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A FORTIS COMPANY

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DELIVERED BY HAND

June 9, 2010

Board of Commissioners
of Public Utilities
P.O. Box 21040
120 Torbay Road
St. John's, NL A1A 5B2

Attention: G. Cheryl Blundon
Director of Corporate Services
and Board Secretary

Ladies and Gentlemen:

RE: Newfoundland and Labrador Hydro – Application for approval of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers

Enclosed are the original and 8 copies of Newfoundland Power's Written Submission on Jurisdictional Issues in two volumes.

A copy of this letter, together with enclosures, has been forwarded directly to the parties listed below. An electronic copy in Adobe format will follow.

If you have any questions regarding the enclosed, please contact the undersigned at your convenience.

Yours very truly,

Gerard M. Hayes
Senior Counsel

Enclosures

c. Geoff Young
Newfoundland and Labrador Hydro

Paul Coxworthy
Stewart, McKelvey, Stirling, Scales

Colm St. Roch Seviour
Abitibi Consolidated

Joseph Hutchings, Q.C.
Poole Althouse

Tom Johnson
Consumer Advocate

Dan Simmons
Ottenheimer, Baker

Join us in the fight against cancer.

IN THE MATTER OF the Public Utilities Act, R .S.N. 1990, Chapter P-47 (the "Act"), and

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for the approval, pursuant to Section 70 (1) and 76 of the Act, of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers.

SUBMISSION OF NEWFOUNDLAND POWER INC. ON JURISDICTIONAL ISSUES

Volume 1

June 9, 2010

NEWFOUNDLAND POWER
A FORTIS COMPANY

Page

PART I – FACTS 1

Introduction 1

Load Variation Component – Ongoing Review 2

2007 Final Rates 4

Interim Rates 5

Load Variation Transfers 7

PART II – ISSUES 10

PART III- LEGAL PRINCIPLES AND ANALYSIS 12

Statutory Framework 12

Prospective Rate Making 14

Interim Rates 15

Deferral Accounts 16

Analysis 18

Concluding 26

PART I - FACTS

Introduction

1. The Rate Stabilization Plan ("RSP") was established in 1986, primarily to smooth rate impacts for variations between actual and forecast test year fuel costs at the Holyrood Thermal Generating Station ("Holyrood"). These variations include changes in the following factors: (1) hydraulic production; (2) the price of No. 6 fuel used at Holyrood; and (3) the customer load requirements of Newfoundland Power and Industrial Customers.[1]

2. Rate changes resulting from the operation of the RSP are normally implemented on July 1st for Newfoundland Power and on January 1st for the Industrial Customers. The annual RSP adjustments are derived based on RSP balances and a fuel rider and are expressed in ¢ per kWh. The fuel rider reflects the difference between the forecast fuel price for the upcoming year and the fuel price used to determine the test year fuel costs.

3. The transfers associated with each RSP component are allocated between amounts attributable to Newfoundland Power and amounts attributable to the Industrial Customer class.

[1] The RSP also includes the impact of certain variations in Hydro's rural revenues. The rural revenue component specifically relates to the RSP adjustment for Newfoundland Power.

Load Variation Component – Ongoing Review

4. In evidence filed in Hydro's 2003 general rate application ("GRA"), the Industrial Customers expressed dissatisfaction with both the existence of the load variation component and its allocation. Among their concerns was that the Industrial Customer class was at risk for cost increases resulting from load growth on Newfoundland Power's system. [2]

5. The 2003 GRA Negotiated Settlement provided that the net effect of changes in revenue and fuel cost resulting from load variations should be assigned to the customer class that caused the load variation ("class assignment approach").[3]

6. At the 2003 GRA, the Board's Financial Consultants identified a potential for customer rate volatility as a result of the RSP changes proposed in the 2003 Settlement Agreement.[4] In Order No. P.U. 14 (2004) (the "2003 GRA Order"), the Board directed Hydro to review the operation of the revised RSP after 24 months to assess its effectiveness. A report was to be filed with the Board no later than June 30, 2006.[5]

7. Hydro reported on the operation of the RSP at its 2006 GRA. Hydro's review concluded that the "customer allocation for the load variation should be revised

[2] Pre-filed testimony of P. Bowman, September 30, 2009, page A-3, lines 1-11 and footnote 23.
[3] See Banfield Supplementary Evidence, page 4 and Consent #2, 2003 GRA. The RSP modifications resulting from the settlement agreement, which also introduced a fuel rider, were implemented effective January 1, 2004.
[4] Grant Thornton Supplementary Evidence, December 5, 2003, 2003 Hydro GRA, page 4, lines 9 – 12.
[5] Page 78 of Order No. P.U. 14 (2004).

so that it is more closely aligned with Cost of Service treatment." This change would result in the net load variation transfers being allocated between Newfoundland Power and the Industrial Customer class based on energy ratios. [6]

8. The 2006 GRA Settlement Agreement provided for a further review of the RSP (the "2007 RSP Review"). It was anticipated that any changes resulting from the 2007 RSP Review would be implemented by January 1, 2008.[7] The allocation of load variation transfers was one of the items to be addressed in the review.

9. The 2007 RSP Review commenced in early 2007. An intial step in the review was the identification of the objectives of the RSP. This was completed, and the RSP objectives were outlined in a report entitled *Review of Rate Stabilization Plan*, which was filed with the Board on May 31, 2007. The report also outlined the terms of reference and a tentative schedule indicating the 2007 RSP Review would be completed by November 30, 2007. The anticipated implementation date of January 1, 2008 remained unchanged.[8]

[6] See page 14, "Review of the Operation of the Rate Stabilization Plan For the Period January 1, 2004 to December 31, 2005" dated June 30, 2006 and provided as Appendix A to the Application.
[7] Item 12 of Agreement on Cost of Service, Rate Design And Rate Stabilization Plan dated October 20, 2006.
[8] Review of Rate Stabilization Plan report dated May 31, 2007 and filed in response to NP-NLH-2.

10. Work on the 2007 RSP Review was delayed for a number of reasons, including illness and personnel changes affecting the RSP review team. Subsequent developments resulted in the indefinite suspension of work on the review.[9]

2007 Final Rates

11. Industrial Customer rates include three components: a demand charge, a firm energy charge and specifically assigned charges. The firm energy charge consists of a base rate and an RSP adjustment.[10]

12. The 2007 firm energy charge for the Industrial Customer class was approved on a final basis in Order No. P.U. 8 (2007). Table 1 shows the computation of the approved 2007 firm energy charge.

Table 1
2007 Firm Energy Charge[11]

Base Rate			**3.676 ¢ per kWh**
RSP Adjustment			
	Historic Plan	1.215 ¢ per kWh	
	Current Plan	(2.000) ¢ per kWh	
	Fuel Rider	0.000 ¢ per kWh	
	Total		**(0.785) ¢ per kWh**
Firm Energy Charge			**2.891 ¢ per kWh**
AUR Resources energy rate excluding Historic Plan			**1.676 ¢ per kWh**

[9] In a January 30, 2009 letter to the Board, Hydro advised that the review could not proceed until after an evaluation by Hydro's IFRS Project Team of the accounting treatment of the RSP under the new IFRS. On February 27, 2009, the Board removed the RSP review from its regulatory calendar due to inactivity. See response to NP-NLH-2.

[10] The base rate is established based on the test year embedded energy costs expressed on a ¢ per kWh basis. The RSP adjustment consists of an RSP recovery factor plus a fuel rider.

[11] Order No. P.U. 8 (2007), Schedule A, page 5 of 8.

Interim Rates

13. On December 20, 2007, Hydro proposed that the 2007 final rates then in effect for the Industrial Customer class be made interim. The stated purpose of the application was to provide Hydro with additional time to consider the impact of "a significant load change of one of Hydro's Industrial Customers" and the "potential volatility in [the] Industrial Customers' rates both for 2008 and in future years".[12]

14. In Order No. P.U. 34 (2007), the Board approved, on an interim basis, the Industrial Customer rates as attached in Schedule A to the Order. Schedule A to the Order set out the RSP adjustments that had been approved as part of the 2007 final rates, and which would be in effect on an interim basis effective January 1, 2008.

15. The RSP adjustment to become effective January 1, 2008 would normally be calculated using an RSP recovery factor determined with reference to the 2007 year-end Industrial Customer RSP balance. In the normal course, a fuel rider would also have been implemented effective January 1, 2008 to reflect changes in the forecast cost of No. 6 fuel since the test year base rate was established.

16. The effect of the interim rate approval in Order No. P.U. 34 (2007) was that the annual RSP update did not occur, and the firm energy rate approved for 2007 continued to be used, on an interim basis, for billing in 2008.

[12] Interim Rate Application filed by Hydro on December 20, 2007.

17. On December 11, 2008, Hydro applied to continue the 2008 interim rates for the Island Industrial Customers on an interim basis.[13] The application was based upon "further potential volatility in its Industrial Customers' rates both for 2009 and in future years". This volatility was anticipated "in light of the recent announcement of the closure of Abitibi Consolidated (Grand Falls) and recent fuel price projections".[14]

18. Order No. P.U. 37 (2008) stated that the Board was satisfied that it was reasonable and prudent to: (i) continue on an interim basis until March 31, 2009 the existing rates for the Island Industrial class of customers; (ii) continue the current RSP rules on an interim basis until final rates are established; and (iii) require Hydro to file an application for approval of final rates, rules and regulations for the Island Industrial Customers allowing sufficient time for a full examination of the matter.

19. The Board ordered the continuation of the rates, rules and regulations for Hydro's Island Industrial Customers on an interim basis from January 1, 2009 to March 31, 2009 with the Schedule of Rates as attached in Schedule A to the Order. The RSP adjustment for 2009 remained the same as the RSP adjustment for 2007 and 2008.[15]

[13] The application also proposed that rates for Teck Cominco Limited be increased to the same rate charged to the other Industrial Customers.

[14] Transmittal letter accompanying interim Industrial Customer rates application dated December 11, 2008.

[15] The Schedule of Rates no longer specifically referenced the individual recovery factors comprising the adjustment.

20. Order No. P.U. 37 (2008) also ordered Hydro to make application to finalize the interim rates, rules and regulations for the Industrial Customers by January 30, 2009. In Order No. P.U. 6 (2009), the Board approved a revised filing deadline of June 30, 2009 for the finalization of Industrial Customer rates and approved the continuation of the rates, rules and regulations for Hydro's Industrial Customers on an interim basis. The current proceeding arises from Hydro's application filed in accordance with Order No. P.U. 6 (2009).

21. The end result of the interim orders of the Board referenced above has been that the Industrial Customers have continued to pay the same customer rates since January 1, 2007.

Load Variation Transfers

22. The reduced load requirements of the Industrial Customer class have resulted in Hydro incurring lower production costs and receiving reduced revenues from energy sales relative to the 2007 test year.

23. As a result of the reduced Industrial Customer class load requirements, production cost reductions at Holyrood are forecast to exceed the base rate revenue reductions by approximately $74 million on a cumulative basis over the period 2007 to 2010F. Table 2 provides the load variation transfers for 2007 to

2009 and forecast for 2010 resulting from the reduced Industrial Customer load requirements.[16]

Table 2
Load Variation Transfers 2007-2010F
($000)

	2007	2008	2009	2010F	Total
Annual Transfer	(6,393)	(11,192)	(28,021)	(28,878)	(74,484)

24. Approximately $68 million of those load variation transfers have accumulated since the Industrial Customer rates were declared interim effective January 1, 2008.

25. Hydro has recommended that the load variation transfers be allocated between Newfoundland Power and the Industrial Customers using a cost of service approach. Newfoundland Power and the Consumer Advocate support that approach.

26. The Industrial Customers claim entitlement to the entire accumulated load variation balance. Based on the information provided during this proceeding, the current Industrial Customers pay approximately $20 million in annual electricity costs.[17] The $68 million of load variation transfers that have accumulated on an

[16] Response to NP-NLH-31.
[17] Response to CA-NLH-21.

interim basis since January 1, 2008 equates to approximately 3 ½ times the annual electricity costs of the current Industrial Customers.

PART II - ISSUES

27. Following consultation among counsel for the Board and counsel for the parties in this proceeding, Hydro identified certain issues to be considered by the Board in a preliminary hearing. In a letter dated June 2, 2010, Hydro formally submitted the following issues for the Board's consideration:

> Does the Board have the jurisdiction to issue an order which changes how the rate stabilization plan (RSP) operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes? In particular:
>
> - Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?
> - What would generally accepted sound public utility practice as set out in s. 4 of the EPCA require?
> - Are there any concerns in relation to vested rights, i.e. does the language of the RSP create a right/obligation in each of the customers or customer classes? If so at what point does this right/obligation accrue? Does this mean that credits/debits allocated to each customer in accordance with the plan are the responsibility of or to the benefit of customers in the class at the time of the accumulation or does the Board have the jurisdiction to order alternative disbursements of the balances?

- Does the issuance of Order Nos. P.U. 34(2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?

PART III - LEGAL PRINCIPLES AND ANALYSIS

Statutory Framework

28. The *Public Utilities Act* defines the Board's structure and its powers in the regulation of public utilities. In addition, the *Public Utilities Act* sets out the obligations and rights of a public utility providing a regulated service.

> *Public Utilities Act*, RSNL 1990 c. P-47 **[Authorities Tab 1]**

29. The *Public Utilities Act* provides for the Board's general supervision of a public utility's operations (s. 16) and, amongst other things, requires the Board to specifically approve rates (s. 70), regulations governing service (s. 71), capital expenditures (s. 41) and the issue of securities (s. 91).

> *Public Utilities Act*, RSNL 1990 c. P-47, s. 16, 41, 70, 71 and 91 **[Authorities Tab 1]**
> *Newfoundland (Board of Commissioners of Public Utilities), Re*, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.), para. 4 **[Authorities Tab 2]**

30. The *Electrical Power Control Act, 1994* ("the EPCA") sets out the electrical power policy of the province. The electrical power policy of the province deals specifically with rates (s. 3(a)), and the management of utility resources and an equitable access of supply for consumers (s. 3(b)).

> *Electrical Power Control Act, 1994*, SNL 1994 c. E-5.1, s. 3(a) and (b) **[Authorities Tab 3]**

31. "Rates", as defined in the EPCA, includes "prices, charges, tolls or conditions applying to prices for power or other consideration given for the supplying of power." [s. 2 (p)] Accordingly, the definition of "rates" includes conditions

applying to prices for power, such as the provisions contained in the RSP. [Emphasis added]

32. The electrical power policy of the province requires rates to (i) be reasonable and not unjustly discriminatory; (ii) be based on forecast costs for supply for one or more years; and (iii) enable the producer or retailer to earn a just and reasonable return under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world.

Electrical Power Control Act, 1994, SNL 1994 c. E-5.1, s. 3
[Authorities Tab 3]

33. The EPCA requires that the Board, in carrying out its duties and exercising its powers under the EPCA or under the *Public Utilities Act*, shall implement the power policy of the province declared in the EPCA, and shall apply tests which are consistent with generally accepted sound public utility practice (s. 4). Specifically in relation to the issues which arise in this proceeding, the Board must ensure that the prices and conditions applying to prices for the Industrial Customers, including the operation of the RSP, are reasonable and not unjustly discriminatory.

Electrical Power Control Act, 1994, SNL 1994 c. E-5.1, s. 4
[Authorities Tab 3]

Prospective Ratemaking

34. As a general principle, electricity rates must be set prospectively. This is done utilizing one or more future test years. It is permissible to examine a utility's past financial results to forecast future expenses. However, a regulator cannot design future rates to recover past revenue deficiencies.

> *Electrical Power Control Act,1994*, SNL 1994 c. E-5.1, s. 3(a)(ii) **[Authorities Tab 3]**
> *Re Northwestern Utilities Ltd.,* [1979] 1 S.C.R. 684, paras. 7, 9, 29 **[Authorities Tab 4]**
> *Coseka Resources Ltd. v. Saratoga Processing Co.*, 1980 CarswellAlta 136, 126 D.L.R. (3d) 705, 31 A.R. 541, 16 Alta. L.R. (2d) 60 (Alta. C.A.), paras. 22, 28 **[Authorities Tab 5]**
> *Re Atco Gas*, 2010 CarswellAlta 764, 2010 ABCA 132 (Alta. C.A.), para. 46 **[Authorities Tab 6]**
> *Newfoundland (Board of Commissioners of Public Utilities), Re*, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.), para. 77 **[Authorities Tab 2]**

35. Retroactive or retrospective rate making is not generally permissible. Retroactive rate making involves establishing rates to replace or substitute for those which were charged during a past period. Utility regulators cannot retroactively change rates because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers could never be assured of the finality of rates they paid for utility services.

> *Bell Canada v. Canadian Radio-Television & Telecommunications Commission* (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.), para. 39 **[Authorities Tab 7]**
> *Re Atco Gas*, 2010 CarswellAlta 764, 2010 ABCA 132 (Alta. C.A.), para. 47 **[Authorities Tab 6]**
> *Newfoundland (Board of Commissioners of Public Utilities), Re*, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.), paras. 32-33, 77-82 **[Authorities Tab 2]**

36. However, the principle of prospective rate making is subject to two important qualifications:

(i) interim rates; and

(ii) deferral accounts.

Interim Rates

37. Section 75 of the *Public Utilities Act* enables the Board to establish rates on an interim basis. There is an important difference between interim and final orders. Interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect, as well as any discrepancy between the interim order and the final order, may be reviewed and remedied by the final order. Interim decisions, unlike final decisions, are subject to retrospective review and remedial orders. Where original rates are made interim, they are inherently subject to change. Consequently, interim rates may be either increased or decreased for the period that they were in effect.

Public Utilities Act, RSNL 1990 c. P-47, s. 75 **[Authorities Tab 1]**
Bell Canada v. Canadian Radio-Television & Telecommunications Commission (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.), paras. 42-46 **[Authorities Tab 7]**
Bell Canada v. Canadian Radio-Television & Telecommunications Commission, 392 N.R. 323, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.), para. 59 **[Authorities Tab 8]**
Coseka Resources Ltd. v. Saratoga Processing Co., 1980 CarswellAlta 136, 126 D.L.R. (3d) 705, 31 A.R. 541, 16 Alta. L.R. (2d) 60 (Alta. C.A.), paras. 31-38 **[Authorities Tab 5]**

Newfoundland (Board of Commissioners of Public Utilities), Re, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.), para. 87 **[Authorities Tab 2]**
Telecom Decision CRTC 2010-302 **[Authorities Tab 9]**

38. As the Newfoundland Court of Appeal noted in the Stated Case decision at paragraph 87:

> The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superseded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by ss. 75(3) of the Act. [Emphasis added]
>
> *Newfoundland (Board of Commissioners of Public Utilities), Re*, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.), para. 87 **[Authorities Tab 2]**

Deferral Accounts

39. Deferral accounts allow a utility to accumulate variances between a utility's approved rate based on forecasted cost and the utility's actual cost for a given period. Typically, at the end of the period, a utility will then collect from customers through a rate rider any balances in the deferral account owing by them and refund any balances owing to them. Deferral accounts are often established to deal with uncertain items. Using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally

been held not to constitute retroactive rate making. The use of deferral accounts precludes the finding of retroactivity or retrospectivity.

> *Bell Canada v. Canadian Radio-Television & Telecommunications Commission,* SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.), paras. 61-63 **[Authorities Tab 8]**
> *Re Atco Gas*, 2010 CarswellAlta 764, 2010 ABCA 132 (Alta. C.A.), paras. 34-61 **[Authorities Tab 6]**
> *Epcor Generation Inc. v. Alberta (Energy & Utilities Board)* (2003), 346 A.R. 281, 320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.), paras. 14-16 **[Authorities Tab 10]**
> *Newfoundland (Board of Commissioners of Public Utilities), Re*, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.), paras. 97 and 98**[Authorities Tab 2]**

40. The use and operation of deferral accounts are administrative matters for the Board to ensure that rates are reasonable, not unjustly discriminatory, and provide the utility with its just and reasonable return. In *City of Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392, the Alberta Public Utilities Board concluded that it was impossible to determine in advance with reasonable certainty the prospective outlay for gas purchases. The Board therefore established a deferral account. The Supreme Court of Canada upheld that approach, stating as follows at page 406:

> With great respect, however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

City of Edmonton v. Northwestern Utilities Ltd., [1961] S.C.R. 392, at p. 406 **[Authorities Tab 11]**

41. Funds in a deferral account can be characterized as "encumbered revenues" because the rates are subject to the deferral account mechanisms. The authority to establish deferral accounts necessarily includes the disposition of the funds that they contain.

Bell Canada v. Canadian Radio-Television & Telecommunications Commission, SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.), paras. 37, 61-63 **[Authorities Tab 8]**

42. Some deferral accounts may contain mechanisms within the account itself to provide for recovery or disposition of deferred amounts. Other types of deferral accounts may leave the recovery or disposition of balances to the Board. Balances in the RSP are normally disposed of through rate adjustments, and require an Order of the Board.

43. However, deferral accounts that have been created to adjust specific items of a utility's costs should not be turned into a "slush fund" or a "catch all" account to adjust other items.

Re Atco Gas, 2010 CarswellAlta 764, 2010 ABCA 132 (Alta. C.A.), paras. 18, 66-71 **[Authorities Tab 6]**

Analysis

44. The overarching principle in this proceeding is that the Board must ensure that the rates to be charged, either generally or under specific contracts, for the

supply of power within the Province are reasonable and not unjustly discriminatory. "Rates" includes "conditions applying to prices for power", which would include the provisions of the RSP.

45. Where the Board has made rates interim, the Board must ensure that rates are reasonable and not unjustly discriminatory from the date of the interim order, not simply from the date of the final order. This ensures that the power policy of the Province as set forth in the EPCA is fulfilled.

Telecom Decision CRTC 2010-302 **[Authorities Tab 9]**

46. Both the interim rate exception and the deferral account exception to the principle of prospective rate making are relevant and have application in this case.

47. Hydro applied for, and the Board ordered, that Industrial Customer rates be made interim as of January 1, 2008. It is clear from the record that the rates were made interim in 2008 and 2009 because of the implications of the significant load reductions due to reduced production at the Corner Brook Mill and the closure of the Grand Falls Mill. By the end of 2009, these factors had reduced the Industrial Customer load by over 50%. The result was a substantial reduction in overall system load.

48. The load reductions had a number of effects. On an overall system basis, the reduced load resulted in reduced fuel consumption at Holyrood. The reduction in

the cost of production was materially greater than the reduction in revenue from energy sales. This resulted in net system savings. These system savings are reflected in the accumulated balance in the load variation component of the RSP.

49. An RSP review process had been undertaken in 2007, but not completed. That RSP review process had contemplated an implementation date of January 1, 2008. One of the issues in the RSP review was the potential change to the load variation component from a class assignment approach to a cost of service approach based upon energy consumption.

50. In Order No. P.U. 34 (2007), the Board approved, on an interim basis, the Industrial Customer rates as attached in Schedule A to the Order. Schedule A to the Order set out the RSP adjustments that would be in effect on an interim basis as of January 1, 2008. It is clear from Order No. P.U. 34 (2007) that the Industrial Customer class RSP adjustments approved as final for 2007 were made interim for 2008.

51. In addition, Order No. P.U. 34 (2007) effectively made the rules and regulations contained in the RSP interim since “rates”, as defined in the EPCA, includes “conditions applying to prices for power”.

52. In fact, the Industrial Customers have accepted in past proceedings that RSP adjustments are included in "rates". In Order P.U. 7 (2002-2003), the Board noted as follows:

> In final argument (pg. 64) the IC submitted that:
>
> *It should not be forgotten that, <u>while the RSP is clearly a 'rate',</u> it serves a different purpose than a base rate. It is intended to fluctuate, to accommodate variations both positive and negative over time arising from particular causes. …*[18] [Emphasis added]

53. Finally, a purposive understanding of Order No. P.U. 34 (2007), in the context of the factual circumstances, makes it abundantly clear that the interim rates Order was intended to permit the Board to consider the operation of the RSP, specifically in relation to the load variation component.

54. The RSP is a form of deferral account. It provides for a mechanism to adjust certain utility costs based upon certain factors, specifically oil prices, hydraulic production, and load variation.

55. The 2007 Industrial Customer rates were made up of various components, including the 2007 RSP adjustments. In the normal course, those RSP adjustments would have changed on January 1, 2008. However, as of January 1, 2008, Industrial Customer rates, including the various RSP adjustments comprising such rates, were made interim since the operation of the RSP may not have resulted in rates which would be reasonable and not unjustly discriminatory. One of the specific items under consideration was the change in

[18] Page 83 of Order No. P.U. 7 (2002-2003).

the load variation component from a class assignment approach to a cost of service approach. Rates were made interim so that the Board could ensure that rates for 2008 would be reasonable and not unjustly discriminatory in accordance with the Board's statutory mandate and the principles of sound public utility practice.

56. This point was reflected with even greater clarity in Order Nos. P.U. 37 (2008) and P.U. 6 (2009), which specifically made the continuation of the rates, rules and regulations for Hydro's Industrial Customers interim from January 1, 2009.

57. No issue of retroactivity arises in this case. The Board has full power and authority to modify the operation of the RSP and establish final rates, effective January 1, 2008, the date the rates were made interim. The rates were interim as of that date and therefore inherently subject to change (*Bell Canada 2009*, para. 59). To establish final rates, it is first necessary to determine how the RSP will operate from the date the rates were made interim. All parties were aware that the operation of the RSP was subject to review, especially the provisions governing the load variation component of the RSP.

58. As the Alberta Court of Appeal noted in *Re Atco Gas*:

> 54 Calgary argues that cases such as *Bell Canada 1989, Coseka* and *Bell Aliant* are distinguishable. The first two involved interim rather than final rates. In *Coseka*, it was pointed out at para. 36 that consumers must be aware that interim rates may be subject to change. As for *Bell Aliant*, all the parties knew in advance that the telecommunications companies would be obliged to use the balance

> of the deferral accounts in accordance with subsequent regulatory decisions: para. 61.
>
> 57 Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: were the affected parties aware that the rates were subject to change? If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant.
>
> *Re Atco Gas*, 2010 CarswellAlta 764, 2010 ABCA 132 (Alta. C.A.), paras. 54 and 57 **[Authorities Tab 6]**

59. Since rates were made interim in 2008, all parties were aware that rates, and the operation of the RSP which determines such rates, could be subject to change. It is therefore within the jurisdiction of the Board to make an order changing how the RSP operated from January 1, 2008, specifically the provisions governing the load variation component, and establishing final rates effective January 1, 2008.

60. Similarly, the Board has the jurisdiction to determine how the RSP should operate for 2009 and 2010 and to establish final rates for those years.

61. In addition, the Board has the jurisdiction to determine the appropriate disposition of the accumulated balance in the RSP, in particular, the load variation transfers since January 1, 2008.

62. In making those determinations, the Board is required to implement the power policy of the province declared in the EPCA, and to apply tests which are consistent with generally accepted sound public utility practice.

63. The Board's jurisdiction to determine the appropriate disposition of accumulated balances in the RSP for the years 2008, 2009 and 2010 is clear. Those balances accrued while rates were interim and the parties were aware that the operation of the RSP could change.

64. Different considerations apply with respect to amounts accrued during 2007. During 2007, rates were final. There was no expectation that the operation of the RSP might change for 2007. Amounts accrued during 2007 would normally have been applied in RSP adjustments during 2008. However, as of January 1, 2008, rates were made interim and no RSP adjustments were implemented. Consequently, the Board must still deal with the disposition of amounts accrued during 2007. The Board has the jurisdiction to do so. In exercising that jurisdiction, the Board will apply the power policy of the province and sound public utility practice. In doing so, the Board should consider the different circumstances affecting 2007, in particular, the fact that 2007 rates were final and are not subject to retrospective change.

65. No question of vested rights arises in this case. Discussion of the issue of "vested rights" must begin with an understanding of the nature of the right, benefit, privilege or obligation in issue. A right must be concrete and tangible in order to be vested. It must be sufficiently defined. It must be in the control of the claimant.

> R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2003) ("Sullivan"), at 570 **[Authorities Tab 12]**

66. There is no issue of vested rights where the right, benefit, privilege or obligation in issue is subject to ongoing regulatory control. In *Hibernia Management and Development Company Ltd. et al v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2008 NLCA 46, the Newfoundland Court of Appeal concluded that no issue of vested rights arose with respect to research and development expenditures because the level of such expenditures was subject to ongoing monitoring by the CNLOPB. The Court stated at paragraph 74:

> [74] Further, given the interpretation of the benefits plans discussed above, it cannot be said that the elements of the Hibernia plan constituted vested rights that precluded the application of the 2004 Guidelines. The 1986 approval of the Hibernia benefits plan provided for the Board's continuous monitoring of the company's expenditures on research and development. Subject to the question of reasonableness as to the parameters set out in the Guidelines, an issue that is discussed below, the Board reasonably concluded that it has authority to determine on a continuing basis whether the company is making adequate expenditures. In the circumstances, it cannot be said that application of the Guidelines to the Hibernia Project interferes with vested rights.

Hibernia Management and Development Company Ltd. et al v. Canada-Newfoundland and Labrador Offshore Petroleum Board, 2008 NLCA 46, para. 74 **[Authorities Tab 13]**

67. Similarly, no question of vested rights can arise where the Board has an ongoing obligation to ensure that electricity rates are in accordance with the provisions of the *Public Utilities Act* and the EPCA, and specifically that such rates, including the conditions applying to prices for power, are reasonable and not unjustly discriminatory.

68. The Industrial Customers have no vested rights in the continued operation of the RSP on the same terms and conditions as existed in 2007. That is particularly true in the present proceedings since rates have been interim since January 1, 2008. The Board has an ongoing duty of supervision with respect to public utilities and rates and an ongoing obligation to ensure that rates are reasonable and not unjustly discriminatory. No issue of vested rights arises where the right, benefit, privilege or obligation is subject to ongoing regulatory supervision.

Concluding

69. Newfoundland Power therefore submits that the Board, pursuant to its general supervisory power over public utilities under the Public Utilities Act, has full and ample jurisdiction and power to:

- determine, on a final basis, the operation of the RSP effective from and after January 1, 2008;
- determine on a final basis, the rates to be paid by the Industrial Customers effective from and after January 1, 2008; and
- determine the appropriate disposition of any accumulated balance in the RSP.

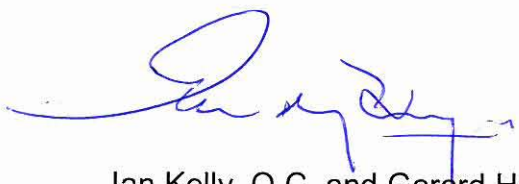
70. Newfoundland Power submits that the EPCA requires the Board to apply the power policy of the province to ensure that rates are reasonable and not unjustly discriminatory. The Board should apply generally accepted sound public utility practice to determine, on a final basis, the operation of the RSP from and after

January 1, 2008, final rates for the Industrial Customers from and after January 1, 2008, and the appropriate disposition of any accumulated balance in the RSP.

71. In summary, the Board has the jurisdiction to issue an order which changes how the RSP operated from January 1, 2008. The Board's jurisdiction extends to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes.

