8] The Board established a procedure to resolve the matter, approaching the underlying issues in stages. The procedure (discussed in detail in Decision 2005-063) took longer than anticipated, and on March 8, 2005 the appellant wrote to the Board, effectively attempting to unilaterally withdraw the Carbon storage facility from its rate base. In decision U2005-133 the Board ruled that the appellant could not unilaterally withdraw assets from the rate base. The Board also issued an Interim Order preserving the status quo until the process had run its course. As the Board later stated in Decision 2005-063, at pg. 6: "It is contemplated that at the time that the Interim Order is terminated, the Board will address any required adjustments between AGS and ratepayers to reflect the Board's jurisdictional and rate base findings." Interim Order U2005-133 is one of the orders presently under appeal. There is no direct challenge in this appeal to the ability of the Board to issue interim orders preserving the status quo while it considers issues before it.

[9] The next phase of the process considered four "Preliminary Questions". In Decision 2005-063 the Board stated and answered the questions as follows:

(1) In general, once an asset or capital expenditure has been approved by the Board for inclusion in rate base, what should be the criteria for removing it from rate base at the request of the utility? The Board decided that an asset is removed from the rate base when the Board (and not the utility) concludes that it is no longer "used or required to be used to provide service to the public".

(2) In general, is it appropriate for the Board to attach conditions to the removal of an asset from rate base that would require the utility to add the asset back into the rate base at some future time should subsequent application by the Board of the criteria identified in Question 1 lead to a different result? The Board concluded that such a condition would not be appropriate, workable or reasonable in most circumstances.

(3) In general, to what extent can (should) the Board direct a utility to deal with a particular asset presently included within rate base in a specific manner? The Board concluded that it has such a jurisdiction, but that normally it would leave the operation and management of the regulated business to the utility.

(4) What is the appropriate scope for the Board to adopt in conducting an examination of whether or not Carbon is used or required to be used to provide service to the public or

> should otherwise remain in rate base? In particular, the Board would like submissions and argument, without reliance on detailed operational or technical Carbon specifics, on which of the following uses or potential uses of Carbon can (should) the Board consider in addressing this question:
>
> (a) historical uses.
> (b) proposed uses.
> (c) possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS.
> (d) potential alternative uses by AGS, ATCO Pipelines or DERS.
>
> The Board concluded that the only possible relevant uses (to be considered in the next phase of the process) would be the use of the Carbon storage facility for revenue generation purposes, or for distribution system load balancing.

Decision 2005-063 is the second of the orders presently under appeal.

[10] In Decision 2006-098 (which is not presently under appeal) the Board concluded that the Carbon storage facility was not required for load balancing of the appellant's distribution system. The Board confirmed that the appellant no longer had any operational need for a gas storage facility as a part of its regulated business, and that there was no operational reason to include the Carbon storage facility within the rate base. The only remaining reason to keep the Carbon storage facility within the rate base would, therefore, be to generate revenue which could be used to reduce the rates otherwise payable by customers.

[11] The Board then embarked on the last phase of the process, which was a determination of whether an asset that has no functional or operational use could be kept in the rate base for revenue generation purposes, as well as several related questions. In Decision 2007-05 the Board first determined that there were no legal impediments to the appellant owning a storage facility, so long as it was not used to provide retail gas services. The Board secondly confirmed its view that "it has the overriding legislative responsibility to review and approve which assets are in rate base."

[12] On the central question, the Board decided: "Ordinarily, revenue generation on a stand-alone basis would likely not satisfy the used or required to be used test for inclusion in rate base." The Board concluded, however, that the Carbon storage facility was unique, in that, in addition to its operational role, it had always provided some revenue generating service by the leasing of excess storage capacity. While the Carbon storage facility no longer had any utility operational purpose, in the Board's view:

> . . . it is not material whether or not revenue generation was a stand-alone use or an ancillary use associated with a utility service or function whose purpose was to indirectly offset the costs of providing this utility functionality. It is clear that there has been a unique course of dealing acceptable to all parties with respect to Carbon. Revenue generation has been an integral, long-standing and accepted use of Carbon for approximately forty years driven by the specific characteristics of the Carbon assets. As a consequence, revenue from Carbon has been used to offset regulated revenue requirement and has been part of the

> Board's determination of just and reasonable rates to customers for the same extensive period. This aspect of the Carbon assets continues today and the Board sees no reason why Carbon should be considered as no longer used or required to be used for this purpose. (at pp. 26-7)

Decision 2007-05 also concluded that the removal of the Carbon storage facility from the regulated business would be a "disposition" under section 26(2)(d) of the *Gas Utilities Act*, and thus would require the approval of the Board. Decision 2007-05 is the third of the orders presently under appeal.

[13] The appellant applied for and was granted leave to appeal the following issues arising from Decisions U2005-133, 2005-063 and 2007-005:

1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue?

2. Does the *Roles, Relationships and Responsibilities Regulation* under the *Gas Utilities Act*, prohibit ATCO Gas South from operating the Carbon facilities and if so, is the Board unable to assert further jurisdiction over the Carbon facilities?

3. Can the Board require an owner of a gas utility to continue to include an asset in the rate base or restrict an owner from withdrawing a specific asset from its gas distribution system once an asset has been included in a past rate base?

4. Did the Board err in determining that a change in use of the Carbon facilities is a "disposition" for the purposes of section 26 of the *Gas Utilities Act*?

5. Did the Board commit any other error the panel hearing the appeal identifies and is prepared to entertain?

[14] The City of Calgary and the Utilities Consumer Advocate did not apply to the Court for intervener or any other status, but purported to participate in these appeals as "interested parties". Absent any objection by the parties, the Court has considered their submissions on this occasion.

Standard of Review

[15] The test for selecting the standard of review was comprehensively set out in ***Pushpanathan v. Canada (Minister of Employment and Immigration)***, [1998] 1 S.C.R. 982, and recently re-examined in ***Dunsmuir v. New Brunswick***, 2008 SCC 9 at paras. 55, 64. It is appropriate to identify or advert to the standard of review in all cases. However, it is not necessary to perform a fresh standard of review analysis in every case if the standard of review has already been set for the type of question in issue: ***Dunsmuir*** at paras. 57, 62.

[16] The case law discloses that the following standards of review have been identified for reviewing decisions of the Board under the *Gas Utilities Act*:

(a) Questions of jurisdiction are reviewed for correctness: ***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)***, [2006] 1 S.C.R. 140, 2006 SCC 4 (the ***Stores Block*** decision) at para 21. "Jurisdiction" is however defined narrowly, and relates only to the ability of the Board to embark on the inquiry. The validity of the result, even on what might be called a "threshold" issue, is not necessarily "jurisdictional": ***Council of Canadians with Disabilities v. Via Rail Canada Inc***., 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 89, 96, 106.

(b) The interpretation of the *Gas Utilities Act* is a question of law within the expertise of the Board, and such questions are reviewed for reasonableness: ***TransCanada Pipeline Ventures Ltd. v. Alberta (Energy and Utilities Board)***, 2008 ABCA 55 at paras. 17-20. All the important issues in this appeal fall within this category.

(c) Whether a particular asset should be included in the rate base is neither a question of law, nor a question of jurisdiction, and no appeal lies:

> "Once the interpretation is determined, whether a particular item is to be brought within the rate basis is essentially a question for the judgment of the board which does not involve a question of jurisdiction or law": ***Alberta Power Ltd. v. Alberta (Public Utilities Board)*** (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 149.

The proper interpretation of the statutory definition of the rate base is, however, a question of law reviewed for reasonableness.

Since the jurisprudence has established the standard of review to be used with respect to questions of the type presented in these appeals, it is not necessary to conduct a fresh standard of review analysis: ***Dunsmuir,*** *supra*.

[17] The appellant argues that the issues under appeal raise jurisdictional questions, namely whether the Board has any authority over assets that serve no purpose in the utility system other than to generate revenue, and whether the Board has any authority to require that assets remain with the regulated business, even though the utility considers them no longer to be a part of the rate base. These questions raise, at most, issues about the proper interpretation of the definitional provisions of the *Gas Utilities Act,* and are not properly categorized as jurisdictional in nature.

[18] ***Dunsmuir*** explained the concept of reasonableness at para. 47 as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

> themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Board's interpretations of the various provisions of the *Act* must accordingly be reviewed to see whether they are "justifiable, transparent and intelligible", and fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Including Revenue Generating Assets in the Rate Base

[19] The first question on which leave was granted is:

> 1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue?

[20] Section 37 of the *Act* provides:

> 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.

The issue is whether an asset which merely generates revenue is "used" to provide a service, or whether only assets that have a functional or operational role in the system qualify for inclusion in the rate base.