DATED at St. John's, NL this 9th day of June, 2010.

NEWFOUNDLAND POWER INC.



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IN THE MATTER OF the Public Utilities Act, R .S.N. 1990, Chapter P-47 (the "Act"), and

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for the approval, pursuant to Section 70 (1) and 76 of the Act, of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers.

SUBMISSION OF NEWFOUNDLAND POWER INC. ON JURISDICTIONAL ISSUES

Volume 2
Book of Authorities

June 9, 2010

NEWFOUNDLAND POWER
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Tab

AUTHORITIES

Public Utilities Act, RSNL 1990 c. P-47 1

Newfoundland (Board of Commissioners of Public Utilities),
Re, 1998 CarswellNfld 150; 164 Nfld. & P.E.I.R. 60; 507 A.P.R. 60 (Nfld. C.A.) 2

Electrical Power Control Act, 1994, SNL 1994 c. E-5.1 3

Re Northwestern Utilities Ltd., [1979] 1 S.C.R. 684 4

Coseka Resources Ltd. v. Saratoga Processing Co., 1980 CarswellAlta 136,
126 D.L.R. (3d) 705, 31 A.R. 541, 16 Alta. L.R. (2d) 60 (Alta. C.A.) 5

Re Atco Gas, 2010 CarswellAlta 764, 2010 ABCA 132 (Alta. C.A.), ... 6

Bell Canada v. Canadian Radio-Television & Telecommunications Commission
(1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15,
1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) 7

Bell Canada v. Canadian Radio-Television & Telecommunications Commission,
392 N.R. 323, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718,
310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.) 8

Telecom Decision CRTC 2010-302 9

Epcor Generation Inc. v. Alberta (Energy & Utilities Board) (2003), 346 A.R. 281,
320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.) 10

City of Edmonton v. Northwestern Utilities Ltd., [1961] S.C.R. 392, at p. 406 11

R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed.
(Markham: Butterworths, 2003) ("Sullivan"), at 570 12

Hibernia Management and Development Company Ltd. et al v. Canada
-Newfoundland and Labrador Offshore Petroleum Board, 2008 NLCA 46 13

Tab

BOARD ORDERS

Order No. P.U. 7 (2002-2003)* 1

Order No. P.U. 40 (2003) 2

Order No. P.U. 14 (2004)* 3

Order No. P.U. 8 (2007)* 4

Order No. P.U. 34 (2007) 5

Order No. P.U. 37 (2008) 6

Order No. P.U. 6 (2009) 7

* Excerpt only

OTHER

2003 Hydro GRA, Banfield Supplementary Evidence and Consent 2 1

2003 Hydro GRA, Grant Thornton Supplementary Evidence 2

2006 Hydro GRA, Agreement on Cost of Service, Rate Design and Rate Stabilization Plan 3

Review of Rate Stabilization Report, May 31, 2007 4

Hydro Application for Interim Rates, December 2007 5

Hydro Application for Continuation of Interim Rates, December 2008 6

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Table of Public Statutes Main Site How current is this statute?

Responsible Department

RSNL1990 CHAPTER P-47

PUBLIC UTILITIES ACT

Amended:

1992 c6 s1; 1992 c48 s21; 1996 cR-10.1 s61; 1997 c13 s59; 1997 c45; 1998 c29; 1999 c32; 2000 c3; 2001 cN-3.1 s2; 2004 cL-3.1 s58; 2006 c24

CHAPTER P-47

AN ACT RELATING TO PUBLIC UTILITIES

Analysis

1. Short title

2. Interpretation

3. Act not to apply to small projects

3.1 Exemption from Act

4. Application of Act

4.1 Exemption

4.2 Labrador Inuit rights

5. Rep. by 1998 c29 s2

6. Appointment of board of commissioners and staff

6.1 Powers and duties of chairperson and chief executive officer

7. Restrictions

8. Interim commissioner

9. When commissioner not disqualified

10. Powers of vice-chairperson

11. Quorum

12. Vacancy

13. Board's expenses

14. Payment of assessment

15. Budget

16. General powers of board

17. Inquiry by board

18. Annual report

19. Rep. by 1998 c29 s8

20. Regulations re practice

21. Board policy

22. Board may prescribe forms

23. Copies of orders

24. Delegation of powers

25. Powers of the board

26. Type of currency

27. Authorization to borrow money

28. Guarantee of loans

29. Endorsement on bonds or debentures

30. Guarantee of interest, premium and sinking fund payments

31. Further respecting guarantee

32. Temporary loans

33. Agreements

34. Performance under guarantee

35. Government may purchase securities of board

36. Office of public utility

37. Adequate service to be provided by public utility

38. Abandonment

39. Construction or extension in territory otherwise served notice

40. Removal of works constructed

41. Capital budget of public utility

42. Interference with other utility

43. Voltage and frequency

44. Maintenance equipment on customer's premises

45. Officer may enter premises

46. Right to discontinue service

47. Appeal

48. Restriction of sale

49. Assignment of franchise

50. Restriction on application of sections 48 and 49

51. Rep. by 1998 c29 s12

52. Rep. by 1998 c29 s12

53. Use of poles, etc. by other utility, etc

54. Duty of power company to supply electrical energy

55. Board may order power company to supply electrical energy

56. Erection of structures in municipalities

57. Complaint of utility

58. Form of records may be prescribed

59. Financial year

60. Inspection of records

61. Audit

62. Information to be supplied

63. Power to compel attendance

64. Valuation by board

65. Cost of valuation

66 Information to be provided

67. Accounts, etc. to be provided

68. Depreciation

69. Establishment of depreciation account

70. Compensation for services

71. Approval of changes in rates

72. Rates to be posted

73. Equality of rates

74. Forms of schedule may be altered

75. Interim order

76. Board may rescind or amend order fixing rates

77. Incidental sale of services to public

78. Rate base

79. Utilities supplying more than 1 type of service

80. Annual earnings

81. Rate base in respect of water and sewage systems

82. Investigation by board

83. Board may recommend legislation

84. Power and procedure of board upon complaint

85. Notice to public utility

86. Notice of hearing

87. Powers of board when rates found unjust

88. Formal hearing

89. Notice of formal hearing

90. Costs

91. Approval of security issues

92. Division of surplus profits

93. Powers of commissioners

94. Effect of judgment of courts

95. Jurisdiction not affected by pending suit

96. Evidence taken as in Supreme Court

97. Record of proceedings to be kept

98. Obligation to testify

99. Appeal from decision of board

100. Procedure on appeal

101. Stated case

102. Court to determine questions of law

103. Disobedience of order of board

104. Penalty for false statement

105. Penalty for unjust discrimination

106. Penalty for accepting unauthorized compensation

107. Penalty for undue preference or prejudice

108. Penalty for soliciting or receiving rebate

109. Penalty for failure to complete forms

110. Penalty for destruction of apparatus of board

111. General penalty

112. Separate offence

113. Enforcement of penalties

114. Rep. by 1996 cR-10.1 s61

115. Establishment of pension scheme for commissioners

116. Rep. by 1996 cR-10.1 s61

117. Consumer advocate

118. Act to be liberally construed

119. This Act to prevail

Short title

1. This Act may be cited as the *Public Utilities Act*.

1989 c37 s1

Back to Top

Interpretation

2. (1) In this Act

(a) "board" means the Board of Commissioners of Public Utilities;

(b) "commissioner" means a member of the board;

(c) "extension" includes a reasonable extension of the service and facilities of a public utility;

(d) "net income" means money available for dividends and surplus, according to the accounts prescribed by the board and required to be kept by public utilities;

(e) "public utility" means a person, firm or corporation that owns, operates, manages or controls in this province equipment or facilities for

(i) [Rep. by 1998 c29 s1]

(ii) the production, generation, storage, transmission, delivery, or providing of electric power or energy, water or heat either directly or indirectly to or for the public or a corporation for compensation,

(iii) the collection, storage, transmission, delivery or providing of water through mains directly or indirectly to or for the public or a corporation for compensation,

(iv) the collection, treatment or disposal of sewage through mains, directly or indirectly, for or from the public or a corporation, for compensation;

(f) "service" includes the use and accommodation given to consumers or patrons, and a product or commodity provided by a public utility, and also includes, unless the context otherwise requires the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in performing a service or in providing a product or commodity and devoted to the purpose in which the public utility is engaged and to the use and accommodation of the public and in the case of a public utility supplying electric energy to another public utility for distribution to the public, the 2nd or distributing public utility shall be a consumer for the purposes of this definition;

(g) "shareholder" means the holder of common or ordinary shares;

(h) "shares" means common or ordinary shares; and

(i) "telecommunications" means a transmission, emission or reception of signs, signals, writing, images, sounds, data, messages or intelligence by wire, radio-communication, cable, waves or electronic, electromagnetic or optical means.

(2) [Rep. by 1998 c29 s1]

1989 c37 s2; 1998 c29 s1

Back to Top

Act not to apply to small projects

3. This Act does not apply to a public utility where

(a) the public utility becomes a public utility after April 30, 1987 ; and

(b) the total installed generating capacity of the public utility at each location within the province at which the public utility has equipment or facilities located is less than 1,000 kilowatts.

1989 c37 s3

Back to Top

Exemption from Act

3.1 (1) Notwithstanding section 3, this Act does not apply to a public utility which generates electricity and sells it to a public utility to which this Act applies.

(2) Subsection (1) does not apply to

(a) a corporation which is the holding company of a public utility regulated by this Act or a subsidiary, an affiliate or associate of that holding company; or

(b) a subsidiary, an affiliate or associate of a public utility regulated by this Act.

(2.1) Subsection (1) shall not apply to the Newfoundland and Labrador Hydro-Electric Corporation, the Newfoundland Light & Power Co. Limited and the Deer Lake Power Company Ltd. and notwithstanding paragraph (2)(a), subsection (1) applies to the Corner Brook Pulp and Paper Limited.

(3) In subsection (2) the word "associate" has the meaning assigned to it by paragraph 2(1)(d) of *The Corporations Act.*

(4) Sections 10, 11 and 12 of *The Corporations Act* apply to determine when a corporation is a subsidiary or an affiliate of another corporation for the purposes of subsection (2).

1992 c6 s1; 1997 c45 s1

Back to Top

Application of Act

4. (1) This Act applies only to public utilities that are subject to the legislative authority of the province.

(2) In the case of a public utility which provides a class of service in respect of which it is not subject to the legislative authority of the province, nothing in this section shall make this Act inapplicable to the public utility in respect of another class of service provided, in respect of which it is subject to the legislative authority of the province.

1989 c37 s4

Back to Top

Exemption

4.1 The Lieutenant-Governor in Council may exempt a public utility from the application of all or a portion of this Act where the public utility is engaged in activities that in the opinion of the Lieutenant-Governor in Council as a matter of public convenience or general policy are in the best interest of the province, to the extent of its engagement in those activities.

1999 c32 s2

Back to Top

Labrador Inuit rights

4.2 This Act shall be read and applied in conjunction with the *Labrador Inuit Land Claims Agreement Act* and, where a provision of this Act is inconsistent or conflicts with a provision, term or condition of the *Labrador Inuit Land Claims Agreement Act,* the provision, term or condition of the *Labrador Inuit Land Claims Agreement Act* shall have precedence over the provision of this Act.

2004 cL-3.1 s58

Back to Top

Rep. by 1998 c29 s2

5. [Rep. by 1998 c29 s2]

1998 c29 s2

Back to Top

Appointment of board of commissioners and staff

6. (1) The corporation known as the Board of Commissioners of Public Utilities is continued.

(2) The board shall consist of 4 full-time commissioners appointed by the Lieutenant-Governor in Council.

(3) In making appointments under subsection (2) the Lieutenant-Governor in Council shall take into consideration the need of the board to be composed of commissioners who have expertise in law, engineering, accountancy or finance.

(4) The Lieutenant-Governor in Council shall designate one of the commissioners as chairperson, and another as vice-chairperson.

(5) The Lieutenant-Governor in Council shall set the terms and conditions of the appointment of a commissioner.

(6) The board shall appoint a board secretary and shall set the terms and conditions of the appointment.

(7) The board secretary shall keep a full record of the proceedings of the board and serve the notices and perform the duties that the board may require.

(8) The commissioners and the board secretary shall be sworn or affirmed to the faithful performance of the duties of their respective offices before entering upon the discharge of those duties.

(9) Each commissioner shall be appointed for a term of 10 years to hold office during good behaviour.

(10) A commissioner is eligible to be appointed for a second term of 10 years.

(11) Unless otherwise directed by the Lieutenant-Governor in Council, a commissioner shall cease to hold office upon reaching the age of 70 years.

(12) The board may employ legal counsel, accountants, engineers, stenographers or other persons that it may require or consider advisable for the purpose of carrying out this Act, and the wages, salaries or compensation of those persons shall be paid by the board and shall form part of the annual expenses of the board.

(13) An action or other proceeding does not lie against the board or a member, officer or employee of the board for anything done or omitted to be done in good faith in the course of carrying out its or his or her duties under this Act.

2006 c24 s1

Back to Top

Powers and duties of chairperson and chief executive officer

6.1 (1) The chairperson shall be the chief executive officer of the board and shall have full authority for the overall operation, management and financial administration of the board.

(2) The chairperson shall supervise and direct the work of the commissioners and the staff of the board.

(3) The chairperson shall manage and plan the conduct of applications to the board and matters referred to it including the appointment of commissioners to panels of the board and the referral of applications and matters to a panel.

2006 c24 s2

Back to Top

Restrictions

7. (1) A commissioner shall not be directly or indirectly employed by or interested in a public utility or interested in a share, stock, bond, mortgage, security or contract of a public utility that is subject to this Act.

(2) Where a commissioner voluntarily becomes interested under subsection (1), his or her office shall become vacant.

(3) Where a commissioner becomes interested under subsection (1) otherwise than voluntarily, he or she shall, within a reasonable time, divest himself or herself of the interest and if the commissioner fails to do so the office shall become vacant.

1989 c37 s7

Back to Top

Interim commissioner

8. Where a commissioner is interested in accordance with section 7 in a matter before the board, or where a commissioner is unable to act because of illness, absence or other cause, the Lieutenant-Governor in Council may appoint a disinterested person to act as commissioner in his or her place and a person so appointed may complete any unfinished business in which he or she has taken part, even if the commissioner whom he or she has replaced has returned or has become able to act.

1989 c37 s8

Back to Top

When commissioner not disqualified

9. A commissioner is not disqualified from acting in a matter affecting a public utility because of being the purchaser of power, water or electric current or service for his or her own personal use from a public utility.

1989 c37 s9; 1998 c29 s4

Back to Top

Powers of vice-chairperson

10. (1) In the absence of the chairperson or if he or she is unable to act, the vice-chairperson shall exercise the powers of the chairperson and in that case all regulations, orders and other documents signed by the vice-chairperson have the same effect as if signed by the chairperson.

(2) Whenever the vice-chairperson appears to have acted for or instead of the chairperson, it shall be presumed that he or she so acted in the absence or disability of the chairperson.

1989 c37 s10

Back to Top

Quorum

11. Two commissioners shall form a quorum and may exercise all powers of the board; but where there is no opposing party and no notice to be given to an interested party, 1 commissioner may act alone for the board.

1989 c37 s11

Back to Top

Vacancy

12. A vacancy in the board does not impair the right of the remaining commissioners to act.

1989 c37 s12

Back to Top

Board's expenses

13. (1) The expenses of the board, including the salaries, pensions and allowances of the commissioners, board secretary, counsel, experts, accountants, stenographers and other assistants, and reasonable allowances for travelling of all the persons shall be estimated by the board annually and assessed upon and borne by the individual public utilities that carried on business during the whole or a part of the preceding calendar year in the proportion or at the rate that the board may determine on the gross earnings of each public utility as shown by the balance sheets, reports and other information relating to the financial year of the public utility filed with the board by the public utilities respectively and the cost of inquiries chargeable to specific utilities under section 90 shall not be included.

(2) Sales of appliances and other goods, wares and merchandise by a public utility shall be included in determining the gross earnings of the public utility for the purposes of subsection (1).

(3) A public utility which is an incorporated municipal body shall not be liable to assessment under this section.

(4) Where the balance sheet, report and other information are not so filed by a public utility, or the board considers them inadequate or insufficient, the question of the amount of the gross earnings of the public utility shall be a matter relating to the public utility within the meaning of section 82.

(5) Before July 2 in each year, or a later date that the board in its absolute discretion, with or without notice, shall order, the board shall assess in the manner fixed by subsection (1) each of the public utilities and shall notify each public utility of the amount at which it is assessed.

(6) Where the estimated assessments prove insufficient, the board may make further assessments and levies that may be necessary or may temporarily advance the amount of a deficiency out of a reserve and may add that amount to a later assessment.

(7) Where the expenses of the board are less than the assessments paid by the public utilities under subsection (5), the board may retain the amount of the difference, and the amount retained may be applied to reduce a subsequent assessment under subsection (5).

1989 c37 s13; 1998 c29 s5

Back to Top

Payment of assessment

14. (1) The amount assessed under section 13 on a public utility shall be paid by it within 1 month after it has been notified by the board of the amount, and in default of payment the board may sue for and recover the sum in a court in the name of the Board of Commissioners of Public Utilities as if the board were incorporated under that name, and the proceedings shall not be affected by a change in the membership of the board.

(2) Costs ordered in the proceedings to be paid by the board, and costs and expenses incurred by the board, because of the proceedings shall be held to be part of the expenses of the board for the year in which they are paid, and costs ordered in the proceedings to be paid to the board shall when paid be credited to the expenses of the board for the year in which they are paid.

1989 c37 s14

Back to Top

Budget

15. (1) Not later than December 31 in each year, the board shall prepare and submit to the Lieutenant-Governor in Council through the Minister of Justice, a budget containing estimates of all amounts required during the coming financial year.

(2) In a budget submitted under subsection (1), the board shall set out, in the detail and form that the Minister of Justice may prescribe, the amount the board estimates it will require from the Consolidated Revenue Fund and the proposed expenditure of that amount for the financial year for which the budget is submitted.

(3) Where an amount received by the board from the Consolidated Revenue Fund is not expended by the board in the financial year in which it is received, the board shall remit the unexpended amount back to the Consolidated Revenue Fund.

(4) The Lieutenant-Governor in Council may approve or alter a budget submitted to the Lieutenant-Governor in Council by the board.

1989 c37 s15; 1998 c29 s6

Back to Top

General powers of board

16. The board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law and shall have the right to obtain from a public utility all information necessary to enable the board to fulfil its duties.

1989 c37 s16

Back to Top

Inquiry by board

17. The board may inquire into a violation of the laws or regulations in force in the province by a public utility doing business here, or by the officers, agents or employees, or by a person operating the plant of a public utility, and has the power and it is its duty to enforce this Act as well as all other laws relating to public utilities.

1989 c37 s17

Back to Top

Annual report

18. The board may publish an annual report regarding its proceedings.

1998 c29 s7

Back to Top

Rep. by 1998 c29 s8

19. [Rep. by 1998 c29 s8]

1998 c29 s8

Back to Top

Regulations re practice

20. The board may make, revoke and alter rules and regulations for the effective execution of its duties and of the intention and objects of this Act, and the regulations of the practice and procedure with regard to the matters over which it has jurisdiction and the rules and regulations, when approved by the Lieutenant-Governor in Council, shall have the force of the law.

1989 c37 s20

Back to Top

Board policy

21. The board may make policies

(a) providing for the granting; and

(b) prescribing terms, conditions and restrictions respecting, and otherwise regulating, the granting and taking

of leave of absence, including paid leave, special leave with pay and special leave without pay, respecting

(c) members of the board; or

(d) employees of the board or a class of them.

1997 c13 s59; 1998 c29 s9

Back to Top

Board may prescribe forms

22. The board may prepare suitable forms for carrying out the purposes of this Act and shall when necessary provide the forms to each public utility.

1989 c37 s22

Back to Top

Copies of orders

23. Upon application of a person the board shall provide certified copies of an order made by it, which shall be, in the absence of evidence to the contrary, evidence of the facts stated in the order.

1989 c37 s23; 1998 c29 s10

Back to Top

Delegation of powers

24. The board or chairperson may authorize 1 of the commissioners to inquire into and report to the board upon a matter within the jurisdiction of the board or pending before it, and when so authorized he or she shall, for the purpose of taking evidence or obtaining information for the report, have the powers of a commissioner under the *Public Inquiries Act.*

1989 c37 s24

Back to Top

Powers of the board

25. The board may

(a) purchase, lease or otherwise acquire land or personal property of every nature and kind, or interest in land, which the board considers necessary, convenient or advisable to acquire for or incidental to the exercise of the powers, functions or duties of the board;

(b) receive lands, buildings, money or other property, by gift or trust for public use or for the use of the board;

(c) borrow by temporary, interim or long term loans or raise or secure the payment of money in the manner that the board thinks appropriate and, in particular, by the issue of bonds, debentures or other securities, and purchase, redeem or pay off the securities;

(d) pay interest, premium and sinking fund payments in respect of its borrowing;

(e) sell, improve, manage, exchange, lease, mortgage, charge, dispose of, turn to account, grant a term, easement, right or interest in, over or affecting, or otherwise deal with, all or a part of the property and rights of the board;

(f) draw, make, accept, endorse, execute and issue promissory notes, bills of exchange and other negotiable or transferable instruments; and

(g) generally do those things which the board considers necessary, convenient or advisable for or incidental to the exercise of the powers, functions and duties of the board.

1989 c37 s25

Back to Top

Type of currency

26. The money authorized to be borrowed under section 25 may be borrowed and repaid in Canadian or United States of America currency, or in the currency of another country or partly in 1 currency and partly in another, as the board may approve, and authority for borrowing or repaying the money includes authority to pay the exchange charges that may be applicable to the currency and the interest and premium incurred in respect of the borrowing, and to make sinking fund payments.

1989 c37 s26

Back to Top

Authorization to borrow money

27. The board shall not borrow money unless authorized by the Lieutenant-Governor in Council to do so.

1989 c37 s27

Back to Top

Guarantee of loans

28. (1) Subject to the prior approval of the Lieutenant-Governor in Council, the Minister of Finance, acting for and on behalf of the Crown, may unconditionally guarantee as to principal, interest, including interest on overdue interest, premium and sinking fund payments, loans, in Canadian or United States of America currency or in the currency of another country, or partly in 1 currency and partly in another, as the Lieutenant-Governor in Council shall determine, not exceeding in total the limit fixed under subsection (2), to be raised by the board by way of bonds, debentures or other securities issued by the board, the bonds, debentures or other securities to be issued

(a) in a principal amount not exceeding the sum;

(b) at a rate of interest, including interest on overdue interest and premium;

(c) on the terms and conditions; and

(d) with provisions for redemption at the time

that may be approved by the Lieutenant-Governor in Council, and the bonds, debentures or other securities may be issued or sold in the numbers and amounts, at the times, at the prices and upon the terms that the Lieutenant-Governor in Council may approve.

(2) The total of guarantees under this section shall not exceed a limit to be fixed by the Lieutenant-Governor in Council, and it shall be the duty of the Minister of Finance to see that this limit is not exceeded.

(3) Pending the issue and sale of bonds, debentures or other securities referred to in subsection (1), the Minister of Finance may guarantee the repayment by the board of an interim loan, with or without interest, not exceeding the principal sum of the loan to be raised by way of bonds, debentures or other securities, if provision satisfactory to the Minister of Justice is made for the repayment of the interim loan together with interest out of the proceeds of the bonds, debentures or other securities and for making the repayment of the interim loan and interest a 1st charge upon the proceeds, after deducting the costs and expenses, including commission charges of and incidental to the floating of the bonds, debentures or other securities and after deducting all other sums required to be deducted under a trust deed, trust indenture or agreement executed and delivered under section 33.

(4) The repayment of bonds, debentures or other securities may be guaranteed under subsection (1) even if an interim loan to the board has already been guaranteed under this section and even though pending the repayment of the interim loan the liability of the Crown will exceed the principal sum of the loan to be raised by way of bonds, debentures or other securities, but the liability of the Crown in respect of the bonds, debentures or other securities and in respect of the interim loan shall not exceed double the principal sum of the loan to be raised by way of bonds or debentures.

1989 c37 s28

Back to Top

Endorsement on bonds or debentures

29. Notwithstanding the *Financial Administration Act,* where a guarantee is given under section 28 of this Act,

(a) a statement in the following form:

"Guarantor's Certificate

Payment of principal premium and mandatory sinking fund payments on this ..... is guaranteed by the Province of Newfoundland and Labrador , Canada , as more fully set out in the Indenture .....".

or the following form of guarantee:

"Guarantee

under the *Public Utilities Act,* the Province of Newfoundland and Labrador unconditionally guarantees to the holder of the within ....., the payment on the respective due dates of the principal, premium and interest to become due, and also unconditionally guarantees mandatory sinking fund payments in respect of the issue of ..... of which this ..... forms a part, as and when they become due and

payable .....",

shall be endorsed on all bonds, debentures or other securities guaranteed under section 28; and

(b) the statement or the form of guarantee shall be signed on behalf of the province by the Minister of Finance, and the signature of that minister may be engraved, lithographed or otherwise mechanically reproduced on the bonds, debentures or other securities.

1989 c37 s29; 2001 cN-3.1 s2

Back to Top

Guarantee of interest, premium and sinking fund payments

30. Notwithstanding subsection 28(4), where the payment of an interest, premium or sinking fund payment has been guaranteed under this Act, the Crown may incur liability, in excess of the principal sum of the loan in respect of which the payment was guaranteed, to the extent of the guarantee of the interest, premium and sinking fund payment.

1989 c37 s30

Back to Top

Further respecting guarantee

31. The power conferred by section 28 to guarantee the repayment of bonds, debentures or other securities or an interim loan includes the power to guarantee the repayment of part of the bonds, debentures or other securities or part of the interim loan but, with respect to an individual loan, the total of the principal sums guaranteed by the Crown, exclusive of an interim loan guaranteed interest, premium and sinking fund payments shall not exceed the principal sum of an individual loan.

1989 c37 s31

Back to Top

Temporary loans

32. (1) The Minister of Finance, acting for the Crown, may unconditionally guarantee as to principal and interest temporary loans, other than the interim loans referred to in section 28, to be raised by the board, in Canadian or United States of America currency or in the currency of another country or partly in 1 currency and partly in another, not exceeding in total the limit fixed under subsection (2), every loan to be repaid by the board, within a period, not exceeding 24 months or a longer period that the Lieutenant-Governor in Council may prescribe, and to be

(a) in a principal amount not exceeding the sum;

(b) at a rate of interest, including interest on overdue interest and premium;

(c) at the discount; and

(d) on the terms and conditions

that may be approved by the Minister of Finance.

(2) The total of guarantees under this section shall not exceed a limit to be fixed by the Lieutenant-Governor in Council, and it shall be the duty of the Minister of Finance to see that this limit is not exceeded.

(3) A guarantee given under this section shall be in the form that the Lieutenant-Governor in Council approves.

1989 c37 s32; 1990 c62 s20

Back to Top

Agreements

33. The Minister of Finance acting on behalf of the Crown may enter into, execute and deliver a trust deed, trust indenture or an agreement with the board, a lender, a trustee acting for the holders of bonds, debentures or other securities or another person or company setting out the terms and conditions of a guarantee of a loan to be made under this Act.

1989 c37 s33

Back to Top

Performance under guarantee

34. A payment that the Crown may be required to make under this Act shall be paid by the Minister of Finance out of the Consolidated Revenue Fund of the province, or it may be paid out of funds provided in the manner prescribed in section 55 of the *Financial Administration Act,* or out of other funds appropriated for the purpose by the Legislature or it may be paid partly in one way and partly in another.

1989 c37 s34

Back to Top

Government may purchase securities of board

35. Notwithstanding the *Financial Administration Act,* or another Act or law, the province may purchase the securities of the board, and the Minister of Finance shall pay all expenses and charges of or incidental to a purchase made under this section out of the Consolidated Revenue Fund of the province.

1989 c37 s35

Back to Top

Office of public utility

36. Each public utility shall have an office in 1 of the cities, towns or settlements of the province in which its property or some part of it is located and shall keep in the office the books, accounts, papers or records that are required by the board to be kept within the province, and the books, accounts, papers or records shall not be removed from the province except upon the conditions that may be prescribed by the board.

1989 c37 s36

Back to Top

Adequate service to be provided by public utility

37. (1) A public utility shall provide service and facilities which are reasonably safe and adequate and just and reasonable.

(2) The board may either with or without notice to a public utility make an order appointing a person to make examinations, investigations or tests for the purpose of ascertaining whether service reasonably safe and adequate and just and reasonable is being supplied by the public utility and may in the order make provision as to the remuneration and expenses the person is to be paid by the public utility where the board certifies that they are payable.

1989 c37 s37

Back to Top

Abandonment

38. A public utility shall not abandon a part of its line, or works, after they have been operated, or discontinue a service without notice to the board, and without the written consent of the board, which consent shall only be given after notice to an incorporated municipal body interested, and after there has been an inquiry.

1989 c37 s38

Back to Top

Construction or extension in territory otherwise served notice

39. (1) A public utility shall not begin the construction of its line, plant or system or an extension of it in a territory already served or capable of being served by a public utility of similar character without first giving notice to the chief office in this province of the public utility of similar character.

(2) Where, following the giving of the notice, the public utilities concerned reach an agreement with respect to the construction, that agreement shall be presented to the board for its consideration; and upon approval being given, the board shall issue a certificate to the public utility wishing to begin the construction authorizing it to proceed in accordance with the terms of the agreement.

(3) Where an agreement is not reached, the board shall, upon the application of either of the public utilities concerned, and after a hearing involving the financial ability and good faith of the public utilities concerned and the necessity of additional service in the territory, issue a certificate to proceed with the construction or refuse to issue the certificate or issue it for the construction of a portion only of the contemplated line, plant or system or extension and the board may attach to the exercise of the right granted by the certificate those terms and conditions that in its judgment the public convenience and necessity may require.

1989 c37 s39

Back to Top

Removal of works constructed

40. (1) The board may order a public utility to remove, demolish or destroy, at its own cost and expense and within the period that may be prescribed in the order, a line, plant, system or extension referred to in subsection 39(1), which it constructs or begins to construct

(a) without

(i) giving the notice referred to in subsection 39(1), or

(ii) the certificate referred to in subsection 39(2) or (3); or

(b) contrary to the terms and conditions referred to in subsection 39(3).

(2) Where, after making a summary investigation, the board becomes satisfied that sufficient grounds exist to warrant a hearing being held into whether an order should be made under subsection (1), it may hold the hearing.

(3) The board may hold the hearing referred to in subsection (2) without public advertisement or notice to a person other than the parties directly concerned, and the length of notice to those parties shall be as the board determines.

(4) Where the public utility referred to in subsection (1) fails to carry out the order referred to in that subsection within the period prescribed in the order, or within the further period that the board may in writing allow, it is guilty of an offence and, whether it is prosecuted for the offence or not, the board may by its agents or workers effect the removal, demolition or destruction required by the order and sue for and recover the cost from the public utility as a civil debt.

1989 c37 s40

Back to Top

Capital budget of public utility

41. (1) A public utility shall submit an annual capital budget of proposed improvements or additions to its property to the board for its approval not later than December 15 in each year for the next calendar year, and the budget shall include an estimate of contributions toward the cost of improvements or additions to its property the public utility intends to demand from its customers.

(2) The budget shall contain an estimate of future required expenditures on improvements or additions to the property of the public utility that will not be completed in the next calendar year.

(3) A public utility shall not proceed with the construction, purchase or lease of improvements or additions to its property where

(a) the cost of the construction or purchase is in excess of $50,000; or

(b) the cost of the lease is in excess of $5,000 in a year of the lease

without the prior approval of the board.

(4) A public utility shall submit a report on its actual expenditures on improvements or additions to its property in the prior calendar year, together with an explanation as to expenditures in excess of those approved under subsection (1) not later than April 1 in each year.

(5) A public utility that intends to demand from its customers a contribution towards the cost of improvements or additions to its property shall not demand the contribution without the prior approval of the board.

(6) Notwithstanding subsection (5), a public utility may, without the prior approval of the board, demand from its customers a contribution toward the cost of an improvement or an addition to its property where the demand for the contribution is approved under a policy of the board.

1989 c37 s41; 1998 c29 s11

Back to Top

Interference with other utility

42. (1) A public utility shall not make an extension to or changes in its line, plant or system which are likely to be detrimental to the service supplied by another public utility without first giving reasonable notice in writing by prepaid post to the chief office in this province of the other public utility.

(2) The public utilities directly concerned may agree upon methods and specifications which will, where reasonably possible, minimize the detrimental effects on the service of the other public utility.

(3) In the event of the failure of a public utility to comply with subsection (1) as to notice or in the event of failure to so agree, the parties directly concerned may make application to the board for a hearing with respect to the matter in issue.

(4) The board may hold the hearing without public advertisement or notice to a person other than to the parties directly concerned.

(5) After inquiry into the nature of the extensions and changes made or proposed to be made, the board, subject to those terms and conditions that in the judgment of the board the circumstances require, may grant or withhold approval or may order the changes that may be just and expedient.

1989 c37 s42

Back to Top

Voltage and frequency

43. (1) Before supplying electrical energy to a customer a public utility shall declare, in writing signed by its proper officer or its agent, to the customer the constant voltage, and if from an alternating current source, the frequency, at which it proposes to supply electrical energy at the customer's terminals.

(2) The variation of voltage, and in the case of alternating currents the frequency, at a customer's terminals, unless otherwise ordered by the board, shall not under conditions of the supply which the customer is entitled to receive exceed 4% from the declared constant voltage or frequency, whether the variation is due to the resistance of the service lines or apparatus belonging to the public utility, or to an action or effect produced by the apparatus, for which the customer cannot be shown to be responsible, or partly to a variation of voltage in the distributing mains from which the supply is taken.

1989 c37 s43

Back to Top

Maintenance equipment on customer's premises

44. The public utility is responsible for all electric lines, fittings and apparatus belonging to it or under its control upon the customer's premises being maintained in a proper condition, and in all respects suitable for supplying energy, but it is not responsible for damages arising from the use of the electric current in lines, fittings and apparatus not belonging to it or under its control.

1989 c37 s44

Back to Top

Officer may enter premises

45. (1) An officer or agent of the public utility authorized in writing by the public utility may enter at reasonable times premises to which electrical energy is or has been supplied by the public utility, for the purpose of

(a) inspecting the electric wires, meters, accumulators, fittings, works and apparatus of the public utility for the supply of electrical energy;

(b) ascertaining the quantity of electrical energy consumed or supplied;

(c) removing electric wires, meters, accumulators, fittings, works and apparatus belonging to the public utility;

(d) cutting off the supply of electrical energy in cases where a supply of electrical energy is no longer required, or the public utility is authorized to take away and cut off the supply of electrical energy from premises, doing as little damage as possible;

(e) inspecting and testing wires and fittings upon a customer's premises in order to ascertain whether a leakage of electricity exists, after it has been determined that no leakage exists in a part of the circuit concerned which is outside the premises of the customer.

(2) The officer or agent shall repair all damage caused by the entry, inspection or removal.

1989 c37 s45; 1990 c62 s20

Back to Top

Right to discontinue service

46. Where on an inspection and test made under section 45 the officer or agent discovers that a leakage of electricity exists on the customer's premises or where the customer does not give all facilities for the inspection and test, the public utility shall immediately discontinue the supply of electrical energy to the premises of the customer, giving immediate notice of the discontinuance to the customer and shall not recommence the supply until it is satisfied that the leakage has been brought to an end.

1989 c37 s46

Back to Top

Appeal

47. Where a customer is dissatisfied with the action of the public utility; either as to the mode of making the test or in discontinuing the supply of electrical energy to his or her premises, the wires and fittings of the customer may, on application to the board, be tested for the existence of the leakage by an inspector appointed by the board.

1989 c37 s47

Back to Top

Restriction of sale

48. A public utility shall not sell, assign or transfer the whole of its undertaking or a part of it to a person or corporation until the approval of the board has been obtained.

1989 c37 s48

Back to Top

Assignment of franchise

49. (1) A franchise or a right under a franchise to own or operate a public utility, shall not be assigned, transferred or leased, nor shall a contract or agreement with reference to or affecting the franchise or right be valid or have effect, unless the assignment, transfer, lease, contract or agreement has been made under the authority of a statute, or with the written approval of the board.

(2) The approval by the board of the assignment, transfer, lease, contract or agreement under this section shall not be held or construed to revive or validate a lapsed or invalid franchise or to extend or add to the powers and privileges contained in the grant of a franchise or to waive a forfeiture.

1989 c37 s49

Back to Top

Restriction on application of sections 48 and 49

50. Sections 48 and 49 do not apply to a mortgage or charge approved by the board or to a right of entry, sale or other proceeding in the enforcement of the security constituted or in exercise of the rights or remedies granted or otherwise available at law.

1989 c37 s50

Back to Top

Rep. by 1998 c29 s12

51. [Rep. by 1998 c29 s12]

1998 c29 s12

Back to Top

Rep. by 1998 c29 s12

52. [Rep. by 1998 c29 s12]

1998 c29 s12

Back to Top

Use of poles, etc. by other utility, etc.

53. (1) A public utility having conduits, poles, wires or similar equipment shall, for reasonable compensation,

(a) permit the use of its conduits, poles, wires and similar equipment by another public utility; and

(b) permit the use of its conduits and poles by a licensed cable television system,

if public convenience and necessity require that use and it will not result in a substantial detriment to the service rendered or to be rendered by the public utility owning the equipment.

(2) In case of failure to agree upon the use, or the conditions or compensation for the use, a public utility or a person or corporation interested may apply to the board, and if after investigation the board considers that public convenience and necessity require the use, and that it would not result in a substantial detriment to the service rendered by the owners or other users of the equipment, it shall by order direct that the use be permitted and prescribe conditions and compensation for the use, and the use so ordered shall be permitted and the conditions and compensations so prescribed shall be the lawful conditions and compensation to be observed, followed and paid.

(3) The order of the board may be revised or varied by the board upon application of an interested party or of its own motion.

(4) The Lieutenant-Governor in Council may by order issue directions to the board that shall be binding on the board on a matter concerning compensation for the use of poles owned by a public utility by a licensed cable television system.

1989 c37 s53; 1990 c62 s20

Back to Top

Duty of power company to supply electrical energy

54. (1) A power company shall supply electrical energy to premises situated within 100 metres of a transmission line, main supply-wire or cable suitable for that purpose, on being required by the owner or occupier of the premises to do so.

(2) The power company before taking steps to supply the energy, and before supplying the energy or making a connection, or as a condition of the power company continuing to supply it, may require the owner or occupier to give reasonable security for the repayment of the costs of making the connection when those costs exceed $50, and for the payment of the proper tolls for electrical energy and the rent of instruments.

(3) In the event of the power company and the owner or occupier failing to agree upon the nature or amount of the security to be given within 14 days from the date upon which the owner or occupier requires the power company to supply electrical energy, the amount of the security and the manner in which it shall be given shall, upon the application of either party, be determined by the board, and the board may make an order for security under this section for other matters that under the circumstances the board may consider just and equitable.

(4) The board may, for good cause and after hearing the interested parties, relieve a power company from the statutory obligation to supply electrical energy upon the terms and conditions that the board may consider appropriate and in the public interest.

1989 c37 s54

Back to Top

Board may order power company to supply electrical energy

55. Upon the application of a person whose premises are situated at a greater distance than 100 metres from a transmission-line, main supply-wire, or cable suitable for that purpose, and who wishes to be supplied with electrical energy by the power company controlling or operating the transmission-line, supply-wire, or cable, the board may order the power company to supply, within the time that the board may direct, the electrical energy required by that person, and to make those extensions and install the equipment and apparatus that may be necessary to supply it upon the terms and conditions that the board may direct, including, if the board thinks advisable, provision for the cost or a portion of the cost of the extension, equipment, or apparatus to be borne by the person requiring the electrical energy.

1989 c37 s55

Back to Top

Erection of structures in municipalities

56. (1) A public utility shall not, in a city, town or other incorporated municipality, erect or place a pole, wire, conduit or pipe or erect a building, substation, tower or other structure without first obtaining the consent of the council of the city, town or municipality, and the council may consent, or may refuse its consent, as it considers appropriate.

(2) Where the council refuses or neglects to grant a permit to erect or place the pole, wire, conduit or pipe or the building, substation, tower or other structure within 1 month after the application has been received by the mayor or clerk of the city, town or municipality, or agrees to give it only on terms which the public utility will not accept, either party may refer the matter to the board and the board may make an order directing on what terms the work shall be undertaken.

1989 c37 s56

Back to Top

Complaint of utility

57. A public utility may make complaint as to matters affecting its own product or service in the same way that a municipal corporation may under this Act.

1989 c37 s57

Back to Top

Form of records may be prescribed

58. The board may prescribe the form of all books, accounts, papers and records to be kept by a public utility and a public utility shall keep its books, accounts, papers and records and make its

returns in the manner and form prescribed by the board and comply with all directions of the board relating to those books, accounts, papers, records and returns.

1989 c37 s58

Back to Top

Financial year

59. (1) Unless the board otherwise orders, all accounts required to be kept by a public utility shall be closed annually on the last day of December in each year, and a balance sheet as of that date shall be promptly taken from the accounts.

(2) Before April 2 following, or on another date that the board determines, the balance sheet, together with other information that the board shall prescribe, verified on oath or affirmation by an officer of the public utility, shall be filed with the board.

1989 c37 s59

Back to Top

Inspection of records

60. (1) The board or a commissioner, or a person employed by the board for that purpose, shall upon demand have the right to inspect the books, accounts, papers, records and memoranda of a public utility, and the board or a commissioner shall have the power to examine under oath or affirmation an officer, agent or employee of the public utility in relation to its business and affairs.

(2) A person other than a commissioner who makes the demand shall produce his or her authority to make the inspection or examination.

1989 c37 s60

Back to Top

Audit

61. (1) The board may provide for the examination and audit of all accounts, and all items shall be allocated to the accounts in the manner prescribed by the board.

(2) The agents, accountants or examiners employed by the board have authority under the direction of the board to inspect the books, accounts, papers or records and memoranda kept by a public utility.

1989 c37 s61

Back to Top

Information to be supplied

62. (1) A public utility shall provide to the board all information required by it to give effect to this Act, and shall make specific answers to all specific questions submitted by the board.

(2) A public utility receiving from the board blank forms with directions to fill them in shall fill them in so as to answer fully and correctly each question asked, and in case it is unable to answer a question it shall give a good reason for the failure, and the answers shall be verified under oath or affirmation by the president, secretary, superintendent or general manager of the public utility and returned to the board at its office within the period fixed by the board.

1989 c37 s62

Back to Top

Power to compel attendance

63. At a hearing or inquiry the board may hear evidence upon oath or affirmation and may compel the attendance before it of witnesses by subpoena signed and sealed by the chairperson or a member of the board, and may by subpoena compel the production by a witness of papers, books or documents, and a witness who is served with a subpoena and paid the fees allowed to a witness for travel and attendance in the Trial Division shall be subject to the same penalties for disobeying the subpoena as he or she would be had the subpoena been issued out of the Supreme Court, and a member of the board may administer the oath or affirmation to a witness.

1989 c37 s63

Back to Top

Valuation by board

64. (1) The board may, with the assistance of the engineers, accountants, valuators, counsel and others that it thinks advisable to employ, inquire into and determine the extent, condition and value of the whole or a portion of the property and assets of a public utility used and useful in providing or supplying a particular service to or for the public, as of a date to be fixed by the board.

(2) The board may determine the value of the property and assets of a public utility in accordance with the following rules:

(a) where the property and assets were

(i) held by the public utility before January 1, 1950, or

(ii) acquired by the public utility on or after that date, but were in physical existence before that date,

the value shall be determined on the basis of the fair depreciated value of the property and assets at that date, with subsequent depreciation;

(b) where the property and assets are new property and assets created or acquired on or after January 1, 1950, the value shall be determined on the basis of the prudent original cost, with depreciation since the date of creation or acquisition;

(c) where the property and assets are property and assets other than those referred to in paragraphs (a) and (b) and were acquired on or after January 1, 1950, the value shall be determined on the basis of the prudent cost at the time of the acquisition, with depreciation since the date of acquisition.

(3) For the purposes of this section, annual and accrued depreciation shall be calculated by the straight line method, so called, or other method that the board may prescribe.

(4) The board may make those rules and regulations to facilitate inquiries under this section that it may consider convenient, and the rules and regulations so made are binding on all public utilities.

1989 c37 s64

Back to Top

Cost of valuation

65. (1) Where the board orders

(a) a valuation to be made; or

(b) the checking of a valuation submitted to the board by or on behalf of a public utility,

the board may order that

(c) the reasonable costs and expenses of counsel, engineers, valuators, stenographers and other assistants retained and employed by the board; and

(d) expenses of the members of the board

while engaged in and about the making or checking of the valuations shall be paid by the public utility whose property and assets are the subject of the valuation.

(2) Amounts chargeable under this section may, by order of the board, be made payable as the work of making or checking the valuation proceeds and before its completion, and the certificate of the chairperson of the board is sufficient to fix on the public utility the liability for the payment of an amount certified by that chairperson to have been incurred in respect of the making or checking of the valuation.

(3) All costs and expenses in connection with the making or checking of a valuation ordered under subsection (1), including all expenses incurred by the public utility whose property is the subject of the valuation, may when the board so directs be charged to capital account and added to the rate base of the public utility.

1989 c37 s65; 1990 c62 s20

Back to Top

Information to be provided

66. (1) A public utility shall provide to the board as the board may require, maps, profiles, contracts, reports of engineers, books, accounts and other documents and records of every kind, or copies of them and a complete inventory of all its property and other particulars the board may require with a view to determining the value of the property of the public utility.

(2) The board shall keep itself informed of all extensions and improvements or other changes in the condition of the property of the utilities, and may revise and correct its valuation of the property of the public utilities.

(3) To enable the board to make the changes and corrections in its valuation, a public utility shall report correctly to the board changes in its property and file with the board copies of all contracts for changes and improvements at the time they are executed.

1989 c37 s66

Back to Top

Accounts, etc. to be provided

67. Each public utility shall provide to the board whenever required in connection with an investigation by the board, in the form and at the times that the board requires, those accounts, reports and information that show in itemized detail, depreciation, salaries, wages, legal expenses, taxes and rentals, quantity and value of material used, receipts from residuals, by-products, services, or other sales, total and net costs, net and gross profits, dividends and interest, surplus or reserve, prices paid by consumers, and in addition the other items, whether of a similar nature to those enumerated or otherwise, that the board may prescribe, in order to show completely and in detail the entire operation of the public utility in providing its product or service to the public.

1989 c37 s67

Back to Top

Depreciation

68. (1) A public utility shall make provision for proper and adequate annual depreciation of its property and assets used and useful in providing or supplying each kind of service, and shall keep proper accounts.

(2) The annual depreciation shall be calculated by the straight line method or by another method that the board may prescribe.

(3) A public utility shall report to the board the annual rates of depreciation applied to the several classes of property of the public utility.

(4) The board may ascertain and determine what are proper and adequate rates of depreciation of the several classes of property of a public utility, and the public utility shall conform its depreciation account to the rates so ascertained and determined.

(5) The board may revise the rates of depreciation as it considers necessary or expedient.

1989 c37 s68

Back to Top

Establishment of depreciation account

69. (1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.

(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.

(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.

(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

(5) An order under this section shall be made only after hearing the public utility concerned.

1989 c37 s69; 1990 c62 s20

Back to Top

Compensation for services

70. (1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

(2) In the case where a contract for block sale of electrical energy for ultimate distribution to the public is in force on June 10, 1964, and in the opinion of the board the price for a unit charged under the contract is unreasonable and not in the public interest, the board may require all parties to the contract to reform the contract in respect of the price for a unit charged to the purchaser, and this shall not invalidate the contract in other respects.

(3) In a case referred to in subsection (2), section 72 shall not apply.

1989 c37 s70

Back to Top

Approval of changes in rates

71. A public utility shall submit for the approval of the board the rules and regulations which relate to its service, and amendments to them, and upon approval by the board they are the lawful rules and regulations of the public utility until altered or modified by order of the board.

1989 c37 s71

Back to Top

Rates to be posted

72. A copy of so much of the schedule referred to in section 70 and so much of the rules and regulations referred to in section 71 as the board considers necessary for the information of the public shall be printed in plain type and kept in every office of the public utility where payments are made by the consumers or users, open to the public in the form and place that is readily accessible to the public and so as to be conveniently inspected.

1989 c37 s72

Back to Top

Equality of rates

73. (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the board may by regulation declare what shall constitute substantially similar circumstances and conditions.

(2) The taking of tolls, rates and charges contrary to this section and the regulations is prohibited.

1989 c37 s73

Back to Top

Forms of schedule may be altered

74. The board may prescribe those changes in the form in which schedules are issued by a public utility that may be expedient.

1989 c37 s74

Back to Top

Interim order

75. (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

(2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

1989 c37 s75; 1990 c62 s20

Back to Top

Board may rescind or amend order fixing rates

76. The board may upon notice to the public utility and after hearing as provided in this Act, by order rescind, alter or amend an order fixing rates, tolls, charges or schedules, or other order made by the board, and certified copies of the order shall be served and take effect as provided in this Act for original orders.

1989 c37 s76

Back to Top

Incidental sale of services to public

77. (1) Where an industrial corporation utilizes electrical power or water, whether provided, supplied, generated or collected by itself or by an allied corporation or purchased from some other producer, and where the industrial corporation provides power or water to a community associated with or adjacent to its operation, and the providing is not the primary business of the industrial corporation but is done as a matter of convenience to a part of the public not otherwise served, and the providing is not in competition with a public utility whose primary business is to provide the power or water, it shall be in the discretion of the board to exempt the industrial corporation from this Act, or to fix by agreement with the industrial corporation an arbitrary rate to be charged to the public.

(2) The intent of this section is to facilitate the common action of industrial corporations in supplying electricity or water to communities connected with them pending the establishment of ordinary public utilities, and the board shall interpret this section accordingly.

1989 c37 s77; 1998 c29 s13

Back to Top

Rate base

78. (1) Except as otherwise provided in this Act, the board may fix and determine a separate rate base for each kind of service provided or supplied to the public by a public utility, and may revise the base.

(2) In fixing a rate base the board may, in addition to the value of the property and assets as determined under section 64, include

(a) an allowance for necessary working capital;

(b) organizational expenses to the extent of the sum that the public utility establishes to the satisfaction of the board as reasonable;

(c) cost in whole or in part of land or other property and assets acquired or held in reasonable anticipation of future requirements;

(d) costs and expenses of the making or checking of valuations referred to in subsection 65 (3), but only to the extent not amortized in previous years;

(e) the part, that the board may determine, of the cost of energy, water, steam, heat or other distributable thing purchased by the public utility, either as supplementary to or instead of its own production;

(f) the part, that the board may determine, of the money paid for the use of plant or equipment leased, hired or shared by the public utility, either as supplementary to or instead of its own plant or equipment;

(g) an allowance, as determined by the board, for the costs of a plant of a public utility under construction;

(h) other fair and reasonable expenses which

(i) the board thinks appropriate and basic to the public utility's operation, and

(ii) has, with the approval of the board, been charged to capital account,

but the expenses shall be allowed only to the extent not amortized in previous years.

(3) For the purposes of this section, the board, from the appraised value of the property of the public utility concerned,

(a) shall exclude the value of a franchise, licence, permit or concession obtained or held by the public utility from or under a municipality or other public authority beyond the money paid to the municipality or other public authority as consideration for the franchise, licence, permit or concession; and

(b) may exclude

(i) contributions in aid of construction or acquisition of property or assets,

(ii) deferred income taxes, and

(iii) other amounts which the board considers it fair and just to exclude.

1989 c37 s78; 1990 c62 s20

Back to Top

Utilities supplying more than 1 type of service

79. (1) Where a public utility provides or supplies more than 1 kind of service, the board, unless it determines to treat the public utility as providing 1 kind of service, shall segregate those kinds of services into distinct classes of service, and for the purpose of determining the rate base for a particular service provided or supplied, and for the purposes of annual and other returns or reports to be made to the board, each distinct class or category of service shall be considered as a separate and self-contained unit, the rate base for which shall be determined and fixed without regard to the rate base determined and fixed for another class.

(2) The board may, to the extent that it thinks appropriate, take into account distinct areas served by a public utility with a view to ensuring that the rates applicable in each area are adequate in that they yield a fair and reasonable return on the appraised value of the property of the public utility used, or reasonably acquired, for the purpose of providing the service in that area.

(3) Where the board is considering a special area, it may take into account the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.

1989 c37 s79

Back to Top

Annual earnings

80. (1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside

annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.

(3) Reasonable payments each year to former employees of a public utility who have retired and are receiving payments of supplemental income from the public utility are expenses that the board may allow as reasonable and prudent and properly chargeable to the operating account of the public utility.

(4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

1989 c37 s80

Back to Top

Rate base in respect of water and sewage systems

81. A public utility that is a city, a municipality or local improvement district or a town, community, region or local service district established or continued under the *Municipalities Act* or a local public commission or board constituted by or under an Act of the Legislature which owns, operates, manages or controls in the province equipment and facilities for the collection, storage, transmission or providing of water through mains directly or indirectly to the public for compensation and owns, operates, manages or controls in the province equipment and facilities for the collection, treatment or disposal of sewage through mains directly or indirectly for or from the public for compensation shall for the purpose of fixing a rate base be considered to be or supplying one kind of service.

1989 c37 s81

Back to Top

Investigation by board

82. Where the board believes that a rate or charge is unreasonable or unjustly discriminatory, or that a reasonable service is not supplied, or that an investigation of a matter relating to a public utility should be made, it may, of its own motion, summarily investigate the rate or charge or matter with or without notice.

1998 c29 s14

Back to Top

Board may recommend legislation

83. Where a public utility or person proposes a change in a law relating directly or indirectly to the property or operations of a public utility, the proposed change may be submitted to the board, and the board may take evidence and give public hearings, and the board may recommend the bills that will in its judgment protect the interests of the public and the public utility, and transmit the bills to the attorney general.

1989 c37 s83

Back to Top

Power and procedure of board upon complaint

84. (1) Upon a complaint made to the board against a public utility by an incorporated municipal body or the Newfoundland and Labrador Federation of Municipalities or by 5 persons, firms or corporations, that the rates, tolls, charges or schedules are unreasonable or unjustly discriminatory or that a regulation, measurement, practice or act affecting or relating to the operation of a public utility is unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the board shall proceed, with or without notice, to make the investigation that it considers necessary or expedient.

(2) The board may order the rates, tolls, charges or schedules reduced, modified or altered, and make other orders as to the reduction, modification or change of the regulation, measurement, practice or acts that the case may require, and may order on the terms and subject to the conditions that are just that the public utility provide reasonably adequate service and facilities and make extensions that may be required, but an order shall not be made or entered by the board without a public hearing or inquiry.

(3) The board, when called upon to institute an investigation, may require from the complainants the deposit of a reasonable amount of money or other security to cover the costs of the investigation, which money or security shall be dealt with as the board directs, should the decision be given against the complainants.

1989 c37 s84

Back to Top

Notice to public utility

85. The board shall, before the hearing referred to in section 84, notify the public utility complained of that a complaint has been made and after reasonable notice has been given, the board may proceed to set a time and place for a hearing and an investigation as provided in this Act.

1989 c37 s85

Back to Top

Notice of hearing

86. The board shall give the public utility and the complainant 10 days' notice of the time and place of the hearings and investigation referred to in section 85 and the matters considered and determined and both the public utility and the complainant are entitled to be heard and to have process to enforce the attendance of witnesses.

1989 c37 s86

Back to Top

Powers of board when rates found unjust

87. (1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

(2) Where upon investigation it is found that a regulation, time schedule, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or in violation of this Act, or where it is found that reasonable service is not supplied, the board has power to determine and substitute other regulations, time schedules, service or acts and to make the changes in the regulations, time schedules, service or acts that are reasonable.

(3) Upon an investigation for the purpose of determining upon and requiring a reasonable extension of lines, or of service, the board has power to fix, determine, and require an extension to be made and the terms and conditions upon which it shall be made, but a hearing shall not be held

and an order shall not be made respecting the extension, without notice to the public utility affected as provided in this Act.

1989 c37 s87

Back to Top

Formal hearing

88. Where after making a summary investigation, the board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to matters so investigated, it shall provide the public utility interested with a statement notifying the public utility of the matters under investigation and 10 days after the notice has been given the board may set a time and place for a hearing and an investigation as provided in this Act.

1989 c37 s88

Back to Top

Notice of formal hearing

89. Notice of the time and place for the hearing referred to in section 88 shall be given to the public utility and to other interested persons that the board considers necessary as provided in this Act and proceedings shall be held and conducted in reference to the matter investigated in the same manner as complaints filed with the board are investigated, and the same order may be made as if the investigation had been made on complaint.

1989 c37 s89

Back to Top

Costs

90. (1) The costs of and incidental to a proceeding before the board shall be in the discretion of the board, and may be fixed at a definite amount, or may be taxed and the board may order by whom they are to be taxed and to whom they are to be allowed and the board may prescribe a scale under which costs shall be taxed.

(2) All expenses in connection with inquiries held by the board, including costs of counsel, engineers, valuators, stenographers, accountants and other assistants employed by the board as well as the salaries and expenses of the members of the board while employed in and about the inquiry shall, where the board so orders, be paid by the public utilities concerned in the inquiry.

(3) Where an order for payment of expenses under subsection (2) is made against 2 or more public utilities, the expenses shall be apportioned among them in proportion to their gross earnings in the year before the year in which the inquiry was terminated.

1989 c37 s90

Back to Top

Approval of security issues

91. (1) A public utility shall not issue shares, which for the purposes of this section shall include preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than 1 year from the date of issue, except as provided in subsection (2) until it has obtained approval from the board for the proposed issue; except that

(a) without the approval of the board and for the purpose of enabling a public utility to organize, it may make a 1st issue of its shares for cash for a value not exceeding $10,000; and

(b) without the further approval of the board a public utility may issue shares upon the exercise of an optional right of conversion attaching to shares, stocks, bonds, debentures, debenture stocks or other evidence of indebtedness previously approved by the board.

(2) Applications to the board by a public utility for approval of an issue of its shares, stocks, bonds, debentures or other evidence of indebtedness, shall comply with and conform to the rules of procedure of the board.

(3) In considering an application under subsection (2), the board may, in its discretion, hold a public hearing, and where the board is satisfied that the proposed issue by a public utility of its shares, stocks, bonds, debentures or other evidence of indebtedness is to be made in accordance with law and for a purpose approved by the board, the board shall make an order approving the proposed issue to the amount that it considers appropriate, and shall prescribe the purpose to which the issue or the proceeds of the issue are to be applied.

(4) The board may grant its approval under this section for the proposed issue in the amount applied for, or in a lesser amount, and subject to the conditions that it may consider reasonable and necessary to impose.

(5) Without first obtaining the approval of the board,

(a) a public utility shall not make a material alteration in the characteristics of its stocks or shares, or its bonds, debentures, securities, or other evidence of indebtedness as those characteristics are described by the board in granting its approval of the issue; and

(b) a public utility which has, either with the approval of the board or before the time when the approval was required, made an issue of stocks or shares, or of bonds, debentures, securities, or other evidence of indebtedness payable in more than 1 year from the date of issue shall not increase a fixed dividend or interest rate or extend a maturity date concerning the issue, restrict the public utility's right to redeem the issue, or increase the premium to be paid on redemption of the issue.

(6) A municipality shall not be considered to be a public utility within the meaning of this section.

1989 c37 s91; 1990 c62 s20; 1998 c29 s15

Back to Top

Division of surplus profits

92. (1) Nothing in this Act shall be taken to prohibit a public utility from entering into a reasonable arrangement with its employees for the division or distribution of its surplus profits.

(2) An arrangement shall not be lawful until it is found by the board, after investigation, to be reasonable and consistent with this Act, and the arrangement shall be under the supervision and regulation of the board.

1989 c37 s92

Back to Top

Powers of commissioners

93. (1) A commissioner for the purposes mentioned in this Act, shall have power to administer oaths and affirmations, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

(2) In case of failure on the part of a person to comply with a subpoena or on the refusal of a witness to testify to a matter regarding which the witness may be interrogated before the board or a commissioner, it shall be the duty of the Trial Division, on application of the board or a commissioner, to compel obedience in the manner that the Trial Division thinks appropriate.

1989 c37 s93

Back to Top

Effect of judgment of courts

94. In determining a question of fact, the board is not bound by the finding, order or judgment of a court in a suit, prosecution or proceeding involving the determination of the fact, but the finding, order or judgment shall in proceedings before the board, be presumptive evidence only.

1989 c37 s94

Back to Top

Jurisdiction not affected by pending suit

95. The pending of a suit, prosecution or proceeding in a court involving questions of fact shall not deprive the board of jurisdiction to hear and determine the same questions of fact.

1989 c37 s95

Back to Top

Evidence taken as in Supreme Court

96. The board may, in an investigation, take the evidence of witnesses living within or outside the province in the manner prescribed by law for similar evidence in civil actions in the Trial Division.

1989 c37 s96

Back to Top

Record of proceedings to be kept

97. A full and complete record shall be kept of all proceedings held before the board on formal investigations and all testimony shall be recorded in the manner ordered by the board.

1998 c29 s16

Back to Top

Obligation to testify

98. A person shall not be excused from testifying or from producing books, accounts, papers, records and documents in a proceeding based upon or growing out of a violation of this Act for the reason that the evidence, documentary or otherwise, required of the person may tend to incriminate or to subject him or her to penalty or forfeiture, but a person having so testified shall not be prosecuted or subjected to a penalty or forfeiture for a transaction, matter or thing concerning which the person may have testified or produced documentary evidence.

1989 c37 s98

Back to Top

Appeal from decision of board

99. (1) An appeal lies to the Court of Appeal from an order of the board upon a question as to its jurisdiction or upon a question of law, but the appeal can be taken only by leave of a judge of the court, given upon an application presented within 15 days after the making of the decision and upon

the terms that the judge may determine.