[21] These appeals raise no factual issue about the role that the Carbon storage facility plays in the appellant's gas distribution system. The Board has held that it plays no operational role, and its only present contribution is to generate revenue that would reduce rates. This is not, therefore, a case on whether a particular asset should be included in the rate base, something that (as just noted) is neither a question of law nor of jurisdiction. Rather, the issue here is an extricable question of law: whether revenue generation by the Carbon storage facility qualifies as "use" under the proper interpretation of the statute. As noted, the standard of review on this issue is reasonableness. The Board's decision must be examined to see if it is within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law.": ***Dunsmuir***, *supra*.

[22] It is contrary to the general approach to utility regulation to suggest that assets can be included in the rate base merely because they generate revenue that could serve to reduce rates. The Board recognized this when it said in Decision 2005-063 at pg. 16:

> With respect to revenue generation as a stand-alone use of an asset, the Board believes it would have difficulty approving the inclusion in revenue requirement of costs associated with a new asset, where the function of the asset was unconnected to utility service and where its sole purpose was to generate revenue to offset rates otherwise payable.

The Board confirmed this view in Decision 2007-05 at pg. 26:

> Ordinarily, revenue generation on a stand alone basis would likely not satisfy the used or required to use test for inclusion in rate base.

The Board, however, found that the Carbon storage facility was unique, because of its historical role as both an operational part of the system and as a source of revenue from the leasing of surplus capacity. It used this history to justify its conclusion that the Carbon storage facility met the requirements of s. 37.

[23] The Board's interpretation of the section is unreasonable for several reasons. Firstly the Board relied largely on the historical role that the Carbon storage facility played in the system, as opposed to its present or future use. Section 37 of the *Act* is primarily forward looking. The Board's jurisdiction is to set rates "afterwards", that is for the future: ***Northwestern Utilities v. City of Edmonton***, [1979] 1 S.C.R. 684 at pg. 691. The words "used or required to be used" are intended to identify assets that are presently used, are reasonably used, and are likely be used in the future to provide services. Specifically, the past or historical use of assets will not permit their inclusion in the rate base unless they continue to be used in the system. The fact that the Carbon storage facility was previously used to provide service may provide some context, but it is largely irrelevant to whether that asset should remain in the rate base.

[24] Secondly, the Board itself decided in Decision 2005-063 at pg. 15 that historical uses of the property were largely irrelevant:

> In the Board's view, historical uses which are no longer employed at a facility would not typically be relevant in determining whether the asset is used or required to be used today. This would be particularly true where obsolescence is involved or where fundamental changes may have occurred in the regulatory or market régime.

However in identifying the "unique" features of the Carbon storage facility in Decision 2007-005 that justified keeping the facility in the rate base, the Board relied almost entirely on historical factors. They were summarized in the Board's factum as follows:

- Carbon represents an exceptional and unique asset in the history of regulated utilities in Alberta.
- Carbon Storage was initially acquired as a company-owned gas production asset, then converted to a storage facility and expanded over a period of roughly 40 years.

- Company-owned production (COP) from the associated Producing Properties continued throughout this period and to the present.
- Carbon has had multiple utility uses throughout its history, including COP operational security, system balancing, peaking supply, emergency use and revenue generation.
- The acquisition and operation of the Producing Properties have been intertwined with the acquisition, development, protection and evolution of Carbon Storage, such that Carbon has generally been considered by the Appellant, customers and the Board to be a single set of assets.
- Revenue generation has been one of the continuing uses of Carbon since it was converted to a storage facility.
- Some of Carbon's capacity has been leased to third parties since 1967 and lease payments from these parties has always been used to offset utility customer rates.
- Since 1972, it has been accepted by the Appellant and customers that the majority of Carbon capacity be used for revenue generation.
- Although Carbon's use for operational purposes was intermittent and variable, and ultimately declined altogether, the revenue generated from third party leases has had a very significant impact on customer rates for most of Carbon's existence.

The reasoning in the two Decisions is inconsistent, making the overall conclusion unreasonable.

[25] Thirdly, the only reasonable reading of s. 37 is that the assets that are "used or required to be used" to provide service are only those used in an operational sense. It strains the meaning of the word "used" when applied to "property" to suggest that merely accounting for the revenue generated by the asset constitutes "using" the asset.

[26] Fourthly, while the Board sometimes identified revenue generation as a "use"of assets, it also sometimes identified revenue generation as a "service". The test in the statute is whether the assets are "used" to "provide service". In Decision 2007-005 at pp. 1, 19 the Board said:

> In this decision the Board has determined that the Carbon storage and associated production assets are used or required to be used for *purposes of generating revenue* to offset customer rates. . . . accordingly, it is appropriate for the Carbon assets to remain in regulated rate base subject to the Board's jurisdiction.
>
> The purpose of this decision is to determine whether or not Carbon is used or required to be used or should otherwise remain in rate base in order to provide *a revenue generation service* for the benefit of regulated customers. (Emphasis added)

In the utility regulatory regime "revenue generation" cannot reasonably be regarded as a "service". The delivery of gas is the "service": s. 28(e) of the *Act* defines "gas distribution service" as "the service required to transport gas to customers by means of a gas distribution system". Therefore, the issue is whether the Carbon storage facility is required to transport gas to customers, not whether it is required to generate revenue.

[27] Fifthly, while the Board noted that "fundamental changes" in the regulatory regime might change the status of an asset, the Board failed to give effect to the fact that the present issue respecting the use of the Carbon storage facility came about largely because of just such a change. The regulatory regime has changed radically and the operations of the traditional integrated utility have now been split among a number of players. For many years the Carbon storage facility played a dual role as an operational asset, as well as a generator of revenue from the leasing of surplus capacity. Under the present circumstances, the Carbon storage facility has no operational role at all. The Board found in Decision 2007-05 at pp. 26-7 that: "it is not material whether or not revenue generation was a stand-alone use or an ancillary use associated with a utility service or function whose purpose was to indirectly offset the costs of providing this utility functionality." The failure to recognize the fundamental change in the role played by the Carbon storage facility once it lost all of its operational purposes was unreasonable.

[28] Finally, the Board over-emphasized that for over 40 years the Carbon storage facility was included in the rate base. The facility always had excess capacity, and the Board noted all its revenues and expenses were included in setting rates, something that is unusual in utility regulation. All concerned were content with that arrangement, and in this respect the Carbon storage facility probably is unique, as the Board held. The reasons why no one challenged these long standing arrangements are undoubtedly complex, but the failure to object in the past does not create any kind of estoppel preventing the present appeal. If the Carbon storage facility does not now meet the requirements of s. 37, the appellant is entitled to a ruling to that effect.

[29] The *Act* does not contain any provision or presumption that once an asset is part of the rate base, it is forever a part of the rate base regardless of its function. The concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in ***Stores Block*** (at para. 69). Such an approach would fetter the discretion of the Board in dealing with changing circumstances. Previous inclusion in the rate base is not determinative or necessarily important; as the Court observed in ***Alberta Power Ltd. v. Alberta (Public Utilities Board)*** (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 151: "That was then, this is now".

[30] Regulation of the gas utility does not give the end customers an ownership interest in the assets of the utility: ***Stores Block*** at paras. 63-68. The end customers are entitled to service, not assets. The service that they are entitled to is the delivery of gas on reasonable and just terms, not revenue generation. Just as the end customers have no ownership interest in the assets of the utility, they have no interest in the profits, unregulated revenues, or unregulated businesses of the utility. The value of economic assets is often largely determined by the revenues they can generate, and if the end customers are not entitled to any ownership interest in the assets, they are likewise not entitled to any interest in the cash flow generated by those assets: ***Stores Block*** at para. 78. The end customers are entitled to receive gas delivery services from the utility, not revenue-generating services or gas rate subsidization.

[31] The view that the Carbon storage facility could remain in the rate base purely to generate revenue is not one that the section can reasonably bear. The first question upon which leave was granted is answered in the affirmative.

The Remaining Questions

[32] The Board's answers to Questions 2, 3 and 4 were predicated on its conclusion that the Carbon storage facility could be kept in the rate base as a revenue generating asset. Our conclusion to the contrary undermines the assumption on which the Board answered these remaining questions, and the basis on which leave to appeal was granted. In the circumstances, it is neither necessary nor advisable to answer the remaining questions at this time.

Conclusion

[33] In conclusion, the questions on which leave was granted should be answered as follows:

1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue? Yes.

2. Does the *Roles, Relationships and Responsibilities Regulation* under the *Gas Utilities Act*, prohibit ATCO Gas South from operating the Carbon facilities and if so, is the Board unable to assert further jurisdiction over the Carbon facilities? No answer is appropriate at this time.

3. Can the Board require an owner of a gas utility to continue to include an asset in the rate base or restrict an owner from withdrawing a specific asset from its gas distribution system once an asset has been included in a past rate base? No answer is appropriate at this time.