(2) Notice of the application shall be given to the parties or their solicitor and to the board at least 2 clear days before the presentation of the application.

1989 c37 s99; 1992 c48 s21

Back to Top

Procedure on appeal

100. (1) Where the application for appeal has been granted, the appeal shall be brought by notice served on the chairperson or vice-chairperson of the board within 10 days after the permission to appeal has been granted.

(2) The notice shall contain the names of the parties and the date of the order appealed from and after the notice has been filed and within 10 days, a copy of the notice shall be served upon the adverse party by the party appealing.

(3) An appeal does not operate as a stay of proceedings of an order of the board except as ordered by the board.

1989 c37 s100

Back to Top

Stated case

101. The board may of its own motion or upon the application of a party, and upon the security being given as the board directs state a case in writing for the opinion of the Court of Appeal upon a question which in the opinion of the board is a question of law and a similar reference may also be made at the request of the Lieutenant-Governor in Council.

1989 c37 s101

Back to Top

Court to determine questions of law

102. The Court of Appeal shall hear and determine the question of law arising in a case stated under section 101 and remit the matter to the board with the opinion of the court attached.

1989 c37 s102

Back to Top

Disobedience of order of board

103. (1) A public utility that fails to obey an order of the board made under this Act is liable, on summary conviction, to a fine of not less than $200 and not more than $5,000.

(2) Where it is proved that a public utility has failed to obey an order of the board made under this Act, the president and every vice-president, director, managing director, and superintendent of that public utility is liable, on summary conviction, to a fine of not less than $200 and not more than $5,000, unless the person proves that he or she took all necessary and proper means to carry out the order of the board, and that he or she was not at fault for the failure to obey the order.

(3) Where it is proved that a municipal corporation has failed to obey an order of the board made under this Act, the mayor, or other head of that corporation, and every member of the council, or other ruling or executive body of the corporation, is liable, on summary conviction, to a fine of not less than $200 and not more than $5,000, unless the person proves that he or she took all

necessary and proper means to carry out the order of the board, and that he or she was not at fault for the failure to obey the order.

(4) Nothing in or done under this section shall lessen or affect the liability of a public utility or prevent or prejudice the enforcement of an order of the board.

1998 c29 s17

Back to Top

Penalty for false statement

104. A director, president, secretary or other official of a public utility who makes a false statement to the board to secure the issue of a share, stock, certificate of stock, bond, mortgage, or other evidence of indebtedness, or who, by a false statement knowingly made, procures of the board the making of the certificate provided for in this Act or with knowledge of the fraud, issues or negotiates the share, stock, certificate of stock, bond, mortgage or other evidence of indebtedness in violation of this Act is liable to a fine of not less than $2,500, or to imprisonment for a term of not less than 1 year, or to both a penalty and imprisonment, in the discretion of the court.

1989 c37 s104; 1998 c29 s18

Back to Top

Penalty for unjust discrimination

105. Where a public utility or its agent or officer directly or indirectly charges a person, firm or corporation a greater or less compensation for a service rendered by it than that prescribed in the public schedules or tariffs established, as provided in this Act, or than it charges another person, firm or corporation other than one conducting a similar business for a similar and contemporaneous service, the public utility is guilty of the offence of unjust discrimination, and upon conviction is liable to a fine of not less than $250 for each offence and the agent or officer so offending is upon conviction liable to a fine of not less than $125 for each offence.

1989 c37 s105; 1998 c29 s19

Back to Top

Penalty for accepting unauthorized compensation

106. A public utility shall not charge a person, firm or corporation less compensation for a service rendered by the public utility in consideration of the providing by the person, firm or corporation of a part of the facilities incident to the service, but this shall not prohibit a public utility from renting facilities incident to the production, transmission, delivery or providing of heat, light, water or power and paying a reasonable rental, or require a public utility to provide a part of those appliances which are situated in and upon the premises of a consumer or user, and unless otherwise ordered by the board, meters and appliances for measurement of a product or service.

1989 c37 s106; 1998 c29 s20

Back to Top

Penalty for undue preference or prejudice

107. Where a public utility knowingly or wilfully makes or gives an undue or unreasonable preference or advantage to a particular person, firm or corporation, or subjects a particular person, firm or corporation to an undue or unreasonable prejudice or disadvantage, the public utility is guilty of the offence of unjust discrimination and a person, firm or corporation violating this section is on conviction liable to a fine of not less than $250 for each offence.

1989 c37 s107; 1998 c29 s21

Back to Top

Penalty for soliciting or receiving rebate

108. (1) A person, firm or corporation shall not knowingly solicit or receive a rebate, concession or discrimination in respect of a service in or affecting or relating to a public utility by which the service is rendered free or at a lesser rate than that named in the schedules and tariffs in force as provided in this Act, or by which a service or advantage is received other than as specified in this Act.

(2) A person, firm or corporation violating this section shall on conviction be liable to a penalty of not less than $125 for each offence.

1989 c37 s108; 1998 c29 s22

Back to Top

Penalty for failure to complete forms

109. (1) An officer, agent or employee of a public utility who fails to fill out and return a form as required by this Act, or fails to answer a question in the form, or wilfully gives a false answer to a question, or evades the answer to a question where he or she had the means of ascertaining the fact inquired of, or who, upon proper demand, fails to exhibit to the board or a commissioner, or an authorized person a book, paper, account, record or memoranda of the public utility, which is in his or her possession or control, or who fails to use properly and keep a system of accounting as prescribed by the board under this Act, or who refuses to do an act or thing in connection with the system of accounting when so directed by the board or its authorized representative is upon conviction liable to a fine of not less than $1,000 for each offence.

(2) A fine of not less than $2,500 shall on conviction be imposed on the public utility for each offence under subsection (1) where the officer, agent or employee acted in obedience to the direction, instruction or request of the public utility or an officer.

1989 c37 s109; 1998 c29 s23

Back to Top

Penalty for destruction of apparatus of board

110. A person who destroys, injures or interferes with an apparatus or appliance owned or operated by or in the charge of the board or its agents, is upon conviction, liable to a fine not exceeding $500 or imprisonment for a period not exceeding 30 days, or to both a fine and imprisonment.

1989 c37 s110; 1998 c29 s24

Back to Top

General penalty

111. (1) A public utility or person who

(a) contravenes; or

(b) interferes with or obstructs an officer, agent or employee of the board in the discharge of duties under

this Act or the regulations is guilty of an offence and liable on summary conviction, where no penalty is otherwise provided, to a fine of not less than $100 and not more than $5,000.

(2) The conviction of a public utility or person under subsection (1) does not operate as a bar to further prosecution for the continued contravention of this Act or the regulations.

1989 c37 s111; 1998 c29 s25

Back to Top

Separate offence

112. Every day during which a public utility, or its officer, agent or employee knowingly fails to observe and comply with an order of the board, or to perform a duty required by this Act, constitutes a separate and distinct violation of the order or of this Act.

1989 c37 s112

Back to Top

Enforcement of penalties

113. (1) The penalties prescribed by this Act may be recovered or enforced

(a) by civil action or proceeding at the suit of the Attorney General, or of a private party with the consent of the Attorney General, in a court having jurisdiction to the amount of the penalty in cases of simple contract; or

(b) with similar consent under the *Small Claims Act* or the *Summary Proceedings Act.*

(2) An action or proceeding for the violation of this Act shall not be started after the expiration of 3 years from the time of the violation.

1989 c37 s113; 1990 c62 s20

Back to Top

Rep. by 1996 cR-10.1 s61

114. [Rep. by 1996 cR-10.1 s61]

1996 cR-10.1 s61

Back to Top

Establishment of pension scheme for commissioners

115. (1) The Lieutenant-Governor in Council may establish a pension scheme for the award of a pension to a commissioner who is not eligible to receive a pension or gratuity under the *Public Service Pensions Act* or under a pension scheme established under section 114 or to a surviving spouse or both of them.

(2) Pensions awarded under a pension scheme established under this section shall be paid out of the funds of the board.

(3) In a pension scheme established under this section specific provision may be made requiring commissioners to pay contributions towards their pensions but in the absence of a specific provision pensions shall be awarded and paid on a non-contributory basis.

(4) The Lieutenant-Governor in Council may prescribe

(a) the period of service to be done by a commissioner before a pension may be awarded to or in respect of him or her;

(b) the remuneration of commissioners which may be taken into account in calculating pensions;

(c) the basis for the determination of the amounts of pensions and the method for calculating those amounts;

(d) the minimum and maximum amounts of pensions which may be awarded;

(e) the contributions towards pensions to be paid by commissioners, the amounts of those contributions and the time and manner of payment;

(f) all other terms and conditions upon which pensions shall be awarded and paid;

(g) providing for counting towards a pension all or a part of the full time service done by a commissioner before the pension scheme was established; and

(h) generally for matters connected with the pension scheme under this section.

(5) Where there is an increase in pensions under the *Public Services Pensions Act,* the Lieutenant-Governor in Council may increase pensions payable under this section by the same percentage, subject to the same minimum and maximum amounts of increase, as pensions under that Act.

(6) For the purposes of this section "pension" includes a gratuity.

1989 c37 s115; 1996 cR-10.1 s61

Back to Top

Rep. by 1996 cR-10.1 s61

116. [Rep. by 1996 cR-10.1 s61]

1996 cR-10.1 s61

Back to Top

Consumer advocate

117. (1) The Lieutenant-Governor in Council may appoint a consumer advocate under this Act upon those terms and conditions that the Lieutenant-Governor in Council may determine.

(2) Rep. by 1996 cR-10.1 s61

(3) All costs relating to the consumer advocate shall be borne by the board.

1989 c37 s117; 1996 cR-10.1 s61

Back to Top

Act to be liberally construed

118. (1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.

(2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

(3) A substantial compliance with the requirements of this Act is sufficient to give effect to all the rules, orders, acts and regulations of the board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature.

1989 c37 s118

Back to Top

This Act to prevail

119. (1) A general, special, public or private Act, whenever enacted, relating to a public utility, as defined by this Act, shall be read and construed as subject in all respects to this Act, and where the general, special, public or private act conflicts with this Act, this Act shall prevail.

(2) Subsection (1) shall not apply where and to the extent that this Act has been specifically excluded from a general, special, public or private Act.

1989 c37 s119

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1998 CarswellNfld 150

Newfoundland (Board of Commissioners of Public Utilities), Re

In The Matter of Section 101 of the Public Utilities Act, R.S.N. 1990, c. P-47

In The Matter of a case stated by the Board of Commissioners of Public Utilities to the Court of Appeal for its hearing consideration and opinion on questions of law affecting the jurisdiction of the Board of Commissioners of Public Utilities

Newfoundland Court of Appeal

O'Neill, Cameron, Green JJ.A.

Heard: March 11, 1997
Heard: March 12, 1997
Judgment: June 15, 1998
Docket: 96/141

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Subject: Public; Civil Practice and Procedure

Public utilities — Regulatory boards — Regulation of rates

Utilities board stated case to Court of Appeal for determination of "just and reasonable" return on rate base of utility — Board had jurisdiction to fix rate of return that public utility could earn annually — Board did not have jurisdiction to fix rate of return on common equity or shares — Board had jurisdiction to set rate of return as range — Board had broad jurisdiction to regulate how excess revenue was dealt with in situation where utility earned rate of return greater than that determined to be just and reasonable — Board had jurisdiction to define excess revenue for purpose of maintenance of reserve account and set out how excess, if not ordered to be paid into reserve account, was dealt with — In setting rate, board had jurisdiction to consider type and level of projected expenses of utility and determine whether such expenses were reasonable — Board did not have jurisdiction to require public utility to maintain debt-equity ratio or ratio within stated range — Board did not have jurisdiction to require utility to obtain its capital requirements by issue of specific financial instruments — Board did not have jurisdiction to intrude into day to day financial or managerial decision-making of utility with respect to capital structure.

The Board of Commissioners of Public Utilities stated at case to the Court of Appeal with respect to the jurisdiction

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

and powers of the board as they affected the board's approach to the determination of a "just and reasonable" return on the rate base of a utility. A number of question were posed.

Held: The board had broad jurisdiction with respect to the determination of a just and reasonable return on the rate base of a utility.

Per Green J.A. (Cameron J.A. concurring): The board had jurisdiction to fix the rate of return that a public utility could earn annually but it did not have jurisdiction to fix the rate of return on common equity or shares. The board had jurisdiction to set the rate of return as a range and it had broad jurisdiction to regulate how any excess revenue was dealt with in a situation where the utility earned a rate of return greater than that determined to be just and reasonable. The board had jurisdiction to define what excess revenue was for the purpose of maintenance of a reserve account and had the jurisdiction to set out how that excess, if not ordered to be paid into the reserve account, was dealt with. In setting the rate, the board had jurisdiction to consider the type and level of projected expenses of a utility and to determine whether such expenses were reasonable. The board did not have the jurisdiction to require a utility to obtain its capital requirements by issue of specific financial instruments, nor did it have jurisdiction to intrude into the day to day financial or managerial decision-making of a utility with respect to its capital structure.

Per O'Neill J.A. (dissenting): The determination of the rate on common shares of a utility is very much a part of the rate making process. Rates to be charged should provide sufficient revenue to enable the producer or retailer of the power to earn a just and reasonable return so that it is able to achieve and maintain a sound credit rating in the world's financial markets. The board had the jurisdiction to fix the rate of return on the rate base as well as the rate on common shares. Revenues generated after the rates, tolls and charges were set belonged to the utility and thus the board did not have the jurisdiction to order rebates to customers. The Board did not have the jurisdiction to set rates in a manner that would compensate for prior excess earnings.

Cases considered by *Green, J.A.*:

Acker v. United States (1936), 298 U.S. 426, 56 S. Ct. 824, 80 L. Ed. 1257 (U.S. Ill.) — considered

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

Bell Telephone Co. of Canada, Re (1966), 56 B.T.C. 535 — considered

Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia (1923), 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176, P.U.R. 1923D 11 (U.S. W. Va.) — considered

British Columbia Electric Railway v. British Columbia (Public Utilities Commission), [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 (S.C.C.) — considered

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

Federal Power Commission v. Hope Natural Gas Co. (1944), 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333, 51 P.U.R. (N.S.) 193 — considered

Montana-Dakota Utilities Co. v. Northwestern Public Service Co. (1951), 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912, 88 P.U.R. (N.S.) 129 (U.S. S.D.) — considered

Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board) (1987), 25 Admin.

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

L.R. 180, 37 D.L.R. (4th) 35, 63 Nfld. & P.E.I.R. 335, 194 A.P.R. 335 (Nfld. C.A.) — considered

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

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

Wabush (Town) v. Power Distribution District of Newfoundland & Labrador (1988), 71 Nfld. & P.E.I.R. 29, 220 A.P.R. 29 (Nfld. C.A.) — considered

Statutes considered by *Green, J.A.*:

Electrical Power Control Act, 1994, S.N. 1994, c. E-5.1

s. 3(a) — considered

s. 3(a)(i) — considered

s. 3(a)(ii) — considered

s. 3(a)(iii) — considered

s. 3(b) — considered

s. 3(b)(i) — considered

s. 3(b)(ii) — considered

s. 3(b)(iii) — considered

s. 4 — considered

Public Utilities Act, R.S.N. 1990, c. P-47

s. 16 — considered

s. 37(1) — considered

s. 58 — considered

s. 59 — considered

s. 59(2) — referred to

s. 64(1) — considered

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s. 64(2) — considered

s. 68(4) — considered

s. 69 — considered

s. 69(3) — considered

s. 70 — considered

s. 70(1) — considered

s. 75 — considered

s. 75(3) — considered

s. 76 — considered

s. 78(1) — considered

s. 78(2) — considered

s. 78(2)(h) — considered

s. 80 — considered

s. 80(1) — considered

s. 80(2) — considered

s. 80(4) — considered

s. 84(1) — considered

s. 84(2) — considered

s. 87(1) — considered

s. 91 — considered

s. 91(1) — considered

s. 91(3) — considered

s. 91(5)(a) — considered

s. 101 — pursuant to

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s. 102 — referred to

s. 117 — considered

s. 118 — considered

s. 118(2) — considered

Statutes considered by *O'Neill, J.A.*:

Electrical Power Control Act, 1994, S.N. 1994, c. E-5.1

Generally — considered

s. 3 — considered

s. 4 — considered

Public Utilities Act, R.S.N. 1990, c. P-47

Generally — considered

s. 16 — considered

s. 37 — considered

s. 37(1) — considered

s. 58 — considered

s. 59 — considered

s. 69 — considered

s. 69(1) — considered

s. 69(2) — considered

s. 69(3) — considered

s. 69(4) — considered

s. 70 — considered

s. 70(1) — considered

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s. 76 — considered

s. 80 — considered

s. 80(1) — considered

s. 80(2) — considered

s. 80(4) — considered

s. 84(1) — considered

s. 85 — considered

s. 86 — considered

s. 87(1) — considered

s. 91 — referred to

s. 101 — pursuant to

RULING on stated case.

***Green, J.A.*:**

1 The Board of Commissioners of Public Utilities has stated a case for the opinion of this Court, pursuant to s. 101 of the *Public Utilities Act*[FN1]. The questions posed concern the jurisdiction and powers of the Board as they affect the approach of the Board to the determination of a "just and reasonable return" on the rate base of a utility, as well as related matters.

The Stated Case in Context

2 The Board is the statutory body which has the authority and duty for the "general supervision of all public utilities" in Newfoundland and Labrador and in the course of exercising that supervisory role has general authority to "make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law" and, as well, it has the right "to obtain from a public utility all information necessary to enable the Board to fulfil its duties"[FN2].

3 One of the Board's primary functions with respect to electrical utilities is the regulation and approval of rates, tolls and charges[FN3]. In so doing, the Board must take account of the statutory requirement that the utility is entitled to earn annually a "just and reasonable return" as determined by the Board on the rate base as fixed and determined by the Board.[FN4] The process essentially involves the fixing and determining of the appropriate rate base, the determination of a "just and reasonable return" on that rate base and then the approval of a schedule of rates, tolls and charges that would be appropriate to generate the revenue which, in the Board's estimation, would be necessary to provide the determined rate of return. Once rates, tolls and charges are set by the Board they continue to apply until altered under the Act, as a result of a reapplication by the utility for an increase, a complaint by the public or an order for a reexamination initiated by the Board itself.

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4 It is important to remember, however, that in addition to its periodic adjudicative role which itself involves a large measure of policy implementation in arriving at its decisions, the Board has, because of its duty of "general supervision of all public utilities", an ongoing supervisory role of the activities of the utility between hearings as well, which is facilitated by statutory requirements for periodic reporting of financial information to the Board.

5 In 1991 the Board made Orders[FN5] determining a just and reasonable return for Newfoundland Light and Power Co. Ltd.[FN6] and approving a schedule of rates, tolls and charges based on estimated revenue requirements necessary to cover operating expenses and to provide that level of return. The essential features of the 1991 order determining the just and reasonable rate of return were that:

(a) The just and reasonable return was determined to be between a stated range (10.6% - 11.19%) of the company's average rate base;

(b) The rate base was determined on the basis of a hypothetical test year (1992);

(c) The Board determined that the just and reasonable return, as defined, would provide an opportunity to NLP to earn a rate of return on common equity between a certain stated range (13% to 13.5%);

(d) The schedule of rates, tolls and charges was determined applying a rate of return equal to the mid-point between the stated range of returns on rate base;

(e) The Board ordered that a particular capital structure of NLP be adopted and continue to be the basis of NLP's financial plan.

6 The Board had previously adopted a policy allowing NLP to retain earnings above the allowed range of return on rate base, provided those earnings were within the allowed range of rates of return on common equity. Where the earnings exceeded the allowed rate of return on common equity, the Board, in purported exercise of its statutory powers to regulate NLP's accounting procedures, as well as other powers, required NLP to set up a reserve account in which these excess earnings would be held and dealt with in accordance with subsequent direction by the Board.

7 In April of 1996, NLP petitioned the Board for another order fixing and determining a new rate base, determining a just and reasonable return and approving a revised schedule of rates, tolls and charges, amongst other matters. One of the parties represented at the hearing was the "Consumer Advocate", who was appointed[FN7] by the Government of Newfoundland and Labrador to represent the interests of domestic and general service consumers in respect of the rate hearing.

8 During the years between the making of the 1991 orders and the 1996 hearing, NLP had filed annual returns with the Board, as required by s-s. 59(2) of the Act, which indicated that in the years 1991, 1992 and 1993 the company's rate of return on rate base was in excess of the range determined in the 1991 Order. However, as calculated by NLP, the rate of return on common equity was always within the range that had been stipulated by the Board. The rates of return on rate base and on common equity were calculated based on actual expenses and on the actual capital structure of NLP.

9 In its periodic reports to the Board, NLP disclosed that its actual advertising costs in 1992 exceeded the amounts projected to the Board as a forecast for 1992 which had been approved as reasonable and prudent by the Board in its 1991 Order in the course of fixing and determining the rate base.

10 During the course of the 1996 hearing, certain submissions were made to the Board respecting, amongst other things,

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

(a) whether NLP should be regarded as having earned revenue in excess of its allowed range of rate of return where its rate of return on common equity was nevertheless within the stated allowable range;

(b) whether the manner of calculation of excess revenue and the proposed manner of the disposition of any excess was permitted;

(c) whether NLP could and should be required to alter its capital structure so as to obtain its capital requirements in a manner other than the way in which it was presently doing;

(d) whether the Board could and should take account, in setting future rates, of past expenditures which were in excess of amounts deemed reasonable and prudent at the time of a previous hearing.

11 Questions arose as to the jurisdiction and power of the Board to entertain and act on the sorts of submissions that were made. This prompted the Board to state the current case to this Court. NLP and the Consumer Advocate were granted standing to appear and be heard at the hearing.

The Specific Questions

12 The Stated Case poses for consideration by this Court the following questions:

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

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(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

(7) Does the Board have jurisdiction to require a public utility to maintain:

(i) a ratio; or

(ii) a ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

Although the questions are stated above as they appear in the Stated Case filed with the Court, there are several obvious typographical errors in the language used. This was recognized by the participants in references to the questions in their written arguments. In particular "supplied" was at times substituted for the word "applied" in questions 1(i), 3(i) and 4(i) and "base rate" in Question 3(i) was replaced by "rate base." In addition, the phrase "In the event that a public utility should ..." at the beginning of Question 3 was used at times in the written submissions in preference to the phrase "Should a public utility ..." Nothing turns on these informal changes. They do, however, make the import of the questions clearer and I will interpret the questions in that light.

The Legislative Framework

13 The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or im-

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pliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

14 While a number of specific provisions of the Act and related legislation will have to be referred to in the course of this opinion, certain legislative provisions, which are central to this analysis, can be conveniently set forth here:

Public Utilities Act

58. The board may prescribe the form of all books, accounts, papers and records to be kept by a public utility and a public utility shall keep its books, accounts, papers and records and make its returns in the manner and form prescribed by the board and comply with all directions of the board relating to those books, accounts, papers, records and returns.

69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.

(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.

(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.

(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

(5) An order under this section shall be made only after hearing the public utility concerned.

70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

75.(1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

(2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

76. The board may upon notice to the public utility and after hearing as provided in this Act, by order rescind, alter or amend an order fixing rates, tolls, charges or schedules, or other order made by the board, and certified copies

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of the order shall be served and take effect as provided in this Act for original orders.

78.(1) Except as otherwise provided in this Act, the board may fix and determine a separate rate base for each kind of service provided or supplied to the public by a public utility, and may revise the base.

(2) In fixing a rate base the board may, in addition to the value of the property and assets as determined under section 64, include

. . . . .

(h) other fair and reasonable expenses which

(i) the board thinks appropriate and basic to the public utility's operation, and

(ii) has, with the approval of the board, been charged to capital account,

but the expenses shall be allowed only to the extent not amortized in previous years.

80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.

(3) Reasonable payments each year to former employees of a public utility who have retired and are receiving payments of supplemental income from the public utility are expenses that the board may allow as reasonable and prudent and properly chargeable to the operating account of the public utility.

(4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

84.(1) Upon a complaint made to the board against a public utility by an incorporated municipal body or the Newfoundland and Labrador Federation of Municipalities or by 5 persons, firms or corporations, that the rates, tolls, charges or schedules are unreasonable or unjustly discriminatory or that a regulation, measurement, practice or act affecting or relating to the operation of a public utility is unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the board shall proceed, with or without notice, to make the investigation that it considers necessary or expedient.

(2) The board may order the rates, tolls, charges or schedules reduced, modified or altered, and make other orders as to the reduction, modification or change of the regulation, measurement, practice or acts that the case may require, and may order on the terms and subject to the conditions that are just that the public utility provide reasonably adequate service and facilities and make extensions that may be required, but an order shall not be made or entered by the board without a public hearing or inquiry.

87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable,

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insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

91.(1) A public utility shall not issue shares, which for the purposes of this section shall include preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than 1 year from the date of issue, except as provided in subsection (2) until it has obtained approval from the board for the proposed issue;...

. . . . .

(3) After hearing the application and where satisfied that the proposed issue by a public utility of its shares, stocks, bonds, debentures or other evidence of indebtedness is to be made in accordance with law and for a purpose approved by the board, it is the duty of the board to make an order approving the proposed issue to the amount that it considers appropriate, and also to prescribe the purpose to which the issue or the proceeds of the issue are applied.

. . . . .

(5) Without first obtaining the approval of the board,

(a) a public utility shall not make a material alteration in the characteristics of its stocks or shares, or its bonds, debentures, securities, or other evidence of indebtedness as those characteristics are described by the board in granting its approval of the issue;...

Electrical Power Control Act, 1994[FN8]

3. It is declared to be the policy of the province that

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

(iii) should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world, and

. . . . .

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

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> (iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service,...
>
> . . . . .
>
> 4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

Approach to Interpretation

15 The Court was not referred to any decisions in this or other jurisdictions which directly addressed, let alone answered, the specific types of questions which have been posed. To answer the questions, therefore, it is necessary to develop a theoretical frame of reference within the context of the general language of the existing legislation so as to determine the approach to be taken to its application in concrete situations.

16 It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice[FN9]. This approach follows from s. 118 of the Act which provides:

> 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
>
> (2) The Board created has, in addition to the power specified in this Act, all additional implied and incidental powers which may be appropriate or necessary to carry out the powers specified in this Act.
>
> (3) A substantial compliance with the requirements of this Act is sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature.

17 In addition, the EPC Act[FN10], provides that the Board, in carrying out its duties and exercising its powers under the *Public Utilities Act* must implement the power policy of the province, as declared in s. 3 of the Act, and in so doing must "apply tests which are consistent with generally accepted sound public utility practice".

18 It follows from these provisions that a literal and technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation[FN11] as well as the power policy of the province and be consistent with generally accepted sound public utility practice.

19 In answering the questions posed, therefore, it is necessary to identify generally accepted principles of sound public utility practice and to give to the legislation an interpretation which follows those principles and advances the stated legislative policy of the Province.

20 The trade off for the regulation by the state of the rates, tolls and charges of monopolistic utilities in the interests of consumers is the statutory recognition that the utility should be entitled to earn a fair return for its efforts. Although differing in details, the regulatory statutory regimes existing throughout North America can, as a generalization, be said to be broadly similar in approach[FN12], although in recent years the regulatory schemes and their coverage are being affected more and more by the trends towards deregulation.

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21 The regulatory body in question (in Newfoundland, the Board of Commissioners of Public Utilities) is generally charged with balancing the competing interests of consumers and the investors in the utility[FN13]. As de-Grandpré[FN14] observed:

> This involves the Board attempting to make sure that, in the consumers' interests, the service provided is adequate and provided at just and reasonable rates and, for the utility and its investors, that those rates provide a sufficient income.

22 This balancing of interests is found in the province's stated power policy in s. 3 of the *EPC Act* where, emphasizing the interests of the utility, it is declared that the rates charged for the power should provide sufficient revenue to the utility to enable it to earn a just and reasonable return "so that it is able to achieve and maintain a sound credit rating in the financial markets of the world"[FN15] while at the same time declaring that the rates should be "reasonable"[FN16] and that the utilities' facilities should be managed and operated in a manner that would result in power being delivered to consumers "at the lowest possible cost consistent with reliable service"[FN17]. This policy finds legislative expression in the regulatory mechanisms of the Act itself, which provides that a utility must provide service and facilities which are "reasonably safe and adequate and just and reasonable"[FN18] and prohibits a utility from charging rates, tolls and charges unless they have been approved by the Board[FN19] while at the same time stating as a general principle that the utility is entitled to earn annually a just and reasonable return on its rate base[FN20].

23 This statutory entitlement of the utility to earn a "just and reasonable" return is the linguistic touchstone for the balancing exercise. This phrase emphasizes the fairness aspect, both to the utility, in earning sufficient revenues to make its continued investment worthwhile and to maintain its credit rating in financial markets, and to the consumer, in obtaining adequate service at reasonable rates. It also emphasizes the need for a tempering of each interest group's economic imperative by consideration of the interests of the other.

24 Having said that, the entitlement of the utility to a fair return on its investment is always regarded as of fundamental importance[FN21]. In the United States, controls which fail to allow a fair return have the potential of running afoul of constitutional strictures against confiscation of property without due compensation. While the same constitutional concerns may not be present in Canada, the case law has at times nevertheless referred to the entitlement to a fair return as a "common law right"[FN22] which should be read into the legislation even where it is not specifically expressed.

25 There is no uniform methodology employed in the regulatory jurisdictions in North America for the determination of a just and reasonable rate of return[FN23]. What recurs, however, is a theme that the process is not an exact science and depends on a variety of factors necessary to balance the competing interests involved. Rate setting is essentially a prospective exercise where determinations are made on the basis of estimates and information that will not necessarily remain static.

26 Most jurisdictions adopt a "multiple factor" approach. The *Bluefield Waterworks* case[FN24] in the United States emphasized early on that the determination of a fair rate of return

> ...depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.[FN25]

27 Statements such as "the company will be allowed as large a return on the capital invested in the enterprise ... as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise"[FN26] often occur. For the rationale for such statements one need look no further than the provincial policy, stated in paragraph 3(a)(iii) of the *EPC Act* that the utility must be "able to achieve and maintain a sound credit rating in the financial markets of the world" so as to be able to raise the money necessary for the proper performance of its functions. To achieve such a goal of attracting capital, factors such as

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comparisons with other comparable enterprises, the respective costs of debt and equity, the capital breakdown between debt and equity and general economic conditions, amongst other things, are considered.

28 In *Federal Power Commission v. Hope Natural Gas Co.*[FN27], another landmark United States case, the court emphasized that it is the "end result of the process which has to be judged as to whether the rate is "just and reasonable". As a result, in the words of deGrandpré:

> In stating that the end result was the only point of consideration, whatever the means of arriving thereat, the court opened the door to a wide variety of ways and means to arrive at a proper calculation of returns. In effect, it left the valuation of rate bases to the Commission's or Court's discretion.[FN28]

DeGrandpré's conclusion, based on his survey of North American regulatory regimes, is later stated as follows:

> The constantly changing economic conditions are perhaps a good reason why there should be no stringent rules for determining a rate of return. As was often stated, the process is one which calls for common sense, good judgment and a proper appreciation of all surrounding factors.[FN29]

29 This approach is also reflected in the decision of this Court in *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)* where O'Neill, J.A., speaking for the Court in rejecting an argument that the Board of Commissioners of Public Utilities had exceeded its jurisdiction in determining a just and reasonable rate of return by not adopting a particular methodology (a "comparable earnings" test), stated:

> ...it is within the discretion of the Board, having heard all the evidence and giving consideration to the various tests which may be used, to make its ruling on the basis of what in the Board's opinion will give to the applicant a just and reasonable return and permit it to maintain a sound financial credit rating.[FN30]

The Board therefore has a broad discretion to adopt appropriate methodologies for the calculation of allowable rates of return. So long as the methodologies chosen are not inconsistent with generally accepted sound public utility practice and the purposes and policies of the Act, and can be supported by the available opinion evidence, the determination of what constitutes a just and reasonable return in a given case will generally be within the province of the Board and will not normally be interfered with[FN31]. The jurisdiction of the Board must therefore be defined to enable that process to occur.

30 Because setting the rate of return is not an exact science no matter what methodology is chosen, because the viewpoint is essentially prospective, it has been recognized that there is a "zone of reasonableness" within which a rate of return chosen by the Board should be regarded as just and reasonable. This has been expressed by the United States Supreme Court in the following language:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high[FN32].

This notion has also at times been recognized in Canada[FN33].

31 This leads to another point: because the setting of the rate of return is based on projections, one cannot be sure that the rate of return will be achieved in practice. Although the utility is "entitled" by s. 80 of the Act to have the Board determine a just and reasonable rate of return based on appropriate predictive techniques and methodologies, it is not "entitled", in the sense of being guaranteed, to that rate of return[FN34]. The utility therefore takes the risk that its chosen management techniques and the future economic climate may not yield its expected success. Although some of the activities of the utility are regulated within the framework of the statutory objectives, the utility nevertheless remains subject to business risks and the effects of management decisions. To that extent, the financial risks associated with the operation of the utility, just as in the case of any private business, are to be born by the investors in the enterprise, not the consumer of the service.

32 The corollary of this position is that the utility must be accorded a degree of managerial flexibility in deci-

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sion-making in order to be able to minimize the risks to which it must respond. Thus, it is often said that the powers of the Board must be regulative and corrective, but not managerial, and they do not therefore contemplate a retroactive adjustment of the actions of management.

33 This leads to the general principle of non-retroactivity which prevents a utility from recovering expenses incurred in the past out of current rates. The utility must live with the decisions it makes and the economic vicissitudes that occur.[FN35].

34 By the same token, it is sometimes argued that the occurrence of the reverse situation, of the utility doing better than expected, should mean that the utility should be able to reap the advantage of better and more efficient management techniques and favourable economic conditions and keep any surplus. The concern for the consumer interest is often put forward as a brake on this idea, however. The requirement that the consumer receive power "at the lowest possible cost"[FN36] consistent with the utility's requirement of earning a just and reasonable return for its purposes means, it is often argued, that the regulator ought to have power to ensure that excessive returns are somehow accounted and compensated for.

35 Another factor that is referred to in the cases is the recognition that the capital structure of the utility will often have a bearing on the total cost of capital and this will therefore be important where the determination of the rate base depends on the total debt and equity capital requirements. DeGrandpré observes that "the reasonableness of the ratio of debt to equity is a question of fact left to the appreciation of the Board or Court"[FN37]. Thus, issues such as whether the Board can dictate to the utility a particular mix of debt and equity or, for the purpose of setting the rate of return, do so on the basis of a notional blend of capital requirements if the actual blend is not in accordance with what the Board feels is optimal to ensure a fair return as well as low rates, tolls and charges, often surface. Indeed, this issue is presented in this case.

36 Having conducted this brief survey, I will now attempt to state some general principles to be used in the interpretation and application of the local legislation:

1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a deter-

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mination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

37 It is now necessary to consider each of the specific questions that have been posed. In approaching them, it is worth remembering that the questions have been posed in the abstract and ask for answers to broadly-identified issues of jurisdiction. The case is not an appeal and there can be no findings of fact made by this Court in arriving at its conclusions. The information provided by the Board as to past hearings was given as background only so as to assist the Court in better understanding the scope and potential importance of the questions. While the answers given may provide guidance with respect to specific issues that have arisen in hearings in the past, they cannot be taken as an adjudication of those issues in the specific factual context in which they arose.

Question No.1

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

38 It will become apparent from the ensuing discussion that a number of the questions posed on this stated case are interrelated in the sense that the answer to some of them will provide a strong impetus for a particular response in others. This is particularly evident in Question 1.

39 The answer to Question 1 in fact involves a consideration of two sub-issues. The first relates to the legal significance of a determination by the Board on a given application of the just and reasonable return to which the utility is entitled. The second sub-issue, which is affected by the decision on the first, relates to the powers of the Board to make determinations with respect to the rate of return on a utility's common equity portion of its capital structure.

(a) The Legal Significance of a "Determination"

40 It is to be noted that Question 1 asks whether the Board has jurisdiction to "set and fix" the utility's return whereas s-s. 80(1) of the Act speaks in terms of the utility being entitled to earn a return as "determined" by the Board. The use of this differing terminology in the question, as explained by counsel for the Board at the hearing, was designed deliberately to raise the issue as to whether the Board may, by determining the level of return, be said to be prescribing that level as an upper limit to the level of earnings to which the utility may be entitled and thereby exercise certain powers with respect to disposition of any excess that may in fact be earned. This issue becomes more focused when Question 3 is considered. The answer to that question will, to some extent, be influenced by the powe which the Board can be said to have unde s. 80 with respect to the setting of a level of return.

41 It is obvious, of course, that in the process of approving rates, tolls and charges under s-s. 70(1) the Board must determine what is a just and reasonable return on the utility's rate base in order to determine the level of revenue needed by the utility[FN38]. This flows from the utility's "entitlement" in s-s. 80(1) to earn that level of return. The determination of a just and reasonable return on rate base is therefore an essential component in the series of calculations which the Board must undertake in the process of approving rates, tolls and charges.

42 If the determination of a just and reasonable return is merely a step in the process of approving rates, tolls and

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charges under s-s. 70(1), that is, if it is only an intermediate calculation necessary to arrive at the final result of consumer rate approval, the "determination" of a just and reasonable level of return will have no independent legal significance, in the sense of prescribing the limit of the utility's return for other purposes of the Board's functions.

43 On the other hand, if the determination of a just and reasonable level of return has, as it were, an independent life of its own, in the sense of it not being a mere intermediate calculation but can be "set and fixed", in the sense of being prescribed, it could, for example, be used to support an argument that a utility is not entitled to earn in excess of a just and reasonable return. As indicated, this impacts directly on Question 3. While counsel for NLP suggested that there may be other mechanisms available to deal with excess earnings (by means of the use of a designated excess revenue reserve fund), that would not require the derivation of such a power from s. 80, counsel for the Board and the Consumer Advocate both indicated that they were concerned about the legal basis for the derivation of the operation of an excess revenue account from other parts of the legislation, such as the administrative and supervisory power of the Board to regulate a utility's accounts. It is appropriate therefore that this matter be addressed.

44 The issue boils down to this: If the power to "determine" the return encompasses the notion of fixing, in the sense of prescribing the limits of entitlement, one would be able to derive from s-s. 80(1) a power in the Board to say to the utility that it may earn that level of return and no more. If not, the power to determine would simply be part of a calculation that leads to consumer rate setting with no independent existence or significance for regulatory practice generally.

45 *Black's Law Dictionary*[FN39] explains "determine" in part as follows:

> To bring to a conclusion, to settle by authoritative sentence, to decide.... To adjudicate on an issue presented...
>
> To estimate...
>
> To decide, and analogous to "adopt" or "accept"...

46 The *Concise Oxford Dictionary*[FN40] defines the word in pertinent part as:

> 1. v.t. & i. settle, decide, (dispute, person's fate ...), come to a conclusion, give decision, be the decisive factor in regard to ...; ascertain precisely, fix;...
>
> 3. v.t. & i. (esp. Law) bring or come to an end.
>
> 4. v.t. limit in scope, define; fix (date) beforehand.

47 For what limited value these definitions can have in this context, it would appear that the primary meaning of the word determine, with its emphasis on coming to a final decision and amounting to a decisive factor as well as the notion of ascertaining something precisely and "fixing", encompasses something more than a mere calculation in a broader process.

48 Having said that, it is to be noted that s-s. 80(1) is structured in such a way that its emphasis is on the entitlement of the utility to a just and reasonable return, as determined by the Board, rather than involving the express conferral on the Board of a power to prescribe the level of return. The structure of the subsection could be said to be directed towards establishing a minimum base line of entitlement without saying anything expressly about the power of the Board to create a cap. To put the matter beyond doubt, the insertion of the words "and no more" after the language entitling the utility to a just and reasonable return would certainly have clearly indicated a prescriptive power in the Board, if that had been intended. Furthermore, although the return is referred to as being "determined" by the Board, the subsection goes on to indicate that the return so determined is applied to the rate base "as fixed and determined" by the Board. On a strict linguistic analysis alone, the use of the word "fixed" in conjunction with "deter-

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mined" in one place would imply that its absence in the other was deliberate.

49 Notwithstanding these matters, I am not satisfied that a linguistic analysis of the subsection can provide the answer in this case. Even a cursory perusal of the remaining provisions of the Act indicates that there is no uniform terminology chosen to describe the various decision-making functions in which the Board may engage. For example, the Act provides that the Board may "inquire into and determine"[FN41] the valuation of a utility's assets and may "determine"[FN42] those values in accordance with a number of stated rules. It may "ascertain and determine"[FN43] what are proper and adequate rates of depreciation of classes of utility property. Its role with respect to the utility's rates, tolls and charges is one of "approval"[FN44]. Indeed, if there is any decision of the Board which is contemplated as having operative legal effect and to amount to a "fixing" of the utility's rates, tolls and charges from which the utility may not deviate, it is the "approval" contemplated in this regard; yet the word "fix" does not appear. In another context, the Board may "fix and determine"[FN45] a separate rate base for each kind of service supplied by a utility; yet when describing what is to be included in the calculation of rate base, the reference to "determine" is dropped and it is simply described as "fixing a rate base"[FN46]. Finally, the term "approval" surfaces again in the context of the power of the Board to authorize new stock issues of the utility[FN47].

50 To resolve this conundrum, resulting from inconsistency in terminology, resort must be had to the purposes of and policies underlying the legislation as mandated in s-s. 118 of the Act as well as s. 4 of the *EPC Act*. As indicated previously,[FN48] the Board is required, in carrying out its functions under the Act, to balance the interests, as identified in the legislation, of the utility against those of the consuming public. The notion of a "just and reasonable return" in s-s. 80(1) is the benchmark against which fairness to the utility and the consumer is to be measured. It is pivotal in the balancing exercise. The interests of the consuming public in obtaining power at the lowest possible cost consistent with reliable service[FN49] must accommodate the utility's interest in being afforded the opportunity to earn a fair rate of return for its efforts. In the methodology adopted by the Board, the approval of appropriate rates, tolls and charges necessarily factors the just and reasonable return, and only that level of return, into that calculation. Otherwise, the interests of the consumer would not be protected in obtaining power at the lowest possible cost. It is therefore inherent in the process that in determining a just and reasonable return for the utility, the utility should have the opportunity of earning that return but, other things being equal, should not expect to earn any more. Accordingly, determining the just and reasonable return necessarily involving prescribing the return and in that sense can be said to amount to "setting and fixing" the rate of return.

51 It follows from this that the use of the word "determine" can, in the context of the use of that and other terminology in the Act, encompass something more than the notion of mere calculation and extends to the idea of prescribing, or fixing, a level of return in the nature of a legal decision which can bind and have effect on the utility for other purposes related to the Act.

(b) The Power to Set and Fix the Level of Return on Common Equity

52 In order to determine the just and reasonable return on rate base to which the utility is entitled by s-s. 80(1), the Board must first determine the cost to the utility of the various components of its sources of funds. The costs associated with long term debt and preference shares are generally static over the period covered by a particular rate hearing. Accordingly, they are often described as "embedded costs". The rate of return necessary to be earned on rate base to cover the cost of debt and preference shares can therefore usually be easily determined based on the interest rates or dividend rates applicable to such instruments. In the case of common equity, however, the cost to the utility of this source of funds depends upon a number of factors, especially current market conditions which, by nature, can be volatile.

53 At a rate hearing, therefore, the Board usually faces a greater difficulty in determining the component of rate of return on common equity than on the other sources of funds because their embedded costs are usually well defined.

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54 Since the rate base is financed by a combination of debt, preference shares and common equity, the rate of return on which is different for each component, the overall rate of return on rate base is calculated as a weighted average of the rates of return on the various individual components.[FN50]

55 As a generalization, it is sometimes said that the cost of common equity is often higher than that of debt[FN51]. The rate of return on common equity may therefore be expressed as a percentage which is higher than the overall rate of return on the full rate base because the higher equity cost will be weighted downwards by the rates for the other components.

56 The issue raised by Question 1(ii) is whether the Board may set and fix the rate of return on common equity, as a component of the overall rate of return on rate base in a manner such that it can be used as an independent benchmark for other purposes in the same way as the overall determination of return on rate base can be. Alternatively, is the "determination" of the rate of return on common equity to be treated in the narrower sense of a mere calculation leading to the final determination of overall return?

57 Subsection 80(1) makes no reference at all to determining, let alone setting and fixing, the rate of return on common equity. The calculation of an appropriate rate of return on common equity is truly a mere component in the overall process of determining a just and reasonable return on rate base. Furthermore, there is nothing in the purpose of the Act or the policies which the Board is to implement which would lead inexorably to the conclusion that the Board ought to have the power to prescribe a rate of return on common equity as a component of an overall return or rate base, any more than it ought to have a power to prescribe a return on any other component.

58 The Consumer Advocate submitted that inasmuch as s-s. 80(1), by its express language, contemplates that the only measure of what NLP may earn annually is to be determined by a just and reasonable return on rate base, to allow the utility to measure what it may earn annually based upon a different factor, such as a rate of return on common equity which could very well be higher than the overall rate of return on rate base and might lead to a higher overall return that could be said to be justified, would be to allow the utility to earn more than that to which it is statutorily entitled.

59 It is to be noted, however, that in its previous orders[FN52] the Board has not sought to determine the level of return on the basis of anything other than a rate of return on rate base. For example, in the 1991 Order, the Board ordered:

> A just and reasonable return for [NLP] is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%.
>
> [Emphasis added]

The reference to the range of rates of return on common equity appears to have been inserted more as information in support of a rationale for the determination of the overall return on rate base, since the Board states that the determination of the return on rate base "will provide" an "opportunity" to earn a rate of return on common equity. Similarly, the 1996-97 Order simply described the rate of return on rate base as being "derived from" a given range of return on common equity. This is the correct approach.

60 As to whether the Board may make other decisions, for example relating to the manner in which an excess revenue fund should be maintained, by reference to the contemplated rate of return on common equity, is a separate matter which should be dealt with in that context.

61 I therefore conclude that the power to "determine" a just and reasonable return on rate base, as contained in s-s. 80(1) does not include within it a power to "set and fix a rate of return on common equity" but it obviously does

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contemplate that the analysis of appropriate rates of return on common equity will be undertaken and factored into the conclusion as to what is a just and reasonable return on rate base.

62 Accordingly, giving the words "set and fix" in the question a meaning which implies the notion of prescribing, I would answer Question 1 as follows:

As to:

1. (i) - Yes

1. (ii) - No

Question No. 2

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

63 In light of my answer to the second part of Question 1, it is only necessary to address Question 2 in the context of whether the Board has jurisdiction to set the rate of return on rate base as a "range of permissible rates of return".

64 It has already been stressed that the determination of a just and reasonable return on rate base involves a consideration of the differing costs of the components of the utility's capital structure and that in arriving at the overall rate of return, it is permissible for the Board to use a weighted average of the rates associated with each individual component. It has also been pointed out that the cost of common equity is often difficult to estimate with precision. The best that experts are often able to do is estimate rates within a reasonable range. Inasmuch as the cost of common equity is weighted into the overall rate of return on rate base, that range would also have to be reflected in the ultimate rate of return on rate base, as determined by the Board.

65 In *Edmonton (City) v. Northwestern Utilities Ltd.*[FN53] Smith, J. emphasized:

The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

66 It is evident, as *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)*[FN54] demonstrates, that the determination of a just and reasonable return is an area in which the Board is accorded a broad discretion as to the methodology to be adopted. Obviously, the striking of a balance between the interests of the utility and the consumer, whilst at the same time attempting to comply with the Board's obligation to approve rates which will produce a fair return to the utility, cannot be done with the precision of a simple mathematical calculation. Realistically, the balance can only be struck within a reasonable range. It is for that reason that the courts have, on subsequent appeal or applications for judicial review, generally deferred to the determinations of boards in this regard provided the determination is not arbitrary or capricious and can be said to fall within a reasonable range.[FN55] As indicated in the earlier discussion[FN56], in the United States the notion of a "zone of reasonableness" as an "area rather than a pinpoint" has been recognized. Whilst this notion has been enunciated as a justification for deference to Board decisions in the context of challenges on appeal or judicial review, it nevertheless indicates a recognition of what is inherent in the rate setting process.

67 I see no reason, therefore, why, instead of attempting to justify a particular decision ex post facto by an argument that a particular rate falls within a zone of reasonableness, the Board could not expressly indicate what it believes that area of reasonableness to be by expressing what it believes to be a just and reasonable return in terms of a range of rates of return. This indeed is a practice that has been adopted elsewhere[FN57]

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68 It is to be noted that s-s. 80(1) does not speak in terms of a "rate" or "rates" of return; rather, it speaks of a just and reasonable "return". It is not limited by its language to the pinpointing of a particular rate of return. I conclude that a liberal construction of the word "return" in the context of s-s. 80(1) leads to the conclusion that it can include a range of rates of return.

69 Of course, in applying the rate of return to the rate base, as ascertained by the Board, a single figure will have to be used since rates, tolls and charges are expressed as finite numbers. The Board in practice has chosen the mid-point of its stated range of rates of return as the figure to be used for this purpose. This is a perfectly acceptable practice for the purpose of setting the rates. By expressing a range, however, the Board leaves open to the utility the flexibility of earning more than the mid-point up to the maximum end of the range so as, in effect, to give the benefit of the doubt to the utility that the expert evidence favouring the upper end of the range turns out to be the more accurate and to provide an incentive to the utility towards managerial efficiency.

70 The Consumer Advocate expressed concern in argument that the use of the word "permissible" in Question 2, as qualifying the phrase "rates of return", might be misleading. As I understand the argument, the concern is that the adoption of a range approach might lead to the conclusion that the "entitlement" of the utility to a just and reasonable return would be regarded as an entitlement, or guarantee, of earning up to the maximum end of the range. While the utility, if it earned as much as the maximum would be entitled to keep that amount of earnings, it is not, for reasons already given, guaranteed that level of return if it is not in fact successful in earning them. The Board is under no obligation to adjust future rates or to take other steps to make up any such shortfall. Any rate of return earned within the range would be regarded as permissible and it is only when a rate of return exceeds the upper limit of the range that it would be regarded by the Board as subject to any excess revenue regulation.

71 Accordingly, recognizing that, on my analysis, Question 2 only relates to whether the Board has jurisdiction to set rates of return as a range in relation to its determination of a just and reasonable return on rate base, the answer I would give to Question No. 2 is: "Yes".

Question Nos. 3 and 4

> (3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:
>
> (i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or
>
> (ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,
>
> does the Board have jurisdiction to:
>
> (i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or
>
> (ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or
>
> (iii) require the public utility to rebate the excess earnings to customers of the public utility.
>
> (4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,
>
> (i) the rate base as fixed and determined by the Board for each type of service applied by the public

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utility. or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

72 The analysis leading to the answers to Questions 3 and 4 can be considered together since they both address the same general theme: the scope of the Board's powers to deal with situations where a utility in fact earns a rate of return that is greater than that determined to be a just and reasonable return.

73 It was suggested by counsel for NLP that the concept of "excess earnings" does not exist under the Act other than by reference to a definition of what is to be deposited into a reserve fund which the utility may be ordered to create and maintain pursuant to s-s. 69(3) of the Act. This submission follows from the position taken by NLP that the Board has no power under s-s. 80(1) to "set and fix", in the sense of prescribing, a maximum rate of return. NLP had submitted that the Board's power to deal with excess earnings comes solely from its statutory powers to prescribed the form of accounts to be maintained by the utility[FN58] and to create a reserve fund "for a purpose which the Board thinks appropriate"[FN59] which could include the purpose of dealing with excess returns. This argument has already been rejected in the analysis relating to Question 1. It follows, therefore, that the issue of excess earnings may present itself for consideration by the Board in circumstances even where a reserve account has not been ordered to be set up. For the purpose of regulation by the Board, the concept of excess earnings is derived from the process of prescribing a just and reasonable return on rate base and not by the decision to require the creation of a reserve account. The question to be considered is what enforcement mechanisms the Board may use to deal with excess earnings so identified.

74 If. as determined in the answer to Question 1. the Board has jurisdiction flowing from s-s. 80(1) to prescribe the maximum rate of return which a utility may earn in a given year, it is a necessary consequence of such a determination that revenue earned in excess of the maximum of the prescribed range of return is excess revenue to which, by definition, the utility will not be entitled. The Board accordingly must have jurisdiction to regulate how that excess revenue is to be dealt with.

75 Question 3 requires the Court to consider the range of enforcement mechanisms which the Board may employ to ensure that the utility does not benefit from any windfall profits resulting from earnings in excess of the just and reasonable return to which it is entitled. Three scenarios are proposed:

(1) use excess earnings to reduce revenue requirements for the succeeding year ("Revenue Reduction Approach");

(2) place the excess earnings in a reserve fund to enable an adjustment of rates, tolls and charges at a future date ("Reserve Fund Approach");

(3) require a rebate of excess earnings to consumers ("Rebate Approach").

Question 4 is really a subset of the Revenue Reduction Approach. In one sense it really asks the same question as in Question 3(i) but does not limit the process to the application of excess earnings to only the year next succeeding the year in which the excess earnings have been achieved. It appears to ask the Court to address the question of whether, in the absence of the existence of a reserve account, the Board may, upon being made aware of excess earnings in prior years, reach back into those prior years and take account of those excess earnings by using them to reduce rates, tolls and charges in subsequent periods below what would otherwise be indicated.

76 In approaching these questions. it is important to bear in mind the nature of the rate setting process and the general principles which are recognized as being applicable to govern the manner in which that process is carried out.

77 The process of rate setting is generally prospective by nature. Although the Board must set rates for the future,

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it only has data from past experience, the evidence from utility officials as to planned changes in operations and the opinions of experts as to future economic trends as a guide to what the revenue requirements of the utility will likely be. It is, therefore, necessarily speculative. In developing the utility's requirements, the Board focuses on a "test year" as the basis for its estimates and adjustments. Traditionally, in North America the test year was chosen as the latest 12 month period for which complete data were available.[FN60] More recently, due largely to inflation, boards adopted a forward-looking test year which in effect amounts to a forecast of what expenses and costs, and hence revenue requirements, will be. This has been the practice of the Board[FN61] and is supported by the Act[FN62] and the *EPC Act*[FN63]. Past experience of course remains relevant, however, insofar as it gives insight into the possibility of forecasting error.[FN64]

78 Because the process is prospective, there is a good possibility that all of the assumptions will not be achieved in practice. The actual rate of return may therefore differ from the rate, or range of rates, prescribed at a previous hearing. On paper, this difference may appear to redound to the benefit or detriment of the utility depending upon whether the actual rate is greater or less than the rate or range prescribed.

79 When, as a result of actual experience, it appears that the actual rate of return was greater than the rate prescribed for the same period, it becomes necessary to address what the Board can do, if anything, to ensure that the earnings in excess of the prescribed level, (which by definition will be regarded as greater than a just and reasonable return on the rate base), are not allowed to remain with the utility or its investors. In the *Bell Rebate* case[FN65], Gonthier, J. observed that differences between projected and actual rates "call for a high level of flexibility in the exercise of the [Board's] regulatory duties".

80 Those opposing a broad jurisdiction on the part of the Board to define and deal with excess revenue couch the objection, at least in part, in terms of a violation of the non-retroactivity principle.[FN66] In its narrow sense, it is a principle of benefit to consumers, that "today's rate payers should pay the cost of today's services and not the cost of past or future services"[FN67]. More broadly, it also yields a presumption (which is of benefit to the utility as well), flowing from the idea that the Board acts prospectively in setting rates, that the Board cannot or, even if it has jurisdiction, should not as a general rule, make orders that have the retroactive effect of disturbing existing rights already enjoyed by the utility. In practical terms, it leads to the argument that where rates, tolls and charges have been approved by the Board as being permissible for the utility to charge, the Board cannot or should not make a subsequent order that has the direct or indirect effect of reducing or otherwise changing those rates. In other words, changing past transactions or attaching new consequences to past transactions would be prohibited.

81 As Penning points out[FN68] the retroactivity rule has its genesis in general rules of statutory interpretation that guard against interpreting a statutory provision as having a retrospective operation unless it is clear that such an effect was intended. It is not an immutable rule but can give way to contrary legislative intention.

82 Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

> ...the rule is concerned more with issues of fairness, both to customers and to utility shareholders. The customer-related fairness issue is often referred to as the "inter-generational equity" problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity investment in a utility, shareholders require some certainly that matters already dealt with by the regulator have some degree of finality associated with them.[FN69]

83 It was argued that one of the questions that is theoretically presented in this case is the degree to which the Board is authorized to trespass on the no-retroactivity principle in fulfilment of its legislative powers, specifically, to enforce a prescription that a utility may earn a just and reasonable return and no more.

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84 In reality, however, in light of the prospective nature of this Opinion, the non-retroactivity principle is not, in practical terms engaged by Question No. 3. The answers to previous questions have already established that the concept of excess revenue is to be determined by reference to the meaning of a "just and reasonable return" as that phrase is understood in ss. 80(1); and not by the definition used to operate an excess revenue account. All participants in the regulatory process must therefore take account of that concept and conduct their activities accordingly. The "rules of the game" are known.

85 Section 59 of the Act requires the utility, unless otherwise ordered by the Board, to close its accounts at the end of each calendar year and to file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the following year. Effectively, therefore, within 3 months after the utility's year end, both the utility and the Board will know the financial position of the company for the previous year and from that, as well as any other information which the Board may require, a determination of the actual level of return earned by the utility in the previous year can be made. Applying the known definition of excess revenue, by reference to the upper end of the range of return on rate base, as determined by the Board's prior orders under ss. 80(1), it can be determined whether there has been any excess revenue earned. There is no revisiting and revision of a prior order respecting the allowable return on rate base. The examination of actual results in the context of a comparison with the previously prescribed rate merely leads to enforcement of the original order. Any decision by the Board with respect to disposition of excess revenue will therefore not retroactively interfere with past revenues which the utility assumes belong to it and which may be disbursed to shareholders or otherwise spent. Given the concept of excess revenue, as explained in this option, the utility knows in advance that it is not entitled to excess revenue so defined and may institute whatever accounting practices are necessary to segregate and deal with such revenues pending direction from the Board.

86 The situation is conceptually no different from the concept behind an excess revenue account set up under ss. 69(3), which the utility accepts as a legitimate way of dealing with such revenue. Just as in the case of an excess revenue account, the definition of excess revenue is known in advance and the utility can account for such revenue accordingly.

87 The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superseded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by ss. 75(3) of the Act.

88 In the situation presently under consideration, however, there is no subsequent order of the Board which retroactively changes previously-approved rates, tolls or charges or revises the prescribed level of return to which the utility is entitled. All that occurs is the subsequent examination of actual results and a determination of whether excess revenue was in fact earned by applying a pre-existing standard derived from a previous Board order made under ss. 80(1).

89 I recognize that, to the extent that the utility in the past may have been operating under the impression, perhaps engendered by positions taken by the Board, that excess revenue need only be calculated by reference to the excess over the rate of return on common equity as defined for the purpose of operating the existing excess revenue account, it may consider that if the concept of excess earnings as discussed in this Opinion is applied at this stage to those previous years, there may effectively be a change in the "rules of the game". In that practical sense, there would be a "retroactive" readjustment.

90 The Court is not being asked, however, to determine the position of the utility specifically in relation to the years 1991 through 1996 and to determine the entitlement of the utility to excess revenues as calculated by reference to

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the current definition. The degree of NLP's misapprehension, if any, the actions of the Board in dealing with the excess revenue issue in the past, the degree to which NLP may have acted to its prejudice, and the degree to which the utility may nevertheless be required to disgorge excess revenues in previous years in accordance with presently understood concepts raise complex issues of mistake of law in the law of restitution and the defence of change of position which require for their resolution a detailed factual base. It would be inappropriate to attempt to answer such questions in this Opinion.

91 The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity. Here, assuming (without deciding) there was a misapprehension in the past as to how excess revenue should be calculated, the "change" in calculation method comes about, not because of a retroactive change in the rule by the Board but by a (perhaps) unanticipated declaration and clarification by the Court of what the law is and how it is or should be applied.

92 I turn now to the determination of the powers of the Board to deal with excess revenue once it has been determined to exist.

93 The only express provisions of the Act dealing with excess revenue are s-s. 69(4) which provides a power to require a utility to refrain from distributing extra revenue as dividends until further order, and s-s. 75(3) which enables the Board to order that excess revenue earned as a result of an "interim order" made under s-s. 75(1) and not confirmed by final order be either refunded to customers or placed in a reserve account for an approved purpose. Does the fact that similar powers are not expressed in respect of "final" orders mean that they were not intended to be available?

94 I do not believe so. The power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer. The starting point is the power, found to exist in the answer to Question 1, that the Board may prescribe a rate of return under s-s. 80(1) which carries with it the necessary corollary that the utility is only entitled to earn that level of return, as determined by the Board to be just and reasonable. It follows that unless the Board is to be a "toothless tiger" it must be accorded the means by which revenues earned in excess of the prescribed level of return are used in furtherance of the objectives and policies of the legislation and not simply for the benefit of the utility's investors. Such policies as the maintenance of a sound credit rating by the utility[FN70], the efficient production, transmission and distribution of power[FN71], the delivery of power at the lowest possible cost[FN72] and the provision of reliable service[FN73] are all candidates for the use of the excess. It does not follow, as the Consumer Advocate argued, that any dealing with the excess should involve only a return or rebate to consumers so as to ensure that the goal of delivery of low cost power is vindicated. While the maintenance of low rates is an important objective of the legislation, it is not the only one. As emphasized earlier,[FN74] the Board is always engaged in a balancing exercise between the interests of the consumer and the interests of the utility. It is not correct to say that any revenues earned in excess of a just and reasonable return belong to the consumer. Just as the utility is not "entitled" to earn and retain revenues in excess of such a level of return, so also the consumer is not absolutely "entitled" to the excess. The Board, having identified that an excess exists, must deal with it in furtherance of the objectives of the legislation.