4. Did the Board err in determining that a change in use of the Carbon facilities is a "disposition" for the purposes of section 26 of the *Gas Utilities Act*? No answer is appropriate at this time.

[34] The appeals are allowed and the matter is remitted to the Alberta Utilities Commission to be dealt with in a manner consistent with these reasons.

Appeal heard on May 9, 2008

Memorandum filed at Calgary, Alberta
this 27th day of May, 2008

McFadyen J.A.

Hunt J.A.

Slatter J.A.

Appearances:

H.M. Kay, Q.C., L.E. Smith, Q.C. and L.A. Goldbach
for the Appellant

A.E. Domes and B.C. McNulty
for the Respondent

T.D. Marriott
for the Utilities Consumer Advocate

R.B. Brander and P.L. Quinton-Campbell
for the City of Calgary

Supreme Court of Canada | Cour suprême du Canada

No. 32761

December 4, 2008

Coram: Binnie, Deschamps and Abella JJ.

BETWEEN:

City of Calgary

Applicant

- and -

ATCO Gas and Pipelines Ltd.

Respondent

JUDGMENT

The motion for an order confirming that the City of Calgary has the status to apply for leave to appeal in this case, is granted. The application for leave to appeal from the judgment of the Court of Appeal of Alberta (Calgary), Numbers 0501-0102-AC, 0501-0171-AC and 0701-0048-AC, 2008 ABCA 200, dated May 27, 2008, is dismissed with costs.

Le 4 décembre 2008

Coram : Les juges Binnie, Deschamps et Abella

ENTRE :

Ville de Calgary

Demanderesse

- et -

ATCO Gas and Pipelines Ltd.

Intimée

JUGEMENT

La requête sollicitant une ordonnance confirmant que la ville de Calgary a qualité pour demander l'autorisation d'interjeter appel en l'espèce est accordée. La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Alberta (Calgary), numéros 0501-0102-AC, 0501-0171-AC et 0701-0048-AC, 2008 ABCA 200, daté du 27 mai 2008, est rejetée avec dépens.

J.S.C.C.
J.C.S.C.

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2009 ABCA 171

Date: 20090508
Docket: 0701-0341-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Energy and Utilities Board and **The City of Calgary**

Respondents

- and -

Utilities Consumer Advocate

Intervener

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment of
The Honourable Mr. Justice Slatter and
The Honourable Madam Justice Rowbotham

Dissenting Memorandum of Judgment of
The Honourable Mr. Justice Berger

Appeal from the Decision by
Alberta Energy and Utilities Board
Dated the 11th day of December, 2007
(Decision 2007-101)

Memorandum of Judgment

The Majority:

Introduction

[1] When the appellant, ATCO Gas and Pipelines Ltd. (ATCO), wanted to sell property that it was no longer using, the Alberta Energy and Utilities Board (Board) approved the sale and directed that the funds be put into a deferral account for the Board to later determine whether the funds should be taken into consideration in setting gas rates. Although the property had been included in ATCO's rate base, it was never actually used to provide utility service. ATCO submits that the Board cannot impose a condition on the sale of an asset that has not and will not serve a utility function. It submits that this issue was already decided in its favour by the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (*Stores Block*). The Board cited *Stores Block* in support of the conditional approval of the sale. This appeal centres on the interpretation of that decision.

Facts

[2] In 1993, ATCO purchased property for $43,500. That cost was included in ATCO's rate base. A portion of the land was used to construct a regulating station. The remaining portion, approximately four acres, was vacant and never actually used for utility purposes (Harvest Hills property), although it continued in the rate base.

[3] In 2007, ATCO accepted an offer of $1.85 million to purchase the Harvest Hills property through a public sales process. The land was subdivided in order to sell the Harvest Hills property and the costs were borne by ATCO.

[4] ATCO applied to the Board for approval to dispose of the Harvest Hills property pursuant to section 26(2) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 (*GUA*). In its application, ATCO advised the Board that the proceeds of the sale would flow to its shareholders.

Decision of the Board

[5] The Board, in Decision 2007-101, held that when considering the sale of utility assets, it applied a "no harm" test to assess the merits. The test was described in its Decision 2003-098 as follows:

> Section 101(2) of the [*Public Utilities Board Act*] PUB Act and section 26(2) of the GUA do not specify the appropriate test for the Board to utilize when considering an application under these provisions. Without specific legislative guidance, the Board has employed a "no-harm" standard or test when evaluating applications to dispose of rate base assets out of the ordinary

> course of business under section 101(2)(d)(i) of the PUB Act and section 26(2)(d)(i) of the GUA. The Board's no-harm test considers the transaction in the context of both potential financial impacts and service level impacts to customers. The Board also assesses the prudence of the sale transaction. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction.

[6] The Board found that the Harvest Hills property had never been used to provide utility service and there were no foreseeable additional facilities or other utility uses required for the Harvest Hills property. The Board concluded no harm would result to customers in terms of service quality or quantity if the Harvest Hills property were sold.

[7] It also concluded that the sale would not adversely impact the rates customers would pay. Indeed the rates would be somewhat lower as rate base, return and taxes would be reduced as a result of the removal of $37,718 from rate base.

[8] However, the Board also found that there was evidence of financial harm to customers. In response to an information request from the Board, ATCO indicated that in the next five years new mains and service line extensions would be required, as well as a new regulating station approximately four to five kilometres from the Harvest Hills property. ATCO indicated that it would likely have to purchase land for the new regulating station.

[9] The Board believed that the cost of the new mains and services, the new regulating station and the land for the station would result in increased costs to consumers. Based on the sale price of the Harvest Hills property, the Board estimated that the new land would cost approximately $462,500 per acre in contrast to the purchase of the Harvest Hills lot in 1993 at an average of $9,430 per acre. The Board also noted that construction costs would also be incurred and that those costs have dramatically increased in recent years.

[10] Under general regulatory principles, these costs would be included in the rate base of ATCO, subject to Board approval. This would normally increase the rate base and result in increased rates for customers. Given the foreseeable need for future facilities creating additional operating costs, the Board concluded that customers would be harmed if the sale of the Harvest Hills property occurred with the net proceeds being credited to the account of ATCO's shareholders. The Board held that this financial harm could possibly be mitigated by applying the net proceeds from the sale of the Harvest Hills property to partially offset the acquisition and construction costs of the new facilities.

[11] Relying on *Stores Block*, the Board held that it could approve a sale and attach conditions. It approved the sale on the condition that the proceeds from the gain on sale be put into a deferral account. The Board would then consider the disposition of the funds in the deferral account in ATCO's 2008-2009 Phase I general rate application. In those proceedings, focussed on setting just

and reasonable rates, the Board and interested parties could fully address the disposition of the funds and give consideration in light of any new economic data anticipated as result of the sale.

[12] The sale of the Harvest Hills property did not proceed and ATCO obtained leave to appeal.

Issues

[13] This Court granted leave to appeal on the following questions:

1. Does the Board have the jurisdiction to appropriate the proceeds of sale from lands neither used nor required to be used to provide service to customers in order to subsidize gas rates?

2. Does the Board have the jurisdiction to appropriate the proceeds of sale or impose a condition with respect to the same, where the property disposed of has never had a utility use and, in particular, is not being replaced by alternate property?

[14] The second question is potentially misleading when it assumes the property "never had a utility use". Section 37 of the *GUA* permits inclusion in the rate base of assets "used or required to be used to provide a service to the public". While it is true that the surplus four acres of the Harvest Hills lands were never physically used to provide utility services, that does not mean that they were improperly included in the rate base. When these lands were purchased the Board must have been satisfied that they were "used or required to be used", and permitted their inclusion in the rate base. It later turned out that more land was purchased than was actually needed. Perhaps the amount of land needed was overestimated, or perhaps it was not possible to purchase a smaller parcel. In any event, once it was determined that there was surplus land, it should have been removed from the rate base as no longer "required to be used". That there might have been some delay in removing the surplus lands from the rate base does not affect the analysis. Like the assets in *Stores Block* and *Carbon*, the Harvest Hills lands were once properly included in the rate base because they were "used or required to be used", but they were subsequently removed from the rate base when that situation no longer prevailed.

Relevant legislation

[15] Section 26(2) (d) of the *GUA* provides:

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

Standard of review

[16] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 62 provides that once a standard of review has been articulated for a particular type of question decided by that tribunal, a fresh standard of review analysis is not required. The appellant asserts that *Stores Block* considered the identical statutory provision and established correctness as the standard applicable to questions similar to those upon which leave was granted.