95 The means whereby the excess is dealt with should not be, unless expressly limited by the legislation, rigidly prescribed provided the means chosen comport with the objectives and policies of the legislation. It is worth repeating Gonthier, J.'s observation in the *Bell Rebate* case that the fact that the differences between projected and actual rates of return are common calls for "a high level of flexibility in the exercise of the [Board's] regulatory duties".[FN75]

96 Counsel for NLP argued that the only power of the Board to deal with excess revenue, aside from interim order situations, flows from its power in s. 58 to prescribe the form of books and accounts to be kept by the utility and that, if it ordered, pursuant to s-s. 69(3), the creation of a reserve fund "for a purpose which the Board thinks appropriate", it could stipulate that the accounts should be kept in such a way as to require excess revenues to be accounted for in such a reserve account. I do not find the jurisdiction to deal with excess revenue in the power to prescribe the utility's accounts. That is only a procedural means of exercising powers, the jurisdiction for which must be found elsewhere.

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Whilst the creation, pursuant to s-s. 69(3), of a reserve fund to deal with excess revenues could be said to be "a purpose which the Board thinks appropriate" (provided that purpose is consistent with the powers otherwise conferred on the Board), there is nothing in the language of s-s. 69(3) which expressly makes it applicable to an excess revenue situation and there is certainly nothing there which would purport to make the use of a reserve fund for the purpose of dealing with excess revenue as the only mechanism which would be at the Board's disposal to deal with this issue.

97 I conclude that, bearing in mind the approach to interpretation mandated by s-s. 118(2) of the *Act*, the Board must of necessity have broad powers to deal with revenue earned by a utility in excess of the prescribed rate of return. Inasmuch as the ascertainment of the existence of excess revenue can only be made following a subsequent review, any order dealing with excess revenue will of necessity have certain retrospective elements about it. But that is not the same as saying that an order dealing with excess revenue ascertained by application of a pre-existing concept of what constitutes excess revenue is a retroactive order. It was argued by NLP that the setting up of a reserve account would be the only method that would not involve any trespass on the principle of non-retroactivity because the utility would know in advance that it had to set up its reserve account and could therefore provide for it without running the risk of spending or distributing excess revenues in ignorance of the fact that they would have to be held accountable for them.

98 For reasons already given, this argument is unconvincing. By virtue of the answers given to Question 1, the utility knows that it is only entitled to earn a just and reasonable rate of return pursuant to any order made by the Board to that effect under s-s. 80(1). It can monitor its financial progress and can organize its accounts in such a way as to account for excess revenue so as to prevent the possibility of it being disposed of before any subsequent order dealing with the excess may be made. The utility does not need an express order of the Board requiring it, as a general rule, to set up a reserve account for this purpose. Nevertheless, the use of a reserve account is a convenient way of doing this. It may well be, however, that the Board may, through other directions with respect to the manner of keeping accounts, develop other accounting procedures that will enable the utility to identify excess returns and to segregate them for other use.

99 A reserve fund could be ordered by the Board to be used in the future to improve service, or to keep rates low or for some other purpose that is consistent with the objectives and policies of the legislation. Whether the advancement of these policies is done formally through the use of a reserve fund or through some other mechanism such as an order setting further rates, tolls and charges taking the prior excess revenue into account, the utility should not be prejudiced, in light of the fact that it knows that it is not entitled to earn a return in excess of a just and reasonable return.

100 A rebate to consumers would also be permissible since it would have the indirect effect of ex post facto keeping the rates low. While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning[FN76] observes:

> As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers - especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force. Furthermore, to the extent it is still present, it can be dealt with through the choice of mechanism design - so instead of adjusting all rates, through either surcharges or refunds, the individual customers who met the timing criteria would receive an adjustment to their bill.

101 This recognition was echoed by Gonthier, J. in the *Bell Rebate* case[FN77] as follows:

> ...it is true that the one time credit ordered by the appellant will not necessarily benefit the customers who are actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid ex-

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> cessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement among its several classes of customers to determine just and reasonable rates, the appellant's decision was imminently reasonable...

102 Accordingly, I conclude that each of the Revenue Reduction, Reserve Fund and Rebate approaches to dealing with excess returns are within the jurisdiction of the Board and could, in particular circumstances, all constitute reasonable responses to a finding that the utility has earned in excess of a just and reasonable return.

103 I would also add that the setting up of a reserve fund in a given case does not exhaust the ways in which the Board may deal with excess revenue. The methodologies proposed are not mutually exclusive. The Board has jurisdiction to deal with all revenue in excess of a just and reasonable return on rate base using one, or a judiciously blended combination, of the methodologies identified.

104 Having said that, it must be emphasized that just because the Board has the jurisdiction to use these approaches, the particular circumstances may well dictate that one or more of them may be inappropriate in a given case. For example, the ordering of a rebate to consumers of the total amount of an excess return might not, in the light of the general financial condition of the utility, be appropriate when measured against such legislative objectives as the maintenance of the utility's sound credit rating. It might be appropriate, when all of the interests are properly balanced, for the Board, for example, to order that only the excess over a stipulated rate of return on equity, or some other measure, be refunded or otherwise dealt with. These are all matters to be considered by the Board in a given case.

105 The answers to Questions 3 and 4 can be given as follows:

As to: 3(i) - Yes

3(ii) - Yes

3(iii) - Yes

106 The answer to Question 4 is also "yes" on the assumption that what is being asked is not whether the Board may retroactively revise a previous order but merely whether, applying a defined and understood concept of excess revenue, (ie. an excess of a just and reasonable return on rate base) the excess so determined to have existed in prior years may then be taken account of and applied in setting future rates, tolls and charges.

Question 5

> Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

107 In order to understand the import of this question, it is necessary to review the approach taken by the Board to the definition of excess earnings in past years.

108 In correspondence passing between NLP, Newfoundland Telephone Company Limited (which at that time was regulated by the Board) and the Board during the late 1980's, there was considerable discussion as to the manner of defining "excess revenue" for the purpose of the operation of the reserve account which the Board had required the utilities to maintain for that purpose. As a result of these discussions, the Board approved a change in the utilities' systems of accounts to recognize a new definition of excess earnings. As indicated, this was accomplished by defining the excess revenue account in the utilities' system of accounts as follows:

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> This account shall be credited with any revenue in excess of the maximum return on common equity determined by the Board at the previous rate hearing to be refunded to customers or used for such purposes as the Board may order.

109 By the operation of this definition, the situation could occur whereby the utility might earn a rate of return on rate base in excess of the maximum range of returns determined by the Board pursuant to s-s. 80(1) but could nevertheless be within the range of return on common equity used by the Board for the purpose of determining a just and reasonable return on rate base under s-s. 80(1). If that eventuality occurred, there would be no requirement on the utility to pay anything into the excess revenue account; yet, the result would be that the utility would have earned more than a just and reasonable return on rate base. In light of the answer given to Question 1, the benchmark for determining excess revenue is the range of return on rate base determined by the Board to be just and reasonable. Does the Board have jurisdiction to deal with this money as excess earnings in light of the fact that it has defined excess earnings for the purposes of the utility's accounting by reference to the maximum return on common equity?

110 Question 5, we were told, attempts to address this issue. As phrased, however, the question merely asks whether the fact that the Board has "advised" (presumably, in the form of its order changing the definition of excess revenue for the purposes of the establishment of the excess revenue account) the utility of this new definition of excess revenue "affect" the jurisdiction of the Board to approve rates, tolls and charges. The short answer to this question, strictly construed, is "no". The Board cannot limit its jurisdiction, in the sense of its legal power, by determinations made in exercise of its powers. It either has the jurisdiction or it does not. Whether it chooses to exercise the jurisdiction is another matter.

111 As a result of the discussions at the hearing, however, it is apparent that there is a more fundamental issue at stake. The assumption appears to be that if the Board chooses to define excess revenue for the purpose of establishment of the excess revenue account in terms of revenue earned in excess of the maximum return on common equity, it is in effect saying that revenue earned below that maximum but which happens to be in excess of the just and reasonable return on rate base as determined by the Board under s-s. 80(1) is necessarily money which the utility can keep. This position is obvious from the arguments made by counsel for NLP since his position has been throughout that excess revenue has no meaning other than by reference to the definition used for the purposes of the excess revenue account. As indicated previously,[FN78] this is not a correct interpretation of the situation. The same assumption is also apparent from the position taken by the Consumer Advocate who argues that the decision of the Board to define excess revenue for the purpose of the excess revenue account in terms of exceeding the return on common equity, as opposed to rate base is ultra vires the Board because the Board must determine excess revenue by reference to revenues which are earned in excess of a just and reasonable return on rate base.

112 The assumption that the definition of excess revenue for the purpose of the operation of the reserve account is equivalent to the concept of excess revenue flowing from earnings in excess of a just and reasonable return on rate base as prescribed under s-s. 80(1), is false. I agree with the Consumer Advocate, for reasons already given[FN79], that any revenues earned in excess of the maximum range of a just and reasonable return on rate base are revenues to which the utility is not automatically entitled. It does not follow, however, that for the purposes of regulating the accounts of the utility, the Board is prevented from requiring payment into an excess revenue account on a different basis (provided it does not deprive the utility of the level of return on rate base to which it has been determined to be entitled). The Board can and should deal with all revenue earned in excess of a just and reasonable return on rate base; however, it does not have to require that all of it be paid into an excess revenue account.

113 As indicated in the answer to Question 3 and 4, the Board has a broad jurisdiction as to how to deal with the excess and it may well be that, in the circumstances obtaining, it will determine that only a portion (i.e. that portion above the maximum return on common equity) should be paid into a reserve account. It might determine that the rest should be rebated to consumers or used by the utility in furtherance of the objective of ensuring that it maintains a sound credit rating in the financial markets of the world. In short, there is nothing wrong in principle with the Board defining excess revenue for the purposes of a reserve account differently from the notion of excess revenue as de-

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termined by a comparison with a just and reasonable return on rate base as determined by s-s. 80(1). In so doing, however, the Board ought not to assume that any additional excess revenue ought necessarily to be returned to the utility to be used as it sees fit. The Board has jurisdiction, and in exercise of its legislative mandate it ought to exercise that jurisdiction, to make a determination as to how that remaining excess revenue, if any, should be dealt with consistent with the objectives and policies of the legislation.

114 Accordingly, the technical answer to Question 5 is "no" but so as to limit any confusion over the implications of the wording of the question, I would add that the Board has jurisdiction to define excess revenue for the purposes of maintenance of a reserve account by reference to the maximum level of return on common equity (or any other appropriate measure for that matter) but that does not mean that the Board may for all purposes define the level of excess revenue to which the utility is not entitled by reference to that measure; rather, the Board must determine, on the specific circumstances of the case, what is to be done with respect to any excess revenue measured against a just and reasonable return on rate base. If all or a portion of the excess revenue, measured against the return on rate base, is not ordered to be paid into a reserve account, it must nevertheless be dealt with in some other manner consistent with the objects and policies of the legislation. It should not be simply assumed that such excess revenue if not required to be paid into a reserve account belongs to the utility to be dealt with as it sees fit.

Question 6

> Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

115 The just and reasonable return on rate base which the Board determines that the utility is entitled to earn annually is "in addition to those expenses which the Board may allow as reasonable and prudent and properly chargeable to the operating account..."[FN80]. Thus, in the process leading up to the prospective setting of rates, the Board may look at the type and level of projected expenses of the utility in the test year and determine whether they are reasonable and, if not, only allow, for the purposes of calculation of a just and reasonable return on rate base, such types and levels of expenses as are, in the opinion of the Board, reasonable.

116 In the 1991 rate hearing, certain types and levels of projected advertising expenses were approved by the Board. At the 1996 rate hearing, it was suggested that in the light of what actually happened in the years subsequent to 1991, the utility had in fact incurred advertising expenses well in excess of the amounts approved as reasonable and also of a type different from those which were approved, i.e. for corporate image building rather than related to the supply of service. The issue posed by Question No.6 is whether expenses of a class which were previously approved as reasonable but which are in excess of the projected amounts can be disallowed by the Board for the purposes of rate regulation.

117 The level of operating costs is obviously an important factor in fixing rates. It is generally accepted that Board supervision as to reasonableness of such costs is therefore essential to effective regulation.[FN81] Phillips describes the matter thus:

> Commissions seldom challenge expenditures controlled by competitive forces, such as those for plant maintenance, raw materials and labor. Conflicts do arise over whether certain expenditures should be charged to operating expenses or paid for by owners out of earnings.
>
> Management might vote itself high salaries and pensions. Payments to affiliated companies for fuel and services might be excessive. Expenses for advertising, rate investigations, litigation and public relations should be closely scrutinized by the commissions to determine if they are extravagant or if they represent an abuse of discretion. In

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> all cases, moreover, the commissions should require proof as to the reasonableness of a utility's charges to operating expenses.[FN82].

Accordingly, the power to determine reasonable rates necessarily requires supervision of operating expenses.

118 In defining the parameters of such supervisory power, however, the Board must account for a competing principle, namely, that the Board is not the manager of the utility and should not as a general rule substitute its judgment on managerial and business issues for that of the officers of the enterprise[FN83].

119 Nevertheless, it is recognized that regulatory boards have a wide discretion to disallow or adjust the components of both rate base and expense[FN84]. In an American case[FN85] the matter was put as follows:

> The contention is that the amount to be expended for these purposes is purely a question of managerial judgment. But this overlooks the consideration that the charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any other purposes.

120 Having said that, however, there will normally be a presumption of managerial good faith and a certain latitude given to management in their decisions with respect to expenditures. In the United States, the test for disallowance is usually "abuse of discretion" showing "inefficiency or improvidence" or "extravagant or unnecessary costs".[FN86].

121 When the issue becomes a retrospective examination of actual expenses as compared with what was projected and determined to be reasonable and prudent, there ought, similarly, to be caution exercised before determining that an expense was improperly incurred. The circumstances facing a utility are not static and a considerable latitude has to be given to the decisions of management in making expenditures to respond to the new situations as they present themselves.

122 Nevertheless, it is still within the jurisdiction of the Board to supervise and review both the type and level of expenses incurred by the utility in respect of its operations. If it did not have that jurisdiction, the actual rate of return earned on rate base in a given year would be subject to manipulation by the utility as, for example, in a year where near the close of the fiscal period it appears that the rate of return will be more than anticipated, the utility, if totally unsupervised, could make large expenditures, unrelated to the delivery of service, simply to bring the rate of return in line with what had been projected.

123 The jurisdiction of the Board to take account of deviations from estimates of expenses when setting future rates does not differ from that pertaining to its jurisdiction with respect to taking account of excess revenue. The disallowance of an expense may lead, in effect, to a greater rate of return, and potentially to excess revenue if the resulting actual adjusted rate of return is in excess of the previously determined acceptable range of return. The excess revenue over a just and reasonable range of return on rate base can be dealt with by the Board as discussed in the answers to Questions 3 and 4. It does not remain the property of the company.

124 Accordingly, the answer to Question 6 is "yes". In giving this answer, however, I would emphasize that the question that was asked is a jurisdictional one. It does not give, in the circumstances of a particular case, a wide unfettered power to "second guess" managerial decisions with respect to expenses. In this regard, I agree with the comments of Phillips:

> Public utilities ... cannot spend freely and expect all expenditures to be included as allowable operating expenses. In effect, this means the commissions are permitted to question both the judgment and integrity of management. And if rates must be high enough to yield sufficient revenue to cover all operating expenses, the consumer has the right to expect that such expenditure will be necessary and reasonable.

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At the same time, managerial good faith is presumed. Public utilities must be given the opportunity to prove the necessity and reasonableness of any expenditure challenged by a commission (or intervenor). To justify an expenditure, a company must show that the expenses was actually incurred (or will be incurred in the near future), that the expense was necessary in the proper conduct of its business or was of direct benefit to the utility's rate payers, and that the amount of the expenditure was reasonable. Moreover, it must be emphasized again that a public utility may still spend its money in any way it chooses. Management's function is to set the level of expenses; the commission's duty is to determine what expense burden the rate payer must bear.

Question Nos. 7 and 8

(7) Does the Board have jurisdiction to require a public utility to maintain:

(i) a ratio; or

(ii) a ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

125 These two questions will be considered together because the issues they raise are interrelated.

126 In theory, both the overall level of capitalization and the individual components of a utility's structure are of interest to regulatory boards. Clearly, if a utility is allowed to engage in financing practices which result in overcapitalization, the whole viability of the enterprise may be threatened with consequent impact on the delivery of service to the public.

127 Furthermore, unlike in competitive conditions where the enterprise would not be able effectively to raise its prices over those of its competitors even if its costs of capital were excessive, overcapitalization of a regulated utility may well affect rates. That is because, in principle, rates must be set at such a level as to allow for recovery of the utility's costs, including its costs of capital, as well as a just and reasonable return. Overcapitalization, if uncontrolled, would increase the utility's costs and hence its rates. If the utility is not permitted to recover its costs in this regard it will, like any unregulated business, face bankruptcy with the consequence of disruption of service to customers. Overcapitalization may therefore indirectly put an upward pressure on rates to ensure the continued viability of the utility to enable service to be maintained. Alternatively, service may suffer.

128 Arguably, the purpose of s. 91 of the *Act* is to enable the Board to control the risk of overcapitalization and its impact on the viability of the utility, or at least on its credit standing. By examining each proposed new security issue in advance, the Board has a chance of minimizing the adverse effects of overcapitalization before the occur.

129 The composition of a utility's capital structure, that is, the mix of debt and equity, is also a matter that is necessarily of interest to regulatory boards.

130 Because the costs of the individual components of a utility's capital structure, i.e. the embedded costs of debt and preference shares and the reasonable rate of return on common equity, are given a weighted cost, proportional to their share of the total capital structure, for the purpose of deriving a reasonable rate of return on rate base, the level of the actual proportional share of each component will necessarily have an effect on the result of the overall determination of a just and reasonable return on rate base. The makeup of the utility's capital structure can therefore influence

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that determination.[FN87]

131 Phillips[FN88] expresses it this way:

> ...the traditional theory of business finance holds that the average cost of capital to a firm varies with the capital structure upon which it is based. The interest rate on debt is normally lower than the cost of equity capital. Consequently, within limits determined by such factors as the risk of a business, the overall cost may be somewhat lower when the debt-equity ratio is high than when the debt-equity ratio is low.

It is too simplistic, however, to say that in all cases, the higher the debt equity ratio, the lower will be the overall costs of capital. As deGrandpré[FN89] points out:

> It is often argued that if utilities increased their debt ratio, their cost of capital would be reduced since the cost of debt is less than the cost of equity. This may be true, but then the rate of return would have to be increased under the risk factor since the interest has to be paid before dividends and the investor might find himself deprived of dividends because of insufficient earnings.

The debt equity ratio can, therefore, have a complicated effect. What is undeniable, however, is that the debt-equity mix does have an effect on the rate of return. Hence, it is something which, in principle, should come within the regulatory umbrella in fulfilment of the policies of keeping the costs to consumers low and of ensuring a sound credit rating for the utility. The higher the cost of capital, the higher will be the return necessary to be awarded to the utility to enable it to maintain a sound credit rating in world financial markets. This would inevitably lead to higher rates, tolls and charges which would work against the policy of providing power to consumers at the lowest possible cost consistent with reliable service.

132 From this, the Consumer Advocate and the Board itself argued that it is a necessary and appropriate power on the part of the Board to regulate the ratio of debt to equity in a utility's capital structure. Without such a power, the Board is limited, it was suggested, in its ability to ensure that sources and facilities for the production, transfer and distribution of power are managed and operated in a manner that would result in power being delivered to consumers at the lowest possible cost consistent with reliable service.

133 In like manner, it was argued that the Board has the power, as a necessary incident of the legislative scheme, to stipulate, from time to time, that a public utility must obtain its capital requirements by the issue of financial instruments of a specified nature.

134 Granting that the level of overall capitalization and the composition of the capital structure of a utility are both matters of regulatory concern, at least insofar as they affect the utility's rate of return on rate base and hence the cost to consumers of the delivery of reliable service, the question to be determined is the degree of intrusion which the Board may undertake into the financial affairs of the utility. Can it be proactive and, as Question 7 suggests, "require" the utility to maintain a particular debt-equity ratio or, as Question 8 implies, "require" the utility to finance its activities in a particular way, or is it limited to passive disallowance of particular financing in a particular financing proposals either in the process of setting rates or in the course of other applications?

135 In approaching these questions, it has to be remembered that there is no such thing as one ideal capital structure. It is a function of economic conditions, business risks and "largely a matter of business judgment".[FN90] Furthermore, a given capital structure cannot be changed easily or quickly. As well, the long-term effects of changes on capital structure on the enterprise and on the future cost of capital may not be easily predictable. Capitalization decisions also have other business dimensions that transcend the considerations relevant to this issues directly presented in the regulatory process.

136 All of these considerations favour an approach that, in principle, should limit the degree of intrusion by the Board into the managerial control by the utility over financial decision-making. As emphasized earlier[FN91] the

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powers of the Board should be generally regulatory and corrective, not managerial. A debate has nevertheless occurred over whether regulatory agencies can and should "fix" debt-equity ratios and restrict new financing techniques to specified types of instruments.[FN92] Phillips notes that:

> These methods, however, have limitations. For example, since the financial conditions of individual utilities vary, no one ratio of debt to equity is correct. The refusal to approve a bond issue may lead to no issue at all, since, if a utility's earnings are insufficient to maintain its stock at par, it is in no position to issue more stock; bonds are the only way new capital can be raised. As a result of these problems, few commissions are willing to substitute their judgments for those of management...[FN93]

137 An alternative to actual intrusion into the utility's financial affairs in the form of a direction as to how the enterprise should be structured is for the regulator, *for the purpose of setting rates*, to base its estimates of the cost of capital on a hypothetical appropriate capital structure, thereby disregarding the utility's actual capitalization[FN94]. The justification for this approach is given by Phillips who, citing other authors, states:

> Locklin has argued that most commissions 'disregard actual capital structures and set up an ideal or normal structure for the purpose. To do otherwise would burden the public with the higher costs of obtaining capital that result from a capital structure that is something less than ideal, and may, in fact be quite unsound'. And Rose argues: 'When a commission in determining cost of capital disregards the actual capital structure or a capital structure proposed by management it is no more invading the domain of management than when it disregards unreasonable expenses for labor, fuel, or other productive factors in prescribing rates'.[FN95].

It appears, however, that actual capitalization has also been used as a basis[FN96]. Nevertheless, the arguments in favour of the ability of the Board to disregard the actual capital structure in an appropriate case and base its determination upon a hypothetical structure are convincing. Indeed, this has occurred in Canada.[FN97] Without such a power, the Board would not be able effectively to fulfill its mandate of promoting the delivery of reliable service to consumers at the lowest possible cost and at the same time maintaining a sound credit rating for the utility in the financial markets of the world. Having said that, in exercising that power, it goes without saying that the Board ought to have a healthy respect for managerial judgment[FN98] in such matters since if a hypothetical capital structure is used that is too far off the mark of the actual structure, it may in practical terms make the utility unable to meet its actual commitments, thereby threatening its credit standing and possibly affecting service to customers.

138 It is not necessary to go further, for the purpose of promotion of the objectives and policies of the legislation, and accord to the Board a power of actual intrusion into the capital structure of the utility. The distinction between actual intrusion and disallowance for rate making purposes is justified in the context of the existing legislation and enables the Board o respect the principle of general deference to managerial decisions.

139 The question that remains is whether s. 91 of the Act, which is the only provision expressly dealing with the powers of the Board respecting capital structure, can be said, either expressly, or by necessary implication, to accord greater powers to the Board.

140 On its face, s. 91 appears to be limited to a situation where the Board may approve or disapprove of a particular proposal from the utility for the issuance of a proposed form of securities. It is expressed in terms of a power of negative disallowance rather than positive direction.

141 As noted previously[FN99], s. 91 enables the Board to control the level of overall capitalization. Is that the only purpose for which a disallowance under s. 91 can be made? Obviously, an indirect effect of an approval or refusal of a particular security issue could be to affect the utility's future proposed debt-equity ratio and hence the composition of its capital structure. In practical terms, the power to disallow a specific proposal will enable the Board to exercise at the very last, by means of moral suasion in discussion, a degree of positive influence over total capitalization as well as capital structure. The power of disallowance under s.91 may, in my view, be used, in appropriate cases, to further such

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objectives. Subsection 91(3) requires the Board, before approving a security issue, to be satisfied that it is in accordance with law and "for a purpose approved by the Board". Accordingly, so long as the power of approval or disallowance under s. 91 is exercised in a manner that is consistent with and in furtherance of any of the policies which the legislation was designed to serve, it will be within the jurisdiction of the Board to so act. In what way, the Board may influence the total level of capitalization as well as the particular debt-equity ratio. It does not, however, permit the Board to direct the utility to raise money in a particular way or to maintain a particular debt-equity ratio. In other words, it cannot be used as a springboard for an aggressive intrusion into the day to day financial and managerial decision making of the utility with respect to the capital structure of the enterprise. Nor can the general policies underlying the legislation justify such a power. As indicated, financing is undertaken for considerations that are not necessarily directly related to utility regulation. Furthermore, it has also been noted that, within the regulatory context, the utility is still subject to business risks and the effects of management decisions and the utility, other things being equal, ought to have the power to respond to that zone of risk. To that extent, the utility must be able to make financial decisions related to the overall health of the enterprise for reasons other than strictly regulatory ones, provided that in so doing it does not trespass on the objectives and policies of the legislation.

142 Accordingly, while recognizing that a degree of influence over the utility's capital structure and over the choice of financial instruments to be used in financing the enterprise can be exercised by means of the powers conferred by s. 91 and the powers inherent in the regulatory scheme itself, the answers to Questions 7 and 8, insofar as the questions imply an ability to directly stipulate particular financing results, is, in each case, "no".

General Observations

143 In answering the foregoing questions, it is worth emphasizing that the answers are given in terms of the jurisdiction of the Board. The fact that the Board may have jurisdiction, in the sense of legal power, to do something does not mean that, in a particular case, the power ought to be exercised. In the arguments which were presented on the hearing of the stated case, it was apparent that some of the positions taken by a party were being advanced out of a concern that if the jurisdiction was conceded, it would necessarily follow that the Board would exercise its power in a manner adverse to that party.

144 The question of whether the Board should in fact exercise powers within its sphere of jurisdiction and the question of the manner in which those powers should be exercised raise very different considerations. It must always be remembered that, as has been emphasized throughout this opinion, the Board is charged with balancing the competing interests of the utility and the consumers of the service it provides. Neither set of interests can be emphasized in complete disregard of the interests of the other. Thus, in choosing to exercise a particular power within the Board's jurisdiction, the Board must always be mindful of whether, in so acting, it will be furthering the objectives and policies of the legislation and doing so in a manner that amounts to a reasonable balance between the competing interests involved.

Opinion

145 Pursuant to s. 101 of the *Act*, I would summarize my opinion on the questions posed as follows:

Question 1(i) Yes

Question 1(ii) No

Question 2 Yes

Question 3(i) Yes

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Question 3(ii) Yes

Question 3(iii) Yes

Question 4 Yes

Question 5 No

Question 6 Yes

Question 7 No

Question 8 No

I emphasize that inasmuch as the import of the answers given depends on my interpretation of the questions posed, it is necessary to read the answers in the context of the rest of this Opinion.

146 Pursuant to s. 102, the Deputy Registrar of the Court is directed to remit this Opinion to the Board.

O'Neill, J.A.:

147 The Board of Commissioners of Public Utilities (the Board) is a statutory body existing under the provision of the Public Utilities Act, R.S.N. 1990, c. P-47, as amended (the Act).

148 The general powers of the Board are set out in s. 16 of the Act:

> The board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law and shall have the right to obtain from a public utility all information necessary to enable the board to fulfil its duties.

149 In addition to the powers and obligations given to and imposed on the Board by the Act, the Board has certain duties and powers under the Electrical Power Control Act, 1994, Chapter E-5.1, as amended and, by s. 4 of that Act, is specifically directed to "implement the power policy" of the Province, as set out in s. 3 of that Act, and in doing so to apply tests "which are consistent with generally accepted sound public utility practice".

150 By s. 101 of the Act, the Board may, of its own motion, state a case in writing for the opinion of the Court upon a question which in the opinion of the Board is a question of law.

151 On August 14, 1996, the Board stated a case requesting the opinion of the Court with respect to certain specific questions as set out therein. Following an application for directions, the court ordered that, inter alia, certain parties be notified of the proposed hearing. Subsequently Newfoundland Light & Power Co. Ltd., a utility, and "the Consumer Advocate" were granted status to appear and be heard at the hearing before the court.

152 In its application to the Court, the Board stated that in the course of a hearing before it, the submissions of various parties raised questions as to the jurisdiction of the Board under the Act and the Board thereupon stated a case for the Court upon the following questions:

> (1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

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(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tools and charges of the public utility at a future date; or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?

(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tools and charges on the basis queried in Question(4).

(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

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(7) Does nhe Board have jurisdiction to require a public utility to maintain:

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 of the Act or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

Question #1

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

153 It may be useful to set out here the relevant parts of ss. 37, 70 and 80 of the Act:

37 (1) A public utility shall provide service and facilities which are reasonably safe and adequate and just and reasonable.

70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.

(4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

154 In the past, the Board has ordered that a just and reasonable return for a utility is "determined" to be between two stated percentages of its annual rate base for a test year, and ordered the utility to file, for examination by the Board, a schedule of rates, tolls and charges which will comply with the Board's determination, and, if so found to comply, approval is granted for those rates, tolls and charges.

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155 The rate base is arrived at by calculating the utility's net investment in plant and equipment required for the rendering of the regulated service.

156 While not having fixed the return which the utility may earn, the Board has, in its orders, directed that a utility establish an "excess revenue reserve" into which revenue exceeding a certain rate of return on equity is to be deposited.

157 The Board, in its order dated December 4, 1991, having fixed the average rate base for Newfoundland Power for the year 1992, and having determined a just and reasonable return for Newfoundland Power on its average rate base for that year, noted that that return would provide an opportunity for it to earn a somewhat higher rate of return on common equity:

> A just and reasonable return for [Newfoundland Power is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%.

158 The Board's position before the court was that since what is a just and reasonable return on rate base is influenced by the proportion of the various financing components, including long term and short term debt and preferred shares, it is imperative that the Board be able to set and fix the return which the holders of the common shares in the utility may earn since the market conditions for debt could alter the return to the holders of the common shares significantly.

159 Although s. 80 does not specifically provide for a rate of return for common shares, the determination of a rate of return on the common shares of a utility is very much a part of the rate making process. Further, it must be noted that by s. 3 of the Electrical Power Control Act, the policy of the Province is declared to be that the rates to be charged, either generally or under specific contracts, for the supply of power within the Province "should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world...".

160 For Newfoundland Power it was argued that the Board has the jurisdiction to determine the just and reasonable return on the rate base and, as part of that process, the jurisdiction to determine the return on common equity, it being one of its sources of funds. I see no distinction between "determine" and "set and fix" insofar as the jurisdiction of the Board here is concerned. The calculations and projections made by the Board in arriving at the rate of return, whether specifically on rate base or the return on common equity, involve by their very nature, looking into the future, estimating as best can be done the revenues and expenditures contemplated for the utility's operations, the costs of money which may vary substantially, up and down, and then to fix a rate base, and a just and reasonable return on that base upon which the rates, tolls and charges will be based and approved.

161 Although the Board is supplied on a regular basis and has the authority to demand all the financial information it requires of a utility, the rates are, in effect, established for relatively long periods, (in excess of one year) and the likelihood of the accuracy of the forecasts which are necessarily made in setting the rate base and the rates of return is somewhat diminished.

162 For the Consumer Advocate it was argued that s. 80(1) only gives the Board the jurisdiction to calculate the rate of return on rate base and does not allow a calculation of what return the common equity shares will have.

163 As noted earlier, common shares constitute one of the components of the financial make-up of a utility and, as argued by counsel for the Board, while, theoretically, the Board only determines a just and reasonable return on the rate base as fixed and determined by it, in a practical sense, the return on common equity must be considered as part of

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the mix in setting the return on rate base, just as are the rates of interest paid on preferred shares, bonds and other financial obligations.

164 In the result, in my opinion, questions 1(i) and 1(ii) should be answered in the affirmative.

Question #2

Does the Board have jurisdiction to set the rates of return referred to in question (1) as a range of permissible rates of return?

165 There is no question but that the rate setting process of the Public Utilities Board is prospective and is performed by the Board's making estimates of the myriad of factors which have to be considered. The problem is exacerbated by the fact that the process is not one which is contemplated to be reviewed regularly or on a short term basis. The meaningful interpretation of the word "return" as it appears in s. 80(1) allows for and, in the circumstances, contemplates a range of rates of return. It follows then that a just and reasonable return, though it may be stated as a fixed percentage, may be a range of rates which is determined to be just and reasonable. In making such a determination, the Board is clearly acting within its jurisdiction. As noted earlier, a consideration of a just and reasonable return on common equity as one of the components of the financial investment in the company is a necessary part of the process of arriving at a just and reasonable return on rate base, and this return may also be stated as a range.

166 I would answer question 2 in the affirmative.

Question #3

Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on;

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment, which the Board has determined has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, the tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?

167 Under s. 69 of the Act, the Board has very broad powers including requiring a public utility to set aside from earnings monies in a depreciation account and creating and maintaining a reserve fund. Section 69 of the Act is as follows:

69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.

(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.

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> (3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.
>
> (4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

168 The answer to the question also requires a consideration of the powers of the Board as set out in ss. 58 and 59 of the Act.

169 By ss. 58 and 59, the Board may prescribe the form of all books of account and records to be kept by the public utility and to make its returns to the Board on such forms as may be prescribed by it. By s. 59, unless otherwise ordered by the Board, the utility shall close its accounts at the end of each calendar year and shall file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the year following. In effect, approximately three months after the close of the utility's financial year, the Board is made aware of the exact financial position of the company at the end of the previous year and of any other information which it may require.

170 It will be seen from s. 69(3) that the Board has the power to direct a utility to set up reserves out of revenue to be used for replacement of equipment, new construction, extensions or additions to the property of the company. As well, reserves may be ordered to be created which would have the effect of "improving the status of the utility as a borrower or seeker or funds for necessary maintenance or expansion". There is a further power which comes to the Board from s. 69(4) and that is to require the utility to set up a reserve of monies which may have been in excess of those anticipated by the Board at the time of setting the rate of return and to prevent the distribution of that money or any part of it as dividends until the further order of the Board.

171 In the setting of rates, the Board is looking into the future and addressing the anticipated revenues and expenses of the utility with the many variables which may occur. It follows then that it must have the authority to anticipate that there will be variations from what was forecast. While the rates, tolls and charges are set following a hearing and only by an order following a hearing, the constant reporting which a utility must make to the Board allows the Board to be kept informed as to the financial operations of the utility and, in the result, to be aware of how these revenues and expenditures affect the rate of return anticipated by the Board and set out in its order. At the same time, as stated earlier, the rate of return on rate base and on common equity are set not as specific percentages but as a range.

172 In order P.U. 6-1991, the following appears at p. 56:

> The applicant has applied for a rate of return on common equity in the range of 13.5% to 14.0%, with rates set at 13.75%. The midpoint of the range was chosen since it is consistent with past practice and gives the Company the motivation to strive for a higher range (up to 14.0%) while giving them an opportunity to remain within the range if they are unable to come in on forecast (i.e. earn 13.5%)

And later at p. 72:

> The Board orders a range of 13.00% to 13.50% be adopted as the Company's rate of return on common equity with rates being set at the mid-point of the range, 13.25%. In the Opinion of the Board this will give [Newfoundland Power] the opportunity to earn a fair and reasonable return and will increase [Newfoundland Power's] interest coverage in 1992 to 2.87 times.
>
> The Board believes that [Newfoundland Power's] interest coverage in 1991 of 2.81 times at existing rates, which is an increase from 2.7 times in 1990, together with the increase to 2.87 in 1992 is satisfactory.

173 In my view, when rates, tolls and charges are set, the revenues generated belong to the company. If the net

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revenues are less than forecast and result in a return on rate base or on common equity less than as set out in the Board's order, then that loss is the company's loss. Revenues which are greater than anticipated belong to the company and any revenues in excess of those forecast by the Board as reflected in its order belong to the company and cannot be used, except as discussed in the following paragraph, to reduce the revenues of the utility in the future.

174 I see nothing to preclude the Board's directing that those revenues of a utility in excess of the top of the range allowed by the Board in its order as a return on common equity, be set aside and maintained in a reserve fund by an order of the Board, as contemplated by s. 69 "for a purpose which the [B]oard thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations." I do not view any revenues of a utility in excess of those required to achieve the higher point of the range of return either on rate base or on common equity as becoming excess funds unless and until they are set aside by an order of the Board as authorized by s. 69. Until such order, these funds remain the property of the utility and may be treated as such. The creation of a reserve fund is a power given to the Board to be exercised as it sees fit. Indeed, s. 69(4) gives the Board the authority to "require the utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the [B]oard's opinion, attributable to the order". Indeed, it may happen from time to time that circumstances may so change following the making of an order that a utility may need to and may actually earn revenues in excess of those contemplated by the Board when the last order was issued.

175 It follows from what I have said that the Board does not have the power to order rebates to the customers of the utility other than out of such a reserve fund. To order a rebate from revenues other than those which have been placed in a reserve fund and, in that sense, not available to the company directly, would be to make a retroactive order. A sufficiently good reason for this is that just as additional billings are not permitted to be made to customers because of revenues which have fallen below the range set when the order was made, so any additional revenues may not be paid out. The role of rate making is prospective and this is itself in my view would preclude any reaching back.

176 Reference should also be made to s. 80(1) which in may view contemplates, by the use of the words "earn annually", that each year becomes a separate unit and the revenues from one year may not be applied to another year so as to effect any change in the financial makeup of the utility, except through the use of the reserve fund, which, on its creation by order of the Board, has the effect of removing funds from the particular financial year affected by the order of the Board creating or ordering the placing of funds in the reserve fund and, in effect, makes those monies unavailable for the general use of the utility, including the payment of dividends to the holders of common equity.

177 I would answer question 3(i) in the negative, 3(ii) in the affirmative and 3(iii) in the negative.

Question #4

Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares,

in prior years?

178 Although the Board's jurisdiction is to fix and determine a rate base which will enable the utility to earn annually a just and reasonable return on that rate base, it follows that, depending on the range settled upon by the Board in its order and considering that the rates, tolls and charges are set using the mid-point of that range as a basis, the utility may, from time to time, record net revenues which are less than or more than that contemplated by the range as set. Although the wording of s. 80 of the Act states that the utility is entitled to earn a just and reasonable return, it

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does not follow that it may not nor should not have revenues in excess of those contemplated. At the same time, for reasons which may be beyond the complete control of the utility, the revenues received might be substantially below those anticipated when the rates, tolls and charges were set and approved.

179 In my view, the Board cannot set rates, as argued by counsel for the Board, in a manner that would compensate for prior "excess" earnings. At the same time, in setting rates, as it must do prospectively, the Board must be alive to the various factors which may have caused the utility in any previous year to earn more or less than that anticipated by the Board in its order, and it must factor those causes into the percentages and ranges for return on rate base and for return on common equity in future orders.

180 I would answer question 4 in the negative.

Question #5

Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be adjust and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question 4.

181 Counsel for the Board argued that the authority of the Board to amend, alter or rescind any order made by it is plenary and the Board has full power to reconsider any order made previously by it, notwithstanding that there is a right of appeal in respect of its decisions on questions of law. Further, he argued that the fact that the Board has previously ruled or ordered a particular basis for the calculation of excess revenue does not preclude the Board from considering the effect of such earlier decisions in determining what revenues will be required by the utility in setting new rates based on a just and reasonable return in accordance with a new method of calculation.

182 Counsel further argued that since there is no fixed term for the continuing application of any approved rates, tolls or charges, the Board is not precluded from altering its previous order and assessing what is a just and reasonable return based upon its current assessment of the utility. Counsel argued that s. 87(1) of the Act clearly sets out that power:

87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

183 The investigation undertaken under s. 87(1) follows upon a complaint made to the Board as set out in s. 84(1) and following upon the procedures set out in ss. 85 and 86 of the Act.

184 The legislation empowers and indeed directs the Board to conduct a constant monitoring of the financial position of the utility and gives the Board the authority to institute a correction process at any time. It does not, in my opinion follow, as argued by counsel for the Board, that the Board in setting new rates, tolls and charges may take into account earnings of the utility in previous years in excess of a just and reasonable return upon the rate base or upon the investment which the Board has determined has been made in the public utility by the holders of common shares. This is so notwithstanding that the Board has previously ordered or advised a utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return upon the rate base as fixed and determined by the Board where not in excess of the return determined by the Boards to be a just and reasonable return upon the investment made by the holders of common shares.

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185 Counsel for the utility argued that the Board does not have jurisdiction to order that the rates, tolls and charges shall be approved taking into account earnings in excess of a just and reasonable return, either on rate base or on common equity, in prior years. Counsel further argued that such a power would "constitute retroactive appropriation of past revenues for future purposes". He further argued that the only mechanism available to the Board, where a utility earns in excess of the rate of return on rate base or on common equity, is to require the utility to deposit excess revenue, as defined by the Board, into a reserve account in the year earned. It is then, he argued, that the Board may approve the application of these funds as revenue in determining the rates, tolls and charges for a future period but any funds not ordered to be deposited in the reserve account are funds of the utility, belong to the utility, and cannot be considered in setting future rates. To do so, he argued, would be to change the system of accounts so that funds which were not excess in a previous year will then become excess and be brought forward - a retroactive order which is beyond the jurisdiction of the Board.

186 For the Consumer Advocate it was argued that although the Board had advised the utility that it was permitted to retain earnings in excess of the rate of return as determined by the Board, it is not precluded from later making an order under s. 80(1) and s. 76 of the Act rescinding, altering or amending any existing order and in declaring these earnings as excess revenue. The Consumer Advocate also argued that in light of its position taken in response to question 4, the Board does not have jurisdiction to order that the "excess revenue" earned in previous years by the utility should be taken into account in setting rates, tolls and charges in subsequent years but that the Board must order that it be rebated to customers of the utility.

187 I agree with the position taken by the utility. I would answer question 5 in the negative.

Question #6

Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

188 The example given by the Board in its factum illustrative of the situation giving rise to question 6 is as follows:

In determining in 1991 what was a just and reasonable return on the basis of projection for test year, 1992, the Board was presented with projections for the future cost of operating expenses including advertising. The actual cost of advertising for 1995 exceeded the projection for 1992 by some $314,000.00. As such, the amounts for advertising contemplated by the Board as being reasonable, prudent and properly chargeable to operating account vary significantly for the year 1995 from the estimate upon which the Board determined a just and reasonable rate of return.

189 Counsel for the Board argued that "the circumstances of a significant increase in expenses over the estimates used for the test year is indistinguishable from the circumstances of an increase in net earnings. For the same reasons as advanced by it in question 5, it argued that the Board had jurisdiction to order that the rates, tolls and charges could be approved taking into account these expenses, previously incurred, but now considered inappropriate to be allowed as reasonable and prudent.

190 For the utility, it was argued that once rates, tolls and charges are set, the resulting revenue belongs to the utility except for any amounts which the Board may order to be deposited into an excess revenue account. Further, although the Board has the authority to determine whether the expenses comply with s. 80(2), which jurisdiction is necessary to ensure the integrity of the excess revenue account, the Board does not have jurisdiction to disallow the amount of any operating expenses which is reasonable or which had previously been allowed as a just allowance. Further, it argued that the Board may not disallow an expenses because it is of the opinion that had it been the manager, it would not have made that expenditure. The question is whether the expenditure is one that could have been made by

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a reasonable and prudent manager.

191 The utility further argued that there should be no "microscopic review" especially with the benefit of hind-sight. Counsel argued that the Board makes its annual review of the returns made by the utility and, in the specific example here, the Board had obviously made the decision that that expense, although it exceeded predictions, was reasonable (or at least the fact that it didn't say anything about it would indicate that it was reasonable). That expense should not, except in very rare circumstances, be later held to be unreasonable. The utility's position was stated in its factum as follows:

> The Board does not have jurisdiction to order that rates, tolls and charges shall be approved taking into account the amount of such "disallowed" expenses. The Board's jurisdiction is limited to disallowing expenses which it determines not to be "reasonable and prudent and properly chargeable to operating account" or otherwise not a "just allowance" under s. 80(2). The disallowance of an expense would lead to the company earning a somewhat greater return on common equity for the purpose of the excess revenue account for the year in which the expense was incurred. However, this revenue remains the property of the company and its shareholders unless the amount disallowed would mean that the company's return on common equity would exceed the maximum return on common equity previously allowed by the Board. If that were to occur, the amount which would be beyond the maximum return on common equity would be deposited into the "excess revenue account".

192 For the Consumer Advocate, it was argued that the Board may take into account past expenses in order to forecast more accurately future revenues and expenditures. However, its counsel argued that the Board does not have jurisdiction to set future rates, tolls and charges designed to compensate for past expenses that the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account.

193 I agree with the arguments proferred by the utility and the Consumer Advocate.

194 I would answer question 6 in the negative.

Questions #7 & 8

Question #7

Does the Board have jurisdiction to require a public utility to maintain:

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

Question #8

Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

195 In his decision which I have read in draft, Green, J.A. considered questions 7 and 8 together because, as he stated, the issues they raise are interrelated. I agree with the reasoning of Green, J.A. in dealing with these questions and I would answer both questions, as he did, in the negative.

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196 I would also agree with the comments made by Green, J.A. in that part of his decision, entitled "General Observations".

Conclusion

197 In the result then I would answer the questions posed as follows: 1(i) yes, 1(ii) yes, question 2 - yes, question 3(i) - no, question 3(ii) - yes, question 3(iii) - no, question 4 - no, question 5 - no, question 6 - no, question 7 - no, and question 8 - no.

Order accordingly.

FN1 R.S.N. 1990, c. P-47 as amended (hereinafter the "Act")

FN2 *Act*, s. 16

FN3 *Act*, s. 70

FN4 *Act*, s. 80

FN5 Board Orders P.U.6 (1991) and P.U.7 (1991)

FN6 Hereinafter, "NLP"

FN7 Pursuant to s. 117 of the Act. See OC 96-226; OC 96-236

FN8 S.N. 1994, c. E-5.1, as amended (hereinafter, the "EPC Act")

FN9 I acknowledge a large indebtedness to the following sources for much of the information referred to herein about general regulatory principles and practice in North America: Charles F. Phillips, Jr. *The Regulation of Public Utilities* (Arlington: Public Utilities Reports Inc., 1993); A.J. deGrandpré, "Fair Returns for Utilities-Concept or Reality?" (1970), 16 McGill L.J. 19; A.B. Jackson, "The Determination of the Fair Return for Public Utilities" (1964), 7 Canadian Public Administration 343.

FN10 s. 4

FN11 See *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.) (hereinafter referred to as the "Bell Rebate case") where Gonthier, J. in response to an argument that a regulatory board did not have a particular power because it was not expressly provided for in the legislation stated at p. 1758: "This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expansion of the wider rule that the Court must not stifle the legislator's intention by reason only that a power has not been explicitly provided for."

FN12 "Nearly all the boards and commissions in the United States and Canada that regulate public utility rates do so on the basis of allowing a public utility a 'return' on the 'value' of the public utility property. The return that must be allowed is usually referred to as the 'fair return' ..." per Jackson, op.cit. fn.9, p. 343. See also *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.) per Anderson, J. at page 710: "By way of general observation ... there are substantial similarities between the situation here and in the United States, and authorities of courts in the United States are frequently referred to and considered..."

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FN13 *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (U.S. 1944), per Douglas J. at page 603: "The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests"; *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), per Lamont, J. at pages 192-193: "The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested".

FN14 deGrandpré, op.cit. fn. 9, p. 20. See also *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.) per Anderson, J. at page 710: "...it is the function of the [Board] to balance the interest of the [utility] in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interests of its customers to be served as cheaply as possible". See also *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.) per Gonthier, J. at p. 1748.

FN15 *EPC Act*, s. 3(a)(iii)

FN16 *EPC Act*, s. 3(a)(i)

FN17 *EPC Act*, s. 3(b)(iii)

FN18 *Act*, s. 37(1)

FN19 *Act*, s. 70(1). Although, unlike the legislation of some other jurisdictions, s. 70 does not expressly state that the rates approved by the Board must be "reasonable" or "just and reasonable", that standard is nevertheless imported into the approval process by virtue of the *EPC Act*, s. 3(a)(i) which declares the policy of the province to be that rates must be "reasonable".

FN20 *Act*, s. 80(1)

FN21 *British Columbia Electric Railway v. British Columbia (Public Utilities Commission)*, [1960] S.C.R. 837 (S.C.C.), per Locke, J. at page 848: "The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute..."

FN22 Ibid., per Locke, J. at pages 845, 847.

FN23 Ibid., per Locke, J. at page 848: "I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases ...". This observation was adopted and followed by this Court in *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)* (1987), 25 Admin. L.R. 180 (Nfld. C.A.) at page 193.

FN24 *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (U.S. W. Va. 1923). (This case has often been referred and relied upon in subsequent decisions in the United States and Canada, including in this Court. See *Newfoundland Light & Power Co. v. Newfoundland (Public Utilities Commissioners Board)* supra, fn. 23 at page 193.)

FN25 Ibid., page 692.

FN26 *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), per Lamont, J. at page 193.

FN27 320 U.S. 591 (U.S. 1944)

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

FN28 deGrandpré op.cit. fn. 9, page 28

FN29 Ibid., page 37

FN30 supra, fn. 23 at page 194

FN31 Ibid. page 194

FN32 *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (U.S. S.D. 1951), per Jackson, J. at page 251

FN33 *Bell Telephone Co. of Canada, Re* (1966), 56 B.T.C. 535 at page 731: "We are ... not persuaded that reasonableness can, in practical terms, be expressed as a fixed point from which there can be no deviation. We therefore propose to use a range of percentage earnings on total average capitalization."

FN34 *Federal Power Commission v. Hope Natural Gas Co.* Supra fn. 13 per Douglas, J. at page 603

FN35 In *Northwestern Utilities, Re* (1978), 89 D.L.R. (3d) 161 (S.C.C.), Estey, J. stated at p. 164: "The statutory pattern is founded on the concept of the establishment of rates *in futuro*... [T]he Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under the rates established for past periods." [Of course, such an approach assumes that without such rates, the utility will continue to be economically viable. If poor management leads to losses that threaten the very continued existence of the utility, the Board may well have to set future rates at a level that will enable the utility to remain operative so as to ensure continued service to customers. This is an unlikely scenario in view of the close monitoring that the Board should exercise between rate hearings.]

FN36 *EPC Act*, s. 3(1)(b)(iii)

FN37 deGrandpré op.cit. fn. 9, page 26

FN38 "The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity": per Gonthier, J. in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)* supra, fn. 11 at page 1747

FN39 4th ed. rev., 1968

FN40 J.B. Sykes (ed), 7th ed.

FN41 s. 64(1)

FN42 s. 64(2)

FN43 s. 68(4)

FN44 s. 70(1). This provision makes the scheme administered by the Board a "positive approval scheme" (requiring advance approval of rates as being reasonable) rather than a "negative disallowance scheme" (permitting the utility to set its own rates subject to user objection, which would only then trigger a review into reasonableness), as those terms

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

were explained by Gonthier, J. in the *Bell Rebate* case, supra, fn. 11 at p. 1758.

FN45 s. 78(1)

FN46 s. 78(2)

FN47 s. 91(1), (3)

FN48 supra, paragraphs [21]-[23]

FN49 *EPC Act*, s. 3(b)(iii)

FN50 See, e.g., Board Order P.U.6 (1991), page 72

FN51 Phillips, op.cit., fn. 9, p. 389

FN52 See, e.g. P.U. 6 (1991) and P.U. 7 (1996-97)

FN53 Supra fn. 13 at p.199

FN54 supra fn. 23

FN55 *Union Gas Ltd. v. Ontario (Energy Board)*, supra fn. 12

FN56 para.[30]

FN57 See *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, supra, fn. 11 at page 1733. Yvonne Penning, "The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled" (1989), 47 U of T Fac. L.R. 607 observes at p. 617: "The CRTC has developed the practice of setting the allowed ROE on the basis of a one percentile range. While only one actual ROE - usually the middle of the range - is used in the calculation of rates to be charged customers, all rates encompassed by the range, in theory, represent a reasonable return. One reason for setting such a range is that it explicitly provides some incentive for the company to be efficient; financial rewards due to efficiency or productivity gains would accrue to the company's shareholders, rather than being passed on to consumers through lower prices." Another rationale for a range approach is given by Penning later in her article at p. 621 where, after noting that the U.S. Federal Communications Commission also employs ranges, states: "...it also serves a very useful administrative function in that it limits the circumstances under which it would be necessary to alter rates on a prospective basis, within the time period for which the range of rates of return was deemed to be reasonable, in response to changing economic circumstances."

FN58 s. 58

FN59 s. 69(3)

FN60 Phillips, op cit. fn. 9, page 196

FN61 See, eg. Board Order P.U.6(1991), page 81

FN62 S. 80(4)

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

FN63 S. 3(a)(ii)

FN64 *Northwestern Utilities, Re*, supra fn. 35, per Estey, J. at p. 170: "...the Act does not prevent the Board from taking into account past experiences in order to forecast more accurately future revenues and expenses of a utility".

FN65 supra, fn. 11 at p. 1734.

FN66 See supra, para. [33]

FN67 *Wabush (Town) v. Power Distribution District of Newfoundland & Labrador* (1988), 71 Nfld. & P.E.I.R. 29 (Nfld. C.A.), per Goodridge, C.J.N. at p. 33.

FN68 op cit. fn. 57, pp. 608-610

FN69 Ibid, p. 610

FN70 *E.P.C. Act*, s. 3(b)(iii)

FN71 s. 3(b)(i)

FN72 s. 3(b)(iii)

FN73 s. 3(b)(iii)

FN74 Paras. [21]-[23]

FN75 Supra fn 11, at p. 1734

FN76 Op.cit. fn. 57 at page 619

FN77 supra, fn. 11 at page 1762 - 3

FN78 para.[73]

FN79 paras.[31], [50]

FN80 *Act*.s.80(2)

FN81 Phillips, op.cit. fn. 9, pages 256-257

FN82 Ibid. page 256

FN83 supra, para. 32

FN84 *Union Gas Ltd. v. Ontario (Energy Board)* supra fn. 12 per Anderson, J. at page 712.

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1998 CarswellNfld 150, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

FN85 *Acker v. United States*, 298 U.S. 426 (U.S. Ill. 1936), per Roberts, J. at pages 430-431

FN86 Phillips, op. cit. fn. 9, at page 258

FN87 deGrandpré op cit. fn. 9, page 26; Phillips op. cit. fn. 9, page 233

FN88 Phillips, op. cit. fn. 9, pages 388-389

FN89 op. cit. fn. 9, page 26. See also to the same effect Phillips, op. cit. fn. 9, page 233

FN90 Phillips, op. cit. fn. 9, p. 234

FN91 paragraphs [31] - [32]

FN92 Phillips, op. cit. fn. 9, p. 236

FN93 Ibid.

FN94 Phillips, op. cit. fn. 9, pages 388-392

FN95 Ibid., page 389

FN96 Ibid., page 391

FN97 *Bell Telephone Co. of Canada, Re*, supra. fn. 33 at page 723: "...the Board has, when the circumstances so warrant it, seen fit to adjust the company's debt-ratio *for rate making purposes*."

FN98 No doubt as a practical matter, the Board would also be hesitant to make assumptions respecting a utility's capital structure for rate-making purposes, that are different from the actual structure which will have been created as a result of previous approvals given by the Board (though perhaps in not as focused a context as a rate hearing and without the benefit of argument from rate hearing participants, such as the Consumer Advocate) to the issuing of individual share or other financial instruments in the past pursuant to s. 91.

FN99 paragraph [128]

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SNL1994 CHAPTER E-5.1

ELECTRICAL POWER CONTROL ACT, 1994
[Part IV (ss.23-25) - to be proclaimed]

Amended:

1994 c28 s5; 1995 c37; 1999 c32 s1; 2004 cL-3.1 s25; 2006 c26 s2; 2006 c40 s21; 2007 c25

CHAPTER E-5.1

AN ACT TO REGULATE THE ELECTRICAL POWER RESOURCES OF NEWFOUNDLAND AND LABRADOR

(Assented to June 9, 1994)

Analysis

1. Short title

2. Definitions

2.1 Labrador Inuit rights

PART I
DECLARATION OF POLICY AND IMPLEMENTATION

3. Power policy

4. Implementing Policy

5. General reference by government

5.1 Direction to board

5.2 Exemption

5.3 Interpretation

5.4 Agreement to develop a source of power

5.5 Agreement imposed

5.6 Amendments to an agreement

5.7 Provision of an agreement void

PART II
PLANNING, ALLOCATION AND RE-ALLOCATION OF POWER AND FACILITIES

6. Planning of future power supply

7. Inquiry by board where shortage anticipated

8. Board to allocate power

9. Compensation for power

10. No liability for compliance with order

11. Licence for fixed term contracts

12. Considerations

13. Revocation of licence

14. Application of Part II

PART III
POWER EMERGENCIES

15. Application of Part III

16. Emergency controller to control power in an emergency

17. Authority of emergency controller

18. Orders of emergency controller to be obeyed

19. No liability for compliance with order

20. Compensation for power

21. Emergency controller unable to act

22. Essential employees

PART IV
CORPORATE GOVERNANCE OF A RETAILER

23. Corporate ownership and control

24. Restrictions on business

25. Enforcement

PART V
CHANGE OF FREQUENCY

26. Change of frequency

PART VI
GENERAL

27. Powers of board

28. Costs

29. Rep. by 1995 c37 s18

30. Powers under Public Utilities Act

31. Appeal

32. Regulations

33. Offences and penalties

34. Resolving statutory conflict

35. RSN1990 cF-5 Rep.

36. Commencement

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Electrical Power Control Act, 1994*.

1994 cE-5.1 s1

Back to Top

Definitions

2. In this Act

(a) "associate", when used to indicate a relationship between 2 persons, means,

(i) 1 has the power to direct or cause to be directed the management and policies of the other where the other is a corporation,

(ii) 1 is a corporation that is controlled by the other or by a group of persons of which the other is a member,

(iii) 1 is a corporation whose management and policies the other has the power to direct or to cause to be directed,

(iv) another corporation whose management and policies are subject to a power to direct or to cause to be directed by 1 who also has the power to direct or cause to be directed the management and policies of the other where the other is a corporation,

(v) 1 is a partner of the other acting by or for the partnership of which they are both partners,

(vi) 1 is a partnership of which the other is a partner,

(vii) 1 is a trust or estate in which the other has a beneficial interest equal to or in excess of 20% or as to which the other serves as trustee or in a similar capacity,

(viii) 1 is a person to whom the other is married and with whom the other resides or with whom the other is living in a conjugal relationship outside marriage,

(ix) 1 is a son or daughter of the other,

(x) 1 is a relative of the other or of a person mentioned in subparagraph (viii), other than a person described in subparagraphs (viii) and (ix), who has the same home as the other,

(xi) 1 is a government and the other is an agent of that government,

(xii) 1 is an agent of a government and the other is an agent of the same government;

(xiii) 1 is a person who is obligated to act in concert with the other in exercising voting rights in respect of the shares of a retailer,

(xiv) both are members of a voting trust that relates to voting shares, or

(xv) both are at the same time associates within the meaning of subparagraphs (i) to (xiv) of the same person;

(b) "bargaining agent" means an employee organization that is certified for the purpose of the *Labour Relations Act* or an employee organization which has been voluntarily

recognized by the retailer and has not had its bargaining rights terminated;

(c) "consumer" means a person purchasing power from a retailer for the use of that person and not for resale;

(d) "control" means control in a manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, an agreement or arrangement, the ownership of a corporation or otherwise and

(i) a corporation is considered to be controlled by a person where

(A) securities of the corporation to which are attached more than 50% of the votes that may be cast ordinarily to elect directors of the corporation are held, otherwise than by way of security only, by or for the benefit of that person, and

(B) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation, and

(ii) a partnership, trust or unincorporated organization is considered to be controlled by a person if an ownership interest therein representing more than 50% of the assets of the partnership, trust or organization is held, otherwise than by way of security only, by or for the benefit of that person;

(e) "emergency controller" means that person appointed by the Lieutenant-Governor in Council to exercise the powers under Part III ;

(f) "employed capital" means the amount of capital invested in property and assets which are used and useful in the production, transmission and distribution of power other than property or assets rendered unusable or surplus by reason of an order made under subsection 8(2);

(g) "essential employee" means 1 of a number of employees whose duties consist in whole or in part of duties the performance of which at a particular time or during a specified period of time is or may be necessary for the health, safety or security of the public;

(h) "industrial customer" means any person purchasing power, other than a retailer, supplied from the bulk transmission grid at voltages of 66 KV or greater on the primary side of any transformation equipment directly supplying the person;

(i) "lockout" means "lockout" as defined in the *Labour Relations Act* ;

(j) "minister" means the minister appointed under the *Executive Council Act* to administer this Act;

(k) "person" includes an individual, partnership, corporation, government or agency of a government, unincorporated organization, trustee, administrator and other legal representatives;

(l) "parent corporation" means a corporation which controls a retailer;

(m) "power" includes electrical power, however generated, and electrical energy;

(n) "producer" means a person who produces or has the capacity to produce power in the province;

(o) "public utilities board" means the Board of Commissioners of Public Utilities;

(p) "rates" includes prices, charges, tolls or conditions applying to prices for power or other consideration given for the supplying of power;

(q) "retailer" means a public utility within the meaning of the *Public Utilities Act* , other than a public utility exempt from the application of that Act, which buys or generates power and whose primary business is the sale or resale of power to arm's length

customers;

(r) "strike" means "strike" as defined in the *Labour Relations Act* ; and

(s) "voting share" means a share carrying a voting right under all circumstances.