[17] The respondent City and the intervener Utilities Consumer Advocate (UCA) submit that the appropriate standard is reasonableness. They point to the recent decision of this Court in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 A.R. 183, leave to appeal refused [2008] 3 S.C.R. vi (*Carbon*), where the Court established reasonableness as the standard for the Board's interpretation of its constituent legislation. In *Carbon*, the Court explained at para. 16:

> The case law discloses that the following standards of review have been identified for reviewing decisions of the Board under the *Gas Utilities Act*:
>
> (a) Questions of jurisdiction are reviewed for correctness: ATCO *Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 (the *Stores Block* decision) at para. 21. "Jurisdiction" is however defined narrowly, and relates only to the ability of the Board to embark on the inquiry. The validity of the result, even on what might be called a "threshold" issue, is not necessarily "jurisdictional": *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 89, 96, 106.
>
> (b) The interpretation of the *Gas Utilities Act* is a question of law within the expertise of the Board, and such questions are reviewed for

> reasonableness: *TransCanada Pipeline Ventures Ltd. v. Alberta* (*Energy and Utilities Board*), 2008 ABCA 55 at paras. 17-20. All the important issues in this appeal fall within this category.
>
> (c) Whether a particular asset should be included in the rate base is neither a question of law, nor a question of jurisdiction, and no appeal lies:
>
> > "Once the interpretation is determined, whether a particular item is to be brought within the rate basis is essentially a question for the judgment of the board which does not involve a question of jurisdiction or law": *Alberta Power Ltd. v. Alberta* (*Public Utilities Board*) (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 149.
>
> The proper interpretation of the statutory definition of the rate base is, however, a question of law reviewed for reasonableness.

[18] They further submit that the interpretation of the *GUA* is a question of law within the jurisdiction of the Board, and such questions are reviewed for reasonableness: *TransCanada Pipeline Ventures Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 55, 429 A.R. 171 at paras. 17-20. Relying upon these decisions, they submit that reasonableness is the governing standard of review. They contend that the real issue on appeal is not appropriation, but rather the Board's jurisdiction to take the impact of the Harvest Hills transaction into consideration when setting just and reasonable rates.

[19] In our view, the standard of review applicable to the first question is correctness. While it is arguable that the Board's interpretation of the *GUA* should be reviewed on a standard of reasonableness, in *Stores Block* the Supreme Court of Canada characterized the inquiry in that case as the proper construction of the enabling statutes giving the Board jurisdiction to allocate the profits realized from the sale of an asset. The Supreme Court determined the standard of review to be correctness. The *Stores Block* decision on the standard of review cannot be distinguished for the purposes of the first issue in this case.

[20] The second question on appeal regarding the jurisdiction to impose a condition on the sale is an exercise of the Board's jurisdiction, similar to the issues in *Carbon*. As we will discuss more fully, the Board relied upon a paragraph in *Stores Block* which suggests that it could attach conditions to the approval of a sale under section 26(2)(d)(i) of the *GUA*. This is indicative of the Board interpreting its own legislation, something to which deference is owed. Moreover, the Board's finding of financial harm distinguishes this case from *Stores Block*. In the result, we conclude that the appropriate standard on the second question is one of reasonableness.

Stores Block

[21] *Stores Block* also dealt with an ATCO asset. Like the Harvest Hills property, the asset had once been properly included in the rate base, but was now no longer "used or required to be used" in providing utility services. When that use was no longer required, ATCO sought the Board's approval of the sale. The Board approved the sale but determined that it could allocate the proceeds of sale between utility customers and ATCO's shareholders. It allocated a portion of the net gain on sale to rate paying customers. An appeal to this Court was allowed and an appeal to the Supreme Court of Canada on this issue was dismissed.

[22] Bastarache J., writing for the majority, held that the Board did not have the prerogative to decide on the distribution of the net gain from the sale (at para.7). The majority analysed the relevant legislation (section 26 of the *GUA,* section 15 of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, and section 37 of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45) by examining the explicit wording of the statutes, the implicit powers of the Board and the Board's rate-making functions. Bastarache J. found that allocation of sale proceeds was not one of the purposes of section 26(2) of the *GUA*. Section 26(2) was meant to ensure that the asset in question was actually a non-utility asset so that its loss did not impair the quality of service or the utility function (at para. 44).

[23] In examining the entire statutory scheme to determine if there was implicit power permitting the Board to allocate the proceeds of sale, the Court concluded that nowhere in the legislation was there any mention of the authority to allocate proceeds from a sale, or of the discretion to interfere with ownership rights (at para. 58).

[24] The majority observed that although the Board possesses a variety of powers and functions, its principal function in respect of public utilities is the determination of rates. Accordingly, its power to supervise the finances of utility companies was incidental to fixing rates (at para. 60). In examining the rate setting function of the Board, Bastarache J. observed that the Board's role was to ensure that all customers had access to the utility at a fair price: the legislation did not transfer to the customers any property right (at para. 63). The object of the legislation was to protect both the customer and the investor. The regulatory arrangement did not cancel the private nature of the utility (at para. 64). The majority's comments at para. 67 are particularly relevant to this appeal:

> 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, ["The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 Energy L.J. 233] 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. (emphasis added)

[25] Customers of a utility have no property interest in the utility. They do not, by paying rates, implicitly purchase the asset from the utility's investors. To do so would distort fundamental principles of corporate law (at para. 68). Although assets are considered in setting the rate base, it is only the shareholders of the utility who are affected by the profit or loss on a sale. The utility absorbs the losses and gains and the increases and decreases in the value of the assets but continues to provide certainty in the service both in regard to price and quality (at para. 69). As Bastarache J. commented, the capital invested in the utility is not provided by the public purse or by the customers; it is injected by private parties who are entitled to expect a return on their investment (at para. 70).

[26] The difficulty in this case arises from a passage in the majority judgment which considers the Board's power to attach conditions. Section 15(3)(d) of the *Alberta Energy and Utilities Board Act* provides:

> (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;

[27] In *Stores Block*, the City of Calgary submitted that this provision gave the Board the power to allocate the proceeds of sale as necessarily incidental to the approval of the sale. The City argued that the Board is permitted to attach any condition to an order approving a sale. The majority disagreed. In discussing the Board's authority to attach conditions, Bastarache J. commented at para. 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.** (emphasis added)

Carbon

[28] This Court's decision in *Carbon* addressed the issue of whether a storage facility which was no longer used for storage could continue in the rate base as an asset "used or required to be used to provide service to the public" when its only function was to generate revenue. This Court held that it could not. The Court confirmed that as a result of *Stores Block*, regulation of a gas utility does not give the end customers an ownership interest in the assets of the utility, nor any entitlement to any interest in the cash flow generated by the assets. Customers are entitled to receive gas delivery service from the utility, not revenue generating services or gas rate subsidization (at para. 30).

Analysis

Question One - Appropriation of the Proceeds of Sale Neither Used Nor Required to be Used to Provide Service to Customers

[29] The first question upon which leave was granted is completely answered by *Stores Block* and *Carbon*. The Board has no jurisdiction to appropriate the proceeds of sale of an asset which is no longer needed to provide service to customers. Like the assets in *Store Block* and *Carbon*, the Harvest Hills lands were once legitimately included in the rate base. Absent the condition imposed by the Board, this case is indistinguishable from *Stores Block.*

Question Two - Jurisdiction to Impose a Condition on the Proceeds of Sale of Property Not Used for a Utility Purpose and Not Being Replaced by Alternate Property

[30] The respondent City of Calgary and the intervener UCA submit that the Board's finding of financial harm, its general jurisdiction over rate making, including the need for symmetry of risk and return and the concern with potential land speculation, and para. 77 of *Stores Block* enable the Board to impose the condition of placing the proceeds of sale into a deferral account. These reasons will be examined in turn.

[31] The Board's "no harm" test is well established and has been acknowledged by this Court in its *Stores Block* decision *(ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* 2004 ABCA 3, 339 A.R. 250 (at para.18) and by the Supreme Court (*Stores Block* para. 13). The Board found financial harm in the fact that ATCO would require more land to build facilities within four or five kilometres of the Harvest Hills property.This geographic area was arbitrarily selected by the Board, and the new facilities to be built within it had no direct relationship to the Harvest Hills lands. ATCO indicated that this would be needed in approximately five years. As the cost of the land would be significantly higher than the cost of the Harvest Hills property, the Board reasoned that customers would be harmed financially.

[32] In *Stores Block*, the Board found that there would be no harm to customers as a result of the sale. In the Supreme Court, Bastarache J. observed that 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 (at para. 84). In our view, the harm contemplated by the Supreme Court must be harm related to the transaction itself. Here, the Board found that there would be no harm to customers in terms of quality or quantity of service as a result of the sale. Indeed, once the Harvest Hills property was removed from the rate base, there would be a small reduction in the cost to customers. Merely because the utility has plans to spend funds on capital assets in the future cannot be "harm" in any logical sense. As the appellant points out, these expenditures will be incurred independently of the sale of the Harvest Hills property. The Board's proposal to subsidize those future expenditures by diverting the sale proceeds of the Harvest Hills property is effectively an appropriation of the sale proceeds to subsidize rates. This was prohibited in *Carbon* (at para. 30). "Financial harm" resulting from the denial of access to a revenue stream that could be used to subsidize rates is not properly characterized as "harm" in this context. Accordingly, this rationale in support of the imposition of the condition is unreasonable.

[33] The respondent City also submits that to achieve fair and reasonable rates and serve the public interest, the Board must consider the symmetry of risk and return in respect of both the utility and its customers: *Stores Block* (S.C.C. at para. 69). The Board acknowledged that there "may be an argument that regardless of where this new land is located, there is still a financial harm in costs to customers and the asymmetry of risk and return still applies." It stated that it would explore this issue in the context of a general rate application. This reasoning fails to recognize that it is the shareholders who bear the risk of loss as well as the profit. Further, the obvious inference is that the

sale proceeds of the Harvest Hills lands could be used to subsidize rates, something prohibited by *Stores Block* and *Carbon*. The Board's decision in this regard is not reasonable.

[34] The Board also commented that in order to serve the public interest, a condition such as the one imposed in this case guards against land speculation on the part of the utility. While this might be a valid concern in other circumstances, there was absolutely no evidence to suggest that ATCO was engaged in real estate speculation when it purchased the Harvest Hills lands.

[35] The respondent City further submits that the closing words from para. 77 of the majority decision in *Stores Block* support the Board's jurisdiction to impose the condition: "[The Board] could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves optimal growth of the system." The City points out that this Court has approved the use of deferral accounts in the rate setting context: *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, 361 A.R. 1. In light of other conclusions reached by the majority in *Stores Block,* it is not reasonable to interpret this passage as giving the Board the power to impose the condition which it did in this case. The Supreme Court condemned any allocation for ratepayers "based on an unquantified future potential loss" (at para. 84). In our view, a more reasonable interpretation of the Supreme Court's words would permit the Board to impose a condition if there was a close connection between the sale of the asset and the immediate resulting need to replace it. For example, the utility might sell a pumping station and, in order to service the public, it might need to access a different pumping station or even replace the existing one. The sale and purchase would be closely connected. This is what the majority of the Supreme Court had in mind when it stated that in some circumstances the Board could impose a condition that required the utility to reinvest the proceeds of sale into the system.

[36] Accordingly, we conclude that none of the reasons offered by the Board in support of the imposition of the condition are reasonable.

Conclusion

[37] In conclusion, the questions on which leave were granted should be answered as follows:

1. Does the Board have the jurisdiction to appropriate the proceeds of sale from lands neither used nor required to be used to provide service to customers in order to subsidize gas rates?
   No.

2. Does the Board have the jurisdiction to appropriate the proceeds of sale or impose a condition with respect to the same, where the property disposed of has never had a utility use and in particular is not being replaced by alternate property?
   No.

[38] The appeal is allowed.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta
this 8th day of May, 2009

Slatter J.A.

Rowbotham J.A.

Berger J.A. (Dissenting):

[39] I have had the advantage of reading in draft form the reasons of the majority. I regret that I cannot concur entirely in their view of the matter. I differ in particular with my colleagues' interpretation of the decision of the Supreme Court of Canada in ***ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2006 SCC 4, [2006] 1 S.C.R. 140 ("***Stores Block***").

[40] Bastarache J. took great pains to emphasize that "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.))." (at para. 77) He rejected the proposition that the Board was statutorily authorized to appropriate sale proceeds. He did, however, set out "other options within its jurisdiction" as follows:

> "[T]he 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." (at para. 77)

[41] He also made clear that it was open to the Board, on its own initiative, to convene "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 [*Public Utilities Board Act*, R.S.A. 2000. c. P-45] (PUBA, s. 89(a); [*Gas Utilities Act, R.S.A. 2000, c. G-5*] GUA, ss. 24, 36(a), 37(3), 40)." (at para. 81)

[42] Significantly, Bastarache J. noted in ***Stores Block*** that the Board "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." (at para. 83) No such assumption was made or conclusion reached by the Board in the case at bar.

[43] Bastarache J. made clear in ***Stores Block*** that:

> "... 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." (at para. 84)

[44] It follows that the factual underpinnings in the instant case can be distinguished from those in ***Stores Block***. The Board was mindful of the pronouncements governing the exercise of their jurisdiction as articulated by Bastarache J. It also appreciated the fact that the Supreme Court of Canada had endorsed the "no harm" test adopted by the Board in their various decisions including Decision 2003-098, released December 4, 2003, and Decision 2000-41, released July 5, 2000. The 2003 Decision held as follows:

> "Section 101(2) of [Public Utilities Board Act] PUB Act and section 26(2) of the GUA do not specify the appropriate test for the Board to utilize when considering an application under these provisions. Without specific legislative guidance, the Board has employed a 'no-harm' standard or test when evaluating applications to dispose of rate base assets out of the ordinary course of business under section 101(2)(d)(i) of the PUB Act and section 26(2)(d)(i) of the GUA. The Board's no-harm test considers the transaction in the context of both potential financial impacts and service level impacts to customers. The Board also assesses the prudence of the sale transaction. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction." [footnote omitted]

[45] The Board considered that there would be no harm to customers in terms of service quality and/or quantity as a result of the sale of the Harvest Hills property. However, the Board found otherwise with respect to the potential for the proposed disposition to adversely impact the rates customers would otherwise pay. The Board was mindful that ATCO had relied on s. 37 of the GUA to include all of the Harvest Hills property in the rate base because it was "required to be used to provide a service to the public". ATCO should have removed the four acre parcel from the rate base long before it was declared to be "surplus lands". It did not. Consumers paid more than they should.

[46] The City of Calgary had noted the "asymmetry of risk and return" relating to the vacant and surplus Harvest Hills property. It was common cause that following the sale of the Harvest Hills lands ATCO would be required to purchase replacement lands for its system. The cost per acre of the replacement land would likely exceed the cost of the surplus Harvest Hills land. The Board concluded as follows:

> "The Board considers that this financial harm in cost is equivalent to the submissions of the UCA and Calgary regarding the asymmetry of risk and return in allowing losses on sale to be borne by customers and gains on sale to be credited to shareholders in the circumstances of the present application.[1] The Board does not consider this to be a fair practice within the general context of determining rates that are 'just and reasonable.'
>
> The Board notes that no evidence was provided by AG regarding the estimated cost of the new regulating station and the land on which it will be situated. Therefore, the Board considers that the true extent of the financial harm cannot be adequately measured at this time given the uncertainty of the costs of these new facilities. Consequently, the Board believes that the most effective way to proceed with the application would be a conditional sale approval in the manner described in paragraph 77 of the Stores Block Decision. The Board is prepared to allow AG to sell the Harvest Hills Property, under the condition that the gain on sale (which is to be calculated as the sale proceeds less the original cost less prudently incurred disposition costs) be placed in a deferral account. ..."

[47] That disposition, in my view, was squarely within the jurisdiction of the Board in the light of ***Stores Block*** and enjoyed ample support in the factual underpinnings proffered by the parties. I would dismiss the appeal.

[48] If I am wrong and the order of the Board is properly construed as an appropriation of the proceeds of sale, I would allow the appeal and direct that the matter be remitted to the Board to determine whether, on the authority of ***Stores Block***, the "other options within its jurisdiction" as set out by Bastarache J. in ***Stores Block*** at para. 77 should be invoked.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta
this 8th day of May, 2009

Berger J.A.

[1] UCA Argument, page 5, lines 28-29; Calgary Argument, page 3, last paragraph

Appearances:

H.M. Kay, Q.C., L.E. Smith, Q.C.
L.A. Goldbach
for the Appellant

B.C. McNulty
for the Respondent AEUB

J.L. Lebo, Q.C., D.I. Evanchuk
D. Farmer
for the Respondent City of Calgary

T.D. Marriott
for Utilities Consumer Advocate

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2009 ABCA 246

Date: 20090630
Docket: 0701-0325-AC
0801-0244-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Utilities Commission and Alberta Energy and Utilities Board

Respondents

-and-

Utilities Consumer Advocate

Respondent

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of the Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Elizabeth McFadyen
Concurred in by The Honourable Madam Justice Patricia Rowbotham

Appeal from the Decisions of the Alberta Utilities Commission
(formerly, Alberta Energy and Utilities Board)
Dated November 6, 2007 and July 30, 2008

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté

A. Introduction and Facts

[1] The argument in this case ranged over a number of interesting topics, and disclosed some degree of friction or mistrust between the opposing parties (not their counsel). However, I have concluded that some of that discussion is either academic, or *res judicata*, and so I will not address here all the arguments which we heard.

[2] ATCO has been granted leave to appeal two decisions; the first, issued by the Alberta Energy and Utilities Board on November 6, 2007, and the second issued by the Alberta Utilities Commission, its successor, on July 30, 2008 on three grounds:

> (a) Do the Alberta Utilities Commission and the Alberta Energy and Utilities Board have the jurisdiction or authority to compel the owner of a gas utility to use assets neither used nor required to be used in utility service and include the related costs in an application for new rates?
>
> (b) Did the Alberta Utilities Commission and the Board err in directing that the use of the Salt Cavern assets and the inclusion of asset costs based on a prior rate base calculation, for a prior period, require that those assets must continue to be included in future rate base determinations?
>
> (c) Did the Alberta Utilities Commission err in determining that a change in use of the Salt Cavern assets is a disposition requiring Alberta Utilities Commission approval under s. 26 of the *Gas Utilities Act*?

[3] A brief history will suffice. The appellant filed a general rate application with the Alberta Energy and Utilities Board, seeking the approval of its revenue requirements for the 2008 and 2009 test years. In that application, the appellant identified certain assets (called the "Salt Cavern" Assets) which, historically had been included in its rate base. It stated that those assets were not being used in its regulated transmission service, and would not be used in the foreseeable future. So it indicated that it proposed to exclude those assets in its rate calculations.

[4] By letter dated November 6, 2007, the Board directed the appellant to include the assets in its application and rate calculations, on the grounds that the Board considered that any removal from rate base constituted a disposition which required prior Board approval pursuant to s. 26(2)(d) of the *Gas Utilities Act*. The appellant complied.

[5] In February, 2008, the appellant sought the Commission's approval of a proposed transfer of the assets to a related company, pursuant to s. 26(2)(d). In April, the Commission placed the application on hold, pending an industry-wide consideration of the effects of the Supreme Court of Canada decision in "***Stores Block***": ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293.

[6] When attempts to resolve a timing issue created by the delay failed, the appellant company cancelled the transaction and withdrew its approval application. The appellant advised the Commission that, in light of the recently-issued decision of this Court in "***Carbon***" it intended to resubmit its rate application and to exclude the assets in its rate calculations: ***ATCO Gas and Pipeline v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183.

[7] The Commission, in a letter dated July 30, 2008, referred to this Court's decision in "***Carbon***", and concluded that "***Carbon***" had not resolved the question whether removal from rate base constituted a disposition under s. 26 of the Act, and essentially repeated the reasons and the directions set out in its November 6 letter, stating in part:

> "Accordingly, the Commission considers the above direction by the Board and the finding by the Board in Decision 2007-005 with respect to the unilateral withdrawal of assets from utility service by a utility remain valid and continue to be appropriate. Therefore, [the utility company] is directed not to re-file the relevant GRA schedules in its Phase I compliance filing to reflect the withdrawal of the Identified Salt Cavern Assets without first obtaining the consent of the Commission as required by section 26(2)(d) of the *Gas Utilities Act* and section 101(2)(d) of the *Public Utilities Act*. Such an application would allow the Commission and interested parties to adequately examine the merits of the application and assess whether or not the Identified Salt Cavern Assets are used or required to be used to provide service to the public within Alberta."

[8] The appellant sought leave to appeal both orders.

[9] The parties subsequently settled the rate application without including the "Salt Cavern" assets in rate base. The Commission approved the settlement, and cancelled the scheduled rate hearings.

B. Issues

[10] In argument before us, counsel for the appellant utility company modified its initial position that the utility decides unilaterally what assets will be included in rate base as assets used or required to be used in providing the regulated service to the public. He conceded that, in the context of the general rate application, the Commission has jurisdiction, in determining the rate base, to decide

what assets are used or required to be used in providing the utility service to the public, and to require proof when the utility seeks to add or remove assets from rate base.

[11] Although leave to appeal was granted on three grounds (listed above), counsel for the Commission suggested that the only live issue before this Court is as follows:

> Is the unilateral withdrawal of assets from utility service and rate base out of the ordinary course of business a "disposition" under s. 26(2) (d) of the *Gas Utilities Act* requiring approval from the Commission?"

[12] The argument of the Utilities Consumer Advocate is also based on the question of whether the withdrawal of assets from utility service and rate base is a disposition under s. 26(2)(d).

[13] Both respondents argue that removal from rate base is a "disposition" requiring Board approval under s. 26. Neither respondent advanced any argument suggesting that the Commission had jurisdiction to require the gas utility to use assets which it was not using in providing the regulated service, or to include those costs in rate base. Neither respondent suggests that the inclusion of an asset in rate base in prior years gives the Commission jurisdiction to continue the inclusion of that asset in rate base.

[14] In any event, to the extent to which the answers to the legal issues raised in the first and second questions on which leave was granted are not premature, they are largely resolved by this Court's recent decision in "***Carbon***" where the Court held that the Board had no jurisdiction to include in rate base, assets which were not being used or required to be used in providing service to the public, in an operational context. Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system. See ***ATCO Gas and Pipelines v. Energy and Utilities Board***, 2008 ABCA 200, 433 A.R. 183. If any snippets remain, they would turn entirely on s. 26's applicability.

C. Mootness: First Part

[15] It is arguable that the rate settlement has rendered this appeal moot. But all parties agree that this Court should answer the last question of law on which leave was granted, (c). It is whether the Commission erred "in determining that a change in use of the Salt Cavern assets is a disposition requiring [the Commission's] approval under s. 26 of the *Gas Utilities Act*".

[16] The reasoning stated in the two orders under appeal does suggest that the Commission relied on s. 26 (or related sections in other Acts). And the orders under appeal here, like many orders of the Commission, combine in one document both reasons and formal decision or order. But it is not clear whether the two orders appealed say that s. 26 is the only way that the Commission gets jurisdiction to decide whether given assets should be inside or outside the rate base.

[17] In any event, any appeal is from the actual disposition (order) by the court or tribunal appealed, not from its reasons, and a clearly correct disposition will not be overturned because of flaws in the reasons stated. So a question arises as to whether it is necessary to decide question (c) (whether s. 26 applies), if it cannot affect the result of this appeal. Why?

[18] There is a simpler more basic reason, apart from s. 26, why the Commission has jurisdiction to decide this question of what is or is not in the rate base. I must now explain it, both to lay a foundation for the question of mootness, and for the merits of question (c). Then I will return to this question of whether question (c) is academic.

D. Commission's Jurisdiction to Fix Rate Base

[19] Neither the Supreme Court of Canada in the "***Stores Block***" decision, nor the Alberta Court of Appeal in the "***Carbon***" decision, held that the utilities company alone fixes the rate base and that the Commission cannot. Those two decisions are properly cited as follows: ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293; ***ATCO Gas and Pipeline v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183.

[20] It is elementary public utilities law that a regulatory commission fixing fair and just tolls, rates or charges does so in two components:

(i) current expenses and taxes, and

(ii) an annual amount constituting a just and proper return on capital invested in the utility.

[21] One cannot even begin to compute (ii) without knowing how much capital is invested in the utility. Regulatory commissions always determine that, using a number of traditional criteria developed in North America for over a century. That calculation of capital invested and properly attributable is called the "rate base". See 1 Priest, *Principles of Public Utilities Regulation* 173 (1969). Even if the legislation were silent on the topic, it would not only be permissible, but probably mandatory, for a regulatory commission to enter into some such analysis. See ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293 (paras. 65-66); ***Edmonton (City) v. Northwestern Utilities*** [1961] S.C.R. 392, 401-2. And the legislation is not silent here. For example, s. 37 of the *Gas Utilities Act* provides that

> "In fixing just and reasonable rates, tolls or charges . . . the Commission 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 . . ."

Similar is the *Public Utilities Act*, s. 90 (R.S.A. c. P-45).

[22] Despite some contrary suggestions in its factum, the appellant company properly conceded in oral argument that it cannot unilaterally and conclusively decide what is inside or outside the rate base, nor bring items in and take them out at will. The company's counsel conceded that during a rate hearing, the Commission could direct that the utility company prove an assertion that assets previously included in the rate base were not now being used and were not required to be used in the utility service.

[23] Any conclusive unilateral power by the utility company to define its rate base would be contrary to the reasoning in the preceding paragraph but one, indeed contrary to all the case law. Though many rate base cases are about how to value items admittedly in the rate base, many others are about what items should or should not be in the rate base.

[24] It is for that precise purpose that regulatory commissions in North America have developed and so long used the "used or required to be used" test for rate base (recited by the July 30 order under appeal), or variants on the test, such as "used or useful." Any textbook or index of cases on rate regulation contains a host of cases on that topic. See, for example, Phillips, *The Regulation of Public Utilities*, especially at pp. 301, 302, 325, 326, and associated notes (citations) at the end of its Chapter 8 (second printing 1988); Priest, *op. cit. supra*, at 174.

[25] Nothing in this judgment is intended to suggest different criteria for inclusion or exclusion of assets in the rate base, than those traditional tests.

[26] If each public utility company could unilaterally decide what was in or out of the rate base, or what was or was not used or useful, each year, then why did all those regulatory commissions and courts spend all that time and ink on such topics?

[27] Nor is one limited to looking at the textbooks or even the words of Alberta's legislation. One can also see a binding decision of this Court. In that case, the utilities wished to have expensive items in the rate base, and the Commission's predecessor held that they should not (yet) be in the rate base. The Court of Appeal affirmed the regulatory decision: ***Alberta Power v. Public Utils. Bd.*** (1990) 102 A.R. 353 (C.A.). So plainly the Commission has jurisdiction to decide that topic, and to disagree about it with the utility company being regulated.

[28] Can it be reasonably argued that this regulatory power is confined to ruling on adding new items to the rate base, but inapplicable to excluding old or unused items? No. Phillips, *op. cit supra*, at 302 quotes another established textbook and lists items which regulatory commissions may exclude from the rate base. They include obsolete property, property to be abandoned, overdeveloped property and facilities for future needs, and property used for non-utility purposes.

[29] If any of this were not so, any company with both a regulated utility business and another business could shuffle assets in and out of the rate base at will. A host of games could be played to maximize the rates charged by the monopoly utility business to the public.

[30] It is true that regulatory commissions pay some attention to decisions of management, who commonly have a good deal of experience, and do not always second-guess every management decision, especially on doubtful topics. So a typical rate hearing does not spend much, if any, time justifying inclusion in the rate base of every item of capital or equipment, nor even every big item. Rate hearings would go on forever otherwise. But the final decision is the regulator's, not the utility company's. See Phillips, *op. cit supra*, at 302. A regulatory commission has the expertise to know which items to examine closely, and how often. And they have statutory powers to call for information and to make their own investigations, and to direct hearings with evidence.

[31] The paragraphs above show that the rate-regulation process allows and compels the Commission to decide what is in the rate base, i.e. what assets (still) are relevant utility investment on which the rates should give the company a return. The traditional test is whether they are used or required to be used, and (as will be seen below) nothing in the legislation changes that. (Whether s. 26 is relevant is discussed below.)

E. Mootness and Academic Questions: Second Part

[32] Now I return to whether the Court of Appeal should answer question (c) put to it, whether s. 26 of the *Gas Utilities Act* applies.

[33] There is no ideal solution as to how much this Court should say or decide in this appeal. On the one hand (as noted) the Commission did not decide whether the assets in question here belonged in the rate base or not. And it will not and cannot decide that, as this rate hearing is over, and the result of it given (by consent) is likely not appealable, and no one wants to object to these rates. So the Court of Appeal lacks the evidentiary record and concrete facts and arguments usually so helpful to deciding any appeal. There is a danger of vagueness or abstraction in any answers which we may give.

[34] But on the other hand, here there are very evident on-going uncertainty, differences of opinion, misunderstanding, ambiguity, and even mistrust. The parties' factums seemed to suggest one position for the parties. But oral argument clarified and even changed their positions, and in places brought them closer together. In one place, they almost traded positions. Certainly the issues became clearer and sharper.

[35] The whole process of getting leave to appeal and running an appeal and writing a decision takes time. No one is completely sure how to handle disputes about allegedly unused assets at or before the next rate hearing. Any appeal then would likely give an answer too late, or would prolong that next rate hearing unconscionably. Answering question (c) now would make the next rate hearing much more effective, and obviate almost inevitable re-litigation of that question.

[36] The distrust and uncertainty are unfortunate, but the rulings of the Commission (or its predecessor) in the "***Stores Block***" and "***Carbon***" cases and "***Harvest Hills***" have done nothing to

calm the utility company's fears. A number of those Commission rulings relied expressly on s. 26 (formerly s. 25.1) in dealing with who got the benefits of those no-longer needed assets. One may find such passages in these Board decisions: 2001-78 (Oct. 24, 2001) p. 3 ("***Stores Block***" Part 1); 2002-037 (Mar. 21, 2002), [2002] A.E.U.B.D. #52, pp. 12, 17 (Distribution of Stores Block Net Proceeds); 2005-063 (June 15, 2005) pp. 9, 10, 11 about four preliminary questions (Carbon Storage Preliminary Questions); 2007-005 (Feb. 5, 2007) pp. 33 and 34 (S. Carbon Facilities, Part 1 Jurisdiction).

[37] Nor have the arguments of the Utility Consumers Advocate reassured the utility company. The appellant utility company suggests that if the Commission receives an application under s. 26 as to whether the assets in question should stay in (be in) the rate base, the Commission will try to evaluate harm to the consumers and impose some penalty or remedy on the appellant company quite outside any adjustment in rates. Or the Commission may treat any application about these assets as a s. 26 application, and do the same.

[38] Oral argument showed that at least one respondent suggests that such an approach would be suitable. Therefore, the appellant's fears that the Commission would take that approach have a real foundation. For one thing, the Consumer Advocate is a permanent statutory office (see the *Government Organization Act*, Schedule 13.1, R.S.A. c. G-10). So the topic is likely not hypothetical and not necessarily premature.

[39] Therefore, I would now give a substantive answer to question (c). It is about whether s. 26 (on dispositions) applies, and must be resorted to. It turns out to be the pivotal question, and is a question of pure law, interpretation of the *Gas Utilities Act*.

F. The Scope of Section 26

[40] We are left with question (c), plus a few bits of questions (a) and (b). So I will slightly narrow what I propose to answer, and restate the question as follows:

> If a utility company owns an asset whose price or value in previous rate hearings has been included in the rate base calculation, and the company now alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things, does s. 26 of the *Gas Utilities Act* apply, and does the company need leave under that section?

[41] Section 26, subsections (2)(d), (4), (5) read as follows:

> "(2) No owner of a gas utility designated under subsection (1) shall
>
> . . .
>
> (d) without the approval of the Commission,

> (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.
>
> (4) The Commission, on its own initiative or on the application of a person having an interest, may, or on the order of the Lieutenant Governor in Council shall, declare that subsection (2) or any part of it does not apply with respect to any transaction or class of transactions specified in the declaration.
>
> (5) Where a declaration is made under subsection (4) in respect of a transaction entered into before the making of the declaration, the transaction,
>
> (a) in the case of a transaction under subsection (2)(d), is deemed to be no longer void and to have been in force and effect from the date of the transaction, and
>
> (b) in the case of a transaction under subsection (2)(a), (b), or (c), is deemed not to have been in contravention of that subsection,
>
> except that the declaration does not affect any other rights that have accrued prior to the declaration."

[42] It is true that this section, this Act, and the related Acts (such as *Public Utilities Board Act*, s. 101), should be interpreted broadly and purposively. But the Court also has to read the wording of the statute in context and in its grammatical and ordinary sense harmoniously with the scheme and object of the Act: ***United Taxi Drivers' Fellowship v. Calgary (City)***, 2004 SCC 19, [2004] 1

S.C.R. 485, 494, 318 N.R. 170 (para. 8); ***Kraft Can. v. Euro Excellence***, 2007 SCC 37, [2007] 3 S.C.R. 20, 365 N.R. 332 (para. 2). So words matter.

[43] I have looked at the various legal reference works and cases cited to us on the topic of interpreting s. 26(2)(d). In my view, its key words on scope refer to giving up ownership, in whole or part. They do not refer to starting or stopping a particular use, nor acquiring a need, nor losing a need. Nor do they refer to objects becoming useful or becoming useless. Counsel have not given us any legal authority really on point which would make s. 26 apply to the question posed above.

[44] The only word in s. 26 which could conceivably be relied on to cover merely ending a use, or switching to a different use, is "disposition". That word came up in ***Cie. Immobilière BCN v. M.N.R.*** [1979] 1 S.C.R. 865, 876, 878-9. However, there was a kind of transfer between two companies there, and the context was terminal losses under the capital cost allowance sections of the *Income Tax Act*. I do not find any support there for the present situation's being a disposition.

[45] The other two Supreme Court of Canada decisions on "disposition" involve union successorship in labor legislation: ***W.W. Lester (1978) v. Utd. Assn. of Journeymen etc. Pipefitting Ind.*** [1990] 3 S.C.R. 644, 675-6, 123 N.R. 241; ***Ajax v. Nat. Automobile etc. Union***, 2000 SCC 23, [2000] 1 S.C.R. 538, 253 N.R. 223, affg. (1998) 113 O.A.C. 188, 41 O.R. (3d) 426, 166 D.L.R. (4th) 516 (C.A.). The ***Lester*** case cannot help the respondents or support finding a "disposition" here, as it found no "disposition" on its facts ("double-breasting"). Furthermore, ***Lester*** held that such labour succession legislation should be broadly interpreted, and that there is no "disposition" unless there is a relinquishment of a business (or part of it) and gaining of that business by another separate entity.

[46] The ***Ajax*** decision adopts fairly brief reasons on this topic by the Ontario Court of Appeal, which also looked for a transfer from one entity to another. Hiring a whole skilled set of workers (for a complete municipal bus operation) was held to qualify. Once again, two entirely separate entities were involved, and it was easy to find a transfer between them. The case merely holds that the transfer need not be by way of sale or any formal legal transaction.

[47] Does "disposition" mean "giving up or relinquishment" as suggested by the *Canadian Law Dictionary* 70 (2d ed. Yogis 1990)? Even if it does, there is no second person here to whom these assets were given or transferred.

[48] None of that applies where there is no second entity and a mere change in (or cessation of) use.

[49] "Disposition" can refer to a person's temperament or character, but that is obviously irrelevant here. It can also refer to some tribunal's final settlement or determination, which is equally irrelevant here. The only other meaning of the word given by Black is, "The act of transferring something to another's care or possession, especially by deed or will; the relinquishing of property." See *Black's Law Dictionary* 505 (8th ed. Garner 2004).

[50] Ceasing use was held not a disposition in ***Sealey v. Crystal*** (1987) 39 D.L.R. (4th) 141, 154 (B.C. C.A.), though the case is weakened by a statutory definition.

[51] So I interpret the words of s. 26 as not applying to ending a use. If that produced an absurd result, or crippled the Commission's power to regulate rates, then one might have to look harder at s. 26 and even try to stretch its words.

[52] But I see no *hiatus* here. It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. (See Part F. above.)

[53] Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[54] Nor is there any sound legislative philosophy which forces us or even permits us to expand the scope of s. 26 beyond the normal meaning of its words. It is true that s. 26 is a very useful section. But with or without it, an asset no longer used to operate the utility is no longer part of the rate base, whatever its history or earning capacity: "***Carbon***" decision, ***ATCO Gas and Pipelines v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183, 192-93 (paras. 28-30). And even on a true disposition of a former utility asset (e.g. its sale), the Commission cannot turn over any of the proceeds or worth to the consumers, nor force the company to hold the proceeds for the consumers. So held the "***Stores Block***" decision in the Supreme Court of Canada. See ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293. That decision is lengthy and thorough, and so difficult to quote from without expanding my reasons unduly. But it expressly rejects any power to allocate any part of sale proceeds to the benefit of the consumers, even as a condition of approving a sale of a former utility asset. Similar is our recent "***Harvest Hills***" decision: ***ATCO Gas and Pipelines v. A.E.U.B.***, 2009 ABCA 171, Calg. 0701-0341-AC (May 8) (paras. 29, 32-33).

[55] So the philosophy in those court decisions would not expand the scope of s. 26, and would do a good deal to restrict it. Both sides suggested in argument to us that if s. 26 applied, there is a good chance that the Commission would inquire into whether ceasing use of the asset in question harmed the consumer, and if so, what remedy for the harm could be imposed. Where merely ending use or usefulness (or both) is involved, that inquiry and remedy would be incompatible with the courts' "***Stores Block***" and "***Carbon***" decisions, *supra*, and so not a ground to expand s. 26's application. Indeed, the "***Harvest Hills***" decision, *supra*, discusses that topic in detail. The Supreme Court of Canada's 2006 "***Stores Block***" decision, *supra*, is also very clear on the subject of s. 26. That section does not even apply to non-utility assets (or former utility assets), nor to sales in the

ordinary course of business, and it gives no power to earmark or allocate sale proceeds (paras. 40-46).

[56] Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all. The 2008 "***Carbon***" decision (cited in the previous paragraph) clearly adopts the decisions about the "used or required to be used" test, and defines that as operational use in the utility: see para. 25 for example.

G. Standard of Review of Statutory Interpretation

[57] What is the standard of review for interpreting s. 26 of the *Gas Utilities Act*? The point was little stressed in oral argument, and counsel for the Commission did not touch on it. The factum of the Consumer Advocate suggests review on the reasonableness test. The appellant suggests a correctness test.

[58] Can it be said this is a topic on which the Commission has expertise in interpreting its home statute? When setting the standard of review for legal interpretations by an expert tribunal, that is traditionally an important consideration: see ***Board of Management v. Dusnmuir***, 2008 SCC 9, [2008] 1 S.C.R. 190, 372 N.R. 1 (para. 54). But public utilities commissions are almost unique. For over a century, their rulings (and appeals to the courts from them) have been reported in law reports, and cited by later decisions. Besides those law reports there are well-known specialized textbooks. So the contents and limits of this tribunal-made law are neither mysterious nor hard to find.

[59] I have carefully checked the two leading textbooks, and find that the subject covered by s. 26 does not come up in either. See *The Regulation of Public Utilities: Theory & Practice*, by Charles F. Phillips Jr. (Public Utilities Reports 1988) (2d printing); *Principles of Public Utilities Rates*, by James C. Bonbright, Albert L. Danielson, and David R. Kamerschen (2d ed. 1988) (Public Utilities Reports). This is not a question of law on which public utilities commissions have special expertise; still less is it part of their core competence.

[60] Section 26 of the *Gas Utilities Act* can be traced back to s. 52(1)(g) of Alberta's *Natural Gas Utilities Act*, 1944 (c. 4), though oddly that Act did not apply to retail gas distributors. A very similar provision to s. 26 is s. 101 of the present *Public Utilities Act*, which can be traced back to Alberta's 1922, c. 20, s. 37(g).

[61] Expert tribunals' interpretations of law or legislation do not always get deference on appeal. Sometimes the test is correctness: see ***Boardwalk Reit Partnership v. Edmonton (City) (#2)***, 2008 ABCA 220, 437 A.R. 347, 91 Alta. L.R. (4th) 1 (paras. 20-22), reh. den. 2008 ABCA 284, 437 A.R. 222, 93 Alta. L.R. (4th) 309, leave den. [2008] S.C.C.A. No. 28. And note the cases cited there.

[62] It is important that the disputed words of s. 26 of the *Gas Utilities Act* give the Commission a second power (beyond rate regulation) to control utilities. Therefore, the issue here is not about

how the Commission should do its work. The issue is whether the Commission has power to forbid a cessation of use with no sale. Could the Utilities Commission force a utilities company to keep actually using a piece of plant? It is a question of jurisdiction.

[63] There could be some drawbacks to letting a statutory tribunal set its own powers. The concern could be heightened where (as here) the same legislation gives a right of appeal to the Court of Appeal on questions of law or **jurisdiction**, and where a Justice of Appeal has found the question arguable, and given leave to appeal. If the Consumer Advocate's argument about standard of review were correct, the right of appeal might have limited utility. To some degree a right of appeal is the opposite of a privative clause, especially on legal questions. But I must emphasize that that is only one aspect of one aspect to weigh, and is not a free-standing ground to adopt one standard of review.

[64] We must also recall that the standard of review on appeal is ultimately up to the Legislature, and is not constitutional: Jones & de Villars, *Principles of Administrative Law* (4th ed. 2004) at 454-6; ***Pushpanathan v. Min. of Citizenship & Immigration*** [1998] 1 SCR 982, at 1004-05 (paras. 26-7) (amended at p. 1222).

[65] I do not suggest that the jurisdictional nature of the question, or the right of appeal, is conclusive. But each is relevant and weighty among the various ***Pushpanathan*** factors. See ***Director of Investigation & Research v. Southam*** [1997] 1 SCR 748, 209 NR 20, (para. 46); Jones & de Villars, *op. cit. supra*, at 556.

[66] Here the main question is the meaning of the word "disposition". It is a concept familiar to lawyers and judges in many parts of the law. It is not a concept from engineering or science, nor rate regulation. This is not, for example, a case where the Commission had to interpret words in the *Act* such as "production" or "gathering" referring to the physical or technical aspects of gas distribution.

[67] I mentioned weighty factors. Normally I would perform a ***Pushpanathan*** weighing analysis here, but it is not necessary in this case. The Supreme Court of Canada has already performed it for interpreting s. 26 of the *Gas Utilities Act*, and said that the standard is correctness: (***Stores Block*** case) ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (paras. 25-32). I realize that the strict questions there was allocating profits on sale, but it was the same section in the same Act; and that case and this one both involve the breadth or scope of the powers given by s. 26.

[68] I conclude that the standard of review on this statutory appeal on this precise question, is correctness.

H. Conclusion

[69] Therefore, I would answer question (c), as slightly amended, in the negative.

[70] The rest of what the Commission actually did in the two orders under appeal is moot. I would dismiss the appeal.

[71] Here there were split results, three partially academic questions, and shifts in argument between factums and oral argument. So I would let each party bear its own costs.

Appeal heard on April 9, 2009

Reasons filed at Calgary, Alberta
this 30th day of June, 2009

Côté J.A.

I concur: McFadyen J.A.

I concur: Rowbotham J.A.

Appearances:

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