1994 cE-5.1 s2; 2006 c40 s21

Back to Top

Labrador Inuit rights

2.1 (1) This Act and regulations made under this Act shall be read and applied in conjunction with the *Labrador Inuit Land Claims Agreement Act* and, where a provision of this Act or regulations made under this Act is inconsistent or conflicts with a provision, term or condition of the *Labrador Inuit Land Claims Agreement Act* , the provision, term or condition of the *Labrador Inuit Land Claims Agreement Act* shall have precedence over the provision of this Act or a regulation made under this Act.

(2) Where, under this Act the public utilities board issues a licence, the public utilities board may add to that licence terms and conditions that the licensee must comply with in order to ensure compliance with the terms and conditions of the *Labrador Inuit Land Claims Agreement Act* .

2004 cL-3.1 s25

PART I
DECLARATION OF POLICY AND IMPLEMENTATION

Back to Top

Power policy

3. It is declared to be the policy of the province that

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

(iii) should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world, and

(iv) should be such that after December 31, 1999 industrial customers shall not be required to subsidize the cost of power provided to rural customers in the province, and those subsidies being paid by industrial customers on the date this Act comes into force shall be gradually reduced during the period prior to December 31, 1999;

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

(iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service,

(iv) that would result in, subject to Part III , a person having priority to use, other than for resale, the power it produces, or the power produced by a producer which is its wholly-owned subsidiary,

(v) where the objectives set out in subparagraphs (i) to (iv) can be achieved through alternative sources of power, with the least possible interference with existing contracts,

and, where necessary, all power, sources and facilities of the province are to be assessed and allocated and re-allocated in the manner that is necessary to give effect to this policy;

(c) in the event of an emergency arising from the loss of use of generating facilities, a shortage of water or a loss of transmission or distribution facilities which results in there being insufficient power to meet the needs of consumers in the province, or a part of the province, the emergency controller should have the responsibility and authority to

(i) determine priorities,

(ii) allocate and re-allocate available power, and

(iii) make all other necessary provisions for the supply and distribution of power for so long as the emergency continues;

(d) the public utilities board shall have the right to determine if, and the extent to which, employees of retailers are essential employees;

(e) [Rep. by 1995 c37 s15]; and

(f) planning for future power supply of the province shall not include nuclear power.

1994 cE-5.1 s3; 1995 c37 s15

Back to Top

Implementing Policy

4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act* , the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

1994 cE-5.1 s4

Back to Top

General reference by government

5. (1) The Lieutenant-Governor in Council may refer to the public utilities board

(a) existing or proposed rates or a class of rates applicable between producers, retailers and customers;

(b) matters affecting or related to rates charged by producers to retailers and customers;

(c) the principles used by or appropriate for use by producers in determining rates for the supply of power to retailers and customers; or

(d) another matter relating to power,

and the public utilities board shall hold a public hearing at which it shall investigate and examine the matters referred to it and report on the matters to the minister within the time specified by the Lieutenant-Governor in Council in the reference.

(2) A reference under this section may be general or particular in terms and may specify criteria, factors and procedures to guide the public utilities board in making its investigation, examination and report.

1994 cE-5.1 s5

Back to Top

Direction to board

5.1 Notwithstanding section 3 and section 4 of the Act and the provisions of the *Public Utilities Act,* the Lieutenant-Governor in Council may direct the public utilities board with respect to the policies and procedures to be implemented by the board with respect to the determination of rate structures of public utilities under the *Public Utilities Act* and, without limiting the generality of the foregoing, including direction on the setting and subsidization of rural rates, the fixing of a debt-equity ratio for Hydro and the phase in, over a period of years from the date of coming into force of this section, of a rate of return determination for Hydro and the board shall implement those policies and procedures.

1995 c37 s16

Back to Top

Exemption

5.2 The Lieutenant-Governor in Council may exempt a public utility from the application of all or a portion of this Act where the public utility is engaged in activities that in the opinion of the Lieutenant-Governor in Council as a matter of public convenience or general policy are in the best interest of the province, to the extent of its engagement in those activities.

1999 c32 s1

Back to Top

Interpretation

5.3 In section 3, the phrase "all sources and facilities for the production, transmission and distribution of power in the province" shall be read as including sources of every kind, whether developed or undeveloped.

2007 c25 s1

Back to Top

Agreement to develop a source of power

5.4 (1) Two or more persons who have been granted rights by the province to the same body of water as a source for the production of power and who utilize, or propose to utilize, or to develop and utilize the body of water as a source for the production of power shall enter into an agreement for the purpose of achieving, with respect to the body of water, the policy objective set out in subparagraph 3(b)(i).

(2) Where 2 or more persons enter into an agreement under subsection (1), they shall refer the agreement to the public utilities board.

(3) The public utilities board may, with respect to an agreement submitted under subsection (2),

(a) approve the agreement;

(b) approve the agreement subject to the changes the board may require; or

(c) refuse to approve the agreement.

(4) In the exercise of its authority under subsection (3), the public utilities board shall satisfy itself that the agreement meets the policy objectives set out in subparagraph 3(b)(i).

2007 c25 s1

Back to Top

Agreement imposed

5.5 (1) Where 2 or more persons to whom subsection 5.4(1) applies fail to enter into an agreement within a reasonable time, one or more of them may apply to the public utilities board to establish the terms of an agreement between them.

(2) Where an application is made to the public utilities board under subsection (1), the board shall establish the terms of an agreement for the purpose of achieving the policy objective set out in subparagraph 3(b)(i).

(3) An agreement established by the public utilities board under subsection (2) is binding on the persons named in the agreement.

2007 c25 s1

Back to Top

Amendments to an agreement

5.6 (1) An agreement approved by the public utilities board under subsection 5.4(3) or established under subsection 5.5(2) may not be amended by the persons to whom the agreement applies without the prior approval of the public utilities board.

(2) The public utilities board may require reporting commitments, and impose monitoring requirements, as it considers appropriate, to ensure that the persons to an agreement approved by the public utilities board under subsection 5.4(3) or established under subsection 5.5(2) comply with the terms and conditions of the agreement.

(3) Where the public utilities board believes that one or more of the persons to an agreement approved by the board under subsection 5.4(3) or established under subsection 5.5(2) have failed to comply with the terms and conditions of the agreement, the public utilities board may, independent of any of the rights or remedies available to the persons to the agreement,

(a) order a defaulting person to comply with the terms and conditions of the agreement; and

(b) exercise a contractual remedy that may be available to a person who is a party to the agreement as if it were a party to the agreement.

2007 c25 s1

Back to Top

Provision of an agreement void

5.7 A provision of an agreement referred to in section 5.4 or 5.5 shall not adversely affect a provision of a contract for the supply of power entered into by a person bound by the agreement and a third party that was entered into before the agreement under section 5.4 or 5.5 was entered into or established, or a renewal of that contract.

2007 c25 s1

PART II

PLANNING, ALLOCATION AND RE-ALLOCATION OF POWER AND FACILITIES

Back to Top

Planning of future power supply

6. (1) The public utilities board has the authority and the responsibility to ensure that adequate planning occurs for the future production, transmission and distribution of power in the province.

(2) The public utilities board may direct a producer or retailer to perform such activities and provide such information as it considers necessary for such planning to the public utilities board or to any other producer or retailer on such terms and conditions as it may prescribe.

(3) For the purpose of this section, the public utilities board may adopt those rules and procedures that it considers necessary or advisable to give effect to the subsection.

1994 cE-5.1 s6

Back to Top

Inquiry by board where shortage anticipated

7. (1) Where a producer or a retailer believes that it may not be able to supply power sufficient to satisfy the current or anticipated power demands of its customers and prospective customers in accordance with the power policy set out in section 3, it may request the public utilities board to conduct an inquiry into the matter.

(2) The Lieutenant-Governor in Council may request the public utilities board to conduct an inquiry into the matter of the adequacy of supply and the ability of producers and retailers to meet the current or anticipated power demands of consumers in the province, in accordance with the power policy set out in section 3, and to report on the matter to the Lieutenant-Governor in Council within the time specified by the Lieutenant-Governor in Council in the reference.

(3) Where the public utilities board believes that producers and retailers collectively or individually will not be able to satisfy, in accordance with the power policy set out in section 3, the current or anticipated power demands of consumers in the province, the public utilities board may further inquire into the matter.

1994 cE-5.1 s7

Back to Top

Board to allocate power

8. (1) Where a matter is referred to the public utilities board under subsection 7(1) or (2) or the public utilities board decides to conduct an inquiry under subsection 7(3), the public utilities board shall, immediately, by public advertisement, give at least 20 days' notice of and hold a public hearing at which it shall investigate and examine into the matter.

(2) Where, after the conduct of an inquiry, the public utilities board is satisfied that a producer or a retailer is not or will not be able under the existing supply and allocation contracts or arrangements to satisfy the current or anticipated demands of its customers for power in the manner required by this Act, the public utilities board may, subject to subsection 11(3), allocate and re-allocate any or all power produced in the province and may order another producer or retailer to supply, upon those terms and conditions respecting rates, timing, duration and amounts that the public utilities board determines, to the producer or retailer which would otherwise be unable to satisfy such demands power that the public utilities board considers to be necessary to implement the power policy set out in paragraph 3(b).

(3) The public utilities board may, in an order made under subsection (2), require a producer or retailer to make its transmission and distribution plant, equipment and facilities available for the transmission and distribution of the power allocated or re-allocated under the order, on those terms

and conditions respecting rates, timing, duration and amounts that the public utilities board determines.

(4) Upon the application of a retailer, the public utilities board may make an order requiring a retailer to make its transmission and distribution plant, equipment and facilities available for the transmission and distribution of power on those terms and conditions respecting rates, timing, duration and amounts that the public utilities board determines.

(5) A producer or retailer directed by an order made under subsection (2) to deliver power to another producer or retailer shall, within the limits of its capacity, deliver power to the other producer or retailer on the terms and conditions set out in the order notwithstanding that the producer or retailer may as a result have to reduce the amount, or cease the delivery altogether, of power then being supplied to another customer or the amount of power then being consumed for its own use.

1994 cE-5.1 s8

Back to Top

Compensation for power

9. (1) The rates to be paid by a producer or a retailer supplied with power under an order made under subsection 8(2) for that power shall be set by the public utilities board and shall be the total of

(a) the amount of the cost of producing the power as determined by the public utilities board;

(b) a reasonable allowance for employed capital as determined by the public utilities board; and

(c) the amount sufficient to amortize over a period approved by the public utilities board the unamortized cost of any and all transmission and distribution plant and other power-related equipment and facilities of a producer and its customers rendered unusable or surplus by reason of the order of the public utilities board for so long as that plant, equipment and facilities remain unusable or surplus due to the continuation in effect of the order or a substitute order of the public utilities board.

(2) A producer receiving a payment for power under an order made under subsection 8(2) which includes an amount in respect of the unamortized cost of transmission and distribution plant and other power-related equipment and facilities of its customer rendered unusable or surplus by reason of that order shall, immediately upon receipt of the payment, remit that amount to that customer.

(3) Where an order of the public utilities board made under subsection 8(2) requiring a producer or retailer to supply power is likely to affect the interest of a holder of security given by the producer or retailer, or by its customers in connection with the obligations of the producer or retailer, in respect of the former sale of the power to be re-allocated, the public utilities board may

(a) on the request of the producer or retailer, its customer or a security holder, make it a condition of the order that the security holder be given security by the producer or retailer or the customer receiving the re-allocated power, or both, to the extent and in the manner that the public utilities board determines to be substantially the same as the security then in effect; and

(b) on the request of the customer who has ceased to receive the re-allocated supply, make it a condition of the order that the customer receiving the re-allocated supply give to such customer an indemnity, to the extent that the public utilities board determines to be appropriate in the circumstances, from liability under any guarantee or other covenant given by such customer in relation to an obligation to purchase the power directed to be re-allocated.

1994 cE-5.1 s9

Back to Top

No liability for compliance with order

10. (1) Where a producer or retailer is unable to supply power under a contract or obligation because of compliance with an order of the public utilities board made under subsection 8(2), that producer or retailer shall be relieved from all liability for failure to supply that power by reason of the inability for so long as that inability continues.

(2) No failure to supply power in compliance with, and nothing done by a producer or retailer under, an order of the public utilities board made under this Part shall be considered a breach of contract or entitle a person to rescind a contract or release a guarantor from the performance of the obligation or render any of them or another person liable in an action or other legal proceedings for damages notwithstanding another law to the contrary.

1994 cE-5.1 s10

Back to Top

Licence for fixed term contracts

11. (1) Every producer or retailer in the province may apply to the public utilities board for a licence to sell and distribute power under a contract for a term of 10 years or more for the purpose referred to in subsection (2).

(2) The public utilities board may, on those terms and conditions that it may impose, issue a licence for a contract for a term of 10 years or more where

(a) the Lieutenant-Governor in Council has certified that a term of 10 years or more is necessary to facilitate the establishment of an industrial enterprise; or

(b) the public utilities board is satisfied that a term of 10 years or more is necessary in order to raise and secure the funds necessary to construct facilities to generate or transmit the power that is the subject of the contract, and

the actual term authorized is the minimum term reasonable in the circumstances and the term shall not exceed 30 years.

(3) Where the public utilities board issues a licence to a producer or retailer under this section, sections 8 to 10 shall not apply to power sold and distributed by the producer or retailer in respect of which the licence is issued.

1994 cE-5.1 s11

Back to Top

Considerations

12. On an application for a licence under section 11, the public utilities board shall have regard to all considerations that appear to it to be relevant and the public utilities board shall satisfy itself that the contract referred to in section 11 is just and reasonable in relation to the public interest and the power policy set out in section 3.

1994 cE-5.1 s12

Back to Top

Revocation of licence

13. (1) The public utilities board may, by order, revoke or suspend a licence issued under section 11 where a term or condition of the licence has not been complied with or has been contravened.

(2) Notwithstanding subsection (1) and the regulations, an order shall not be made under

subsection (1) unless the public utilities board has, in a notice sent to the holder of the licence, advised the holder of the term or condition of the licence that it is alleged has not been complied with or has been contravened and the board has afforded the holder of the licence a reasonable opportunity to be heard and to correct and justify to the satisfaction of the public utilities board the holder's failure to comply or its contravention.

(3) Notwithstanding subsections (1) and (2), the public utilities board may, by order, revoke or suspend a licence on the application or with the consent of the holder of the licence.

1994 cE-5.1 s13

Back to Top

Application of Part II

14. This Part applies to all contracts for power generated in the province whether the contracts for the power were entered into by producers or retailers before or after the coming into force of this Act.

1994 cE-5.1 s14

PART III
POWER EMERGENCIES

Back to Top

Application of Part III

15. This Part applies to all power generated in the province including power sold and distributed under a contract with a term of 10 years or more in respect of which a licence has been issued by the public utilities board under Part II.

1994 cE-5.1 s15

Back to Top

Emergency controller to control power in an emergency

16. (1) Where the Lieutenant-Governor in Council is of the opinion that a state of emergency exists or has existed by reason of actual or apprehended damage to, destruction, failure, or breakdown of, works, plant or equipment or distribution facilities used in the generation or transmission of power, shortage of water or sudden or unexpected power demand in excess of power resources, the Lieutenant-Governor in Council may, by order, declare that a state of emergency exists or has existed.

(2) Notwithstanding this Act or a general or special Act or a contract entered into or assumed by a person, where the Lieutenant-Governor in Council orders a state of emergency under subsection (1) and during the continuance of that state of emergency and until the Lieutenant-Governor in Council by order declares the cessation of the state of emergency, the emergency controller shall

(a) establish preferences and priorities between different users or classes of users;

(b) allocate and re-allocate power and, if necessary, interrupt or decrease delivery of power under a contract;

(c) regulate, and if necessary, restrict and prohibit the generation, transformation, transmission, distribution, supply and use of power; and

(d) do, or order or direct to be done, any other thing the emergency controller considers necessary for the proper generation, transmission, distribution, supply and use of power in the circumstance.

(3) An order made by the Lieutenant-Governor in Council under this section is not subordinate legislation for the purpose of the *Statutes and Subordinate Legislation Act* .

(4) An order made by the Lieutenant-Governor in Council under this section shall come into force as soon as it is made.

(5) The Lieutenant-Governor in Council may appoint a person to be the emergency controller for the purpose of this Act.

1994 cE-5.1 s16

Back to Top

Authority of emergency controller

17. (1) During the state of emergency, in addition to a general authority under section 16, the emergency controller may

(a) modify, restrict, rescind, suspend, or re-impose an order, regulation, restriction, prohibition or control, given, made or exercised under section 16;

(b) order the cessation, interruption, or decrease in delivery of power, in a manner and to an extent that the emergency controller sees fit, to a person who fails to comply with an order, regulation, restriction, prohibition or control given, made or exercised by the emergency controller under this Part and may enforce the order by all reasonable means as the emergency controller may consider proper and for that purpose may enter, or authorize the entering upon, the land of a person and do, or authorize to be done, whatever is necessary for that purpose; and

(c) order producers and retailers to cease, interrupt, or decrease the delivery of power in a manner, to an extent and by those means that the emergency controller sees fit, to any of its or their customers who fail to comply with an order, regulation, restriction, prohibition, or control given, made or exercised by the emergency controller under this Part and for that purpose the emergency controller, a producer or retailer may enter, or authorize the entering upon, land of a customer and do, or authorize to be done, whatever is necessary for that purpose.

(2) Notwithstanding subsection (1) and paragraph 16(2)(a), wherever it is reasonable and practical, taking into account in particular public health, safety and security, consumption by a producer of the power it produces shall be the last, and power being delivered under a contract in respect of which a licence has been issued under section 11 shall be the second last, interrupted by the emergency controller pursuant to this Part.

1994 cE-5.1 s17

Back to Top

Orders of emergency controller to be obeyed

18. Upon the declaration of an emergency under this Part, every producer and retailer and any other customer or consumer shall immediately comply with all instructions respecting the generation, transmission, distribution, supply and use of power under its or their control, that may be given by the emergency controller under the authority conferred upon the emergency controller under this Part.

1994 cE-5.1 s18

Back to Top

No liability for compliance with order

19. Nothing lawfully done under this Part or under an order, regulation, restriction, prohibition,

or control made or exercised by the emergency controller under this Part, or done to enforce or give effect to anything lawfully done by the emergency controller, a producer or retailer, its or their servants, agents or a person acting under its or their authority, shall be considered to be a breach of contract or entitle a person to rescind a contract or release a guarantor from the performance of his or her obligations or render that corporation or person liable in an action at law or other legal proceedings for damages.

1994 cE-5.1 s19

Back to Top

Compensation for power

20. (1) A producer or retailer required to supply or deliver power otherwise than in accordance with a contract or existing obligation shall be compensated by the party receiving the power for the power delivered at a rate that shall be the higher of the compensation that the producer or retailer would have received had the power not been diverted by order of the emergency controller and the compensation that the consumer to whom the power was delivered would have paid but for the emergency.

(2) Where the compensation paid under subsection (1) is higher than the amount that the producer or retailer would have received had the power not been diverted, the compensation received by the producer or retailer which is in excess of the amount that would have been received but for the emergency shall be paid to the party from whom the power was originally diverted.

(3) In the event of failure to agree upon the compensation to be paid under this section, the public utilities board shall, at the request of a party affected, determine the amount of the compensation.

1994 cE-5.1 s20

Back to Top

Emergency controller unable to act

21. In this Part, where the emergency controller is absent or is unable to act, the Lieutenant-Governor in Council may appoint a person to act in his or her absence and that person shall have the duties and powers of the emergency controller under this Part.

1994 cE-5.1 s21

Back to Top

Essential employees

22. (1) A retailer and a bargaining agent may jointly establish and file with the public utilities board a written statement of the number of employees in each classification in the unit represented by the bargaining agent who are considered to be essential employees which, upon receipt by the public utilities board, shall be binding upon the retailer, the bargaining agent and the employees as an order of the public utilities board.

(2) If the retailer and the bargaining agent do not jointly file a written statement with the public utilities board under subsection (1), either the retailer or the bargaining agent may make an application to the public utilities board to determine the number of essential employees in each classification and the public utilities board shall make such an order.

(3) Within 15 days of the making of an application under subsection (2), the retailer shall provide the bargaining agent and the public utilities board with a written statement of the number of essential employees in each classification who are considered by the retailer to be essential employees.

(4) The number of employees determined to be essential under subsection (2) shall not exceed the number contained in the written statement provided by the retailer under subsection (3).

(5) The public utilities board may, in its discretion, make an interim order under this section based upon such information as it considers necessary and with or without a hearing or notice, which order shall be effective until the public utilities board makes a final order.

(6) A copy of any application made to the public utilities board by a retailer or by a bargaining agent under this section shall be provided to the other party by the applicant not later than 2 days after the application is received by the public utilities board.

(7) Where a hearing is requested by either the retailer or the bargaining agent arising from an application made under subsection (2) or arising from an interim order made under this section, the public utilities board shall hold a hearing into the matter which hearing shall take place not earlier than 15 days after the application was received by it.

(8) The public utilities board may, at any time, amend an order of joint settlement made under subsection (1) or a determination made under subsection (2), and the provisions of subsections (2) and (7) relating to representation, hearing and interim orders shall apply for an amendment as they apply for a determination.

(9) The number of essential employees determined in an amendment to an order of joint settlement shall not exceed the number contained in the order of joint settlement made under subsection (1) or the number contained in the written statement provided by the retailer under subsection (2) unless the retailer and the bargaining agent consent to a greater number.

(10) A determination or amendment made under this section shall be communicated in writing by the public utilities board to the bargaining agent and the retailer not later than 10 days after the determination or amendment is made.

(11) The retailer shall within 10 days of filing a written statement under subsection (1) or receiving from the public utilities board a determination or an amendment under subsection (2) or (8) name the employees in the unit who are essential, but the number of employees named shall not exceed the number considered to be essential as jointly agreed upon under subsection (1) or determined by the public utilities board to be essential under subsection (2) or (8).

(12) The retailer may substitute the name of an employee who is essential for the name of another employee who is essential but the number of employees named shall not exceed the number considered to be essential as jointly agreed upon under subsection (1) or determined by the public utilities board to be essential under subsection (2) or (8).

(13) The retailer shall notify in writing the bargaining agent and each employee in the bargaining unit named by the retailer as an essential employee that he or she has been named as an essential employee.

(14) An employee named as an essential employee shall report for work as if a strike or lockout were not taking place.

(15) Where an employee named as an essential employee does not report for work as required under subsection (14), the retailer shall immediately terminate the employment of that employee, unless the retailer is satisfied that there are reasonable grounds for the employee not so reporting.

1994 cE-5.1 s22

PART IV
CORPORATE GOVERNANCE OF A RETAILER

Back to Top

Corporate ownership and control

23. (1) Subject to subsection (3), no person, without first obtaining leave of the public utilities board, shall

(a) acquire, hold or beneficially own such number of any class of voting shares of a retailer that, together with shares, if any, already directly or indirectly held or beneficially owned by such person and the associates of such person, have in the aggregate attached to them more than 20% of the votes attached to all outstanding voting shares of the retailer;

(b) acquire, together with the associates of the person, control of any person who, together with the associates of such person, holds directly or indirectly, more than 20% of the voting shares of any retailer; or

(c) acquire, hold or beneficially own such number of any class of voting shares of any corporation that, together with shares already directly or indirectly held or beneficially owned by such person and the associates of such person, have in the aggregate attached to them more than 20% of the votes attaching to all outstanding voting shares of such corporation, where that corporation has control, directly or indirectly, of any retailer; or

(d) acquire, hold or beneficially own an ownership interest in a partnership, trust or unincorporated organization that, together with ownership interests, if any, already directly or indirectly held or beneficially owned by such person and the associates of such person, in the aggregate represent more than 20% of the assets of such partnership, trust or organization, where that partnership, trust or organization has control, directly or indirectly, of any retailer.

(2) Where a corporation existing under the laws of the province holds more than 85% of the voting shares of a retailer on April 1, 1994, paragraph (1)(a) shall not apply to that holding.

(3) For the purpose of subsection (1), if 2 or more persons who are not associates hold the same voting shares, each of those persons is deemed to be the holder of all those voting shares.

(4) This section shall not apply to

(a) a mortgage, charge or other security interest to secure any loan or indebtedness or other obligation;

(b) a transaction or series of transactions the effect of which is that all of the holders of voting shares of the retailer exchange on a pro rata basis their voting shares of the retailer for voting shares in a corporation existing under the laws of the province that, upon completion of the transaction or transactions, holds all of the outstanding voting shares of the retailer;

(c) voting shares acquired, held or beneficially owned by the Crown;

(d) voting shares acquired, held or beneficially owned by 1 or more persons acting as underwriters;

(e) voting shares held by any person who provides centralized facilities for the clearing of trades in securities and is acting in relation to trades in the shares solely as an intermediary in the payment of funds or the delivery of securities, or both; or

(f) voting shares held by a nominee or bare trustee which, in either case, does not have any beneficial interest in or discretionary powers of voting over such shares.

(5) An application for leave under this section shall be made to the public utilities board, which may hold a public hearing to decide whether the proposed acquisition, holding or beneficial ownership is not in the public interest and may prescribe such terms and conditions in respect of the proposed acquisition, holding or beneficial ownership as it may determine and, if the public utilities board decides that the proposed acquisition, holding or beneficial ownership is not in the public interest, the public utilities board shall disallow the proposed acquisition, holding or beneficial ownership and otherwise the public utilities board shall allow the proposed acquisition, holding or beneficial ownership on such prescribed terms and conditions, if any.

(6) Immediately on the making of a decision under this section, the public utilities board shall, in writing, inform

(a) every person whose proposed acquisition, holdings or beneficial ownership are affected by the decision;

(b) every person who participated in the public hearing; and

(c) the minister,

of the decision of the public utilities board and, subject to subsection (7), the decision is binding on all persons affected thereby.

(7) Notwithstanding sections 99 to 102 of the *Public Utilities Act,* within 30 days after a decision of the public utilities board under this section, the Lieutenant-Governor in Council may review the decision and allow or disallow the proposed acquisition, holding or beneficial ownership and the decision by the Lieutenant-Governor in Council is binding on all persons affected by it.

(8) A retailer and a parent corporation shall exist under and be governed by the *Corporations Act* or another statute of the province, unless the public utilities board approves otherwise.

1994 cE-5.1 s23; 1994 c28 s5; 1995 c37 s17

Back to Top

Restrictions on business

24. (1) Subject to this Act, a retailer shall not engage or invest in or carry on any business or activity other than the business of the production, transmission, distribution or retailing of power and the business or activity that is generally related to it.

(2) For greater certainty, subsection (1) shall not apply to a person who controls a retailer, including a corporation referred to in paragraph 23(3)(b).

(3) This section does not apply to Newfoundland and Labrador Hydro.

1994 cE-5.1 s24; 2006 c26 s2

Back to Top

Enforcement

25. (1) The public utilities board may require a retailer to provide to it such information in such manner as it may prescribe relevant to the ownership of the retailer.

(2) Where the public utilities board is of the opinion that a person has contravened subsection 23(1), the public utilities board shall send a demand to the person in accordance with this section.

(3) A demand referred to in subsection (2) shall require that the person to whom it is sent, immediately or within such period of time as may be specified in it, comply with this Part and, in the case of a shareholder in a retailer whose shareholding has caused such demand, divest itself of voting shares of the retailer and in the case of a shareholder of a parent corporation whose shareholding has caused such demand, divest itself of voting shares of the parent corporation or otherwise cause compliance with this Part or show cause why there has been no contravention of this Part.

(4) Where a person has acquired, holds or beneficially owns voting shares or other ownership interests in contravention of this Part, the public utilities board may, subject to such terms and conditions as it considers appropriate, require the retailer or the parent corporation, by demand sent to it by the public utilities board, not to permit the exercise of any voting rights attached to such shares or other ownership interests.

(5) Every demand made under this section shall indicate the nature of the proceedings that

may be taken under this section in the event that the person or retailer fails to comply with the demand.

(6) Where the public utilities board is of the opinion that a person or retailer has failed to comply with a demand made pursuant to this section, an application on behalf of the public utilities board may be made to the Trial Division for an order under this section to enforce the demand.

(7) Where, at the conclusion of the hearing of the application under subsection (6), the court finds that the person or retailer has failed to comply with a demand pursuant to this section, the court may make such order or orders to enforce the demand as the court considers necessary in the circumstances.

(8) Without limiting the generality of subsection (7), where a person fails to comply with a demand made under this section, the court may, by order, vest the interest or increased interest to which the demand relates in a trustee named by the court and, in that case, the trustee has all the rights, title and interests in respect of the interest or increased interest in accordance with such directions that the court may issue and, notwithstanding any other Act or law, the trustee may do all those things and execute those documents that are necessary to carry out the disposition in accordance with the directions in the same manner and to the same extent as if the trustee were the owner.

(9) All proceeds from a disposition by a trustee under subsection (8) shall be first applied to the payment of the fees and expenses of the trustee in acting as such and thereafter, subject to the terms of the order, any balance remaining shall be paid to the person or persons who would, but for the vesting order, have been entitled to receive the proceeds.

1994 cE-5.1 s25

PART V
CHANGE OF FREQUENCY

Back to Top

Change of frequency

26. With the approval of the public utilities board, a retailer may

(a) change the periodicity in alternations of current at which it supplies power to a customer;

(b) for the purpose of standardizing and making uniform the periodicity in alternations of current at which it supplies power, alter, reconstruct, rebuild, reassemble, construct, extend or replace its works or do whatever else may be necessary in respect of them, and, with their consent, the works of other persons who are supplying or purchasing or otherwise delivering or accepting delivery of power to or from it, wherever the works may be located in the province;

(c) for the purpose of standardizing and making uniform the periodicity in alternations of current at which power generated or procured by it is utilized and, with the consent of the owner, alter, reconstruct, rebuild, reassemble, construct, extend, replace or do whatever else may be necessary in respect of the equipment, apparatus, appliances, devices and works of a person by which the power is taken and used or authorize the owner to do so; and

(d) charge to and collect from the owners of equipment, apparatus, appliances, devices or works, the expense of anything done by a retailer to or in respect of the equipment, apparatus, appliances, devices or works under this section

on those terms and conditions that the public utilities board may approve including, without limitation, terms limiting the retailer's liability.

1994 cE-5.1 s26

PART VI
GENERAL

Back to Top

Powers of board

27. (1) The public utilities board may

(a) give directions as to the nature and extent of interventions by persons interested in a matter that is to be the subject of a reference or inquiry held under this Act;

(b) set aside for future examination an issue that in its opinion requires a more prolonged examination; and

(c) make interim reports pending its final report with respect to the subject matter of a reference or inquiry.

(2) The public utilities board may appoint for classes of users of power in the province that, in the opinion of the public utilities board, have common interests, persons to represent those classes at a reference or inquiry under this Act where it appears to that board that the appointment should be made so that a particular class of user of power can be heard.

(3) Notwithstanding an appointment under subsection (2), a member of a class in respect of which the appointment was made may be heard on his or her own behalf.

1994 cE-5.1 s27

Back to Top

Costs

28. (1) The costs of and incidental to a reference or inquiry under this Act to the public utilities board shall be in the discretion of that board and may be fixed at a sum certain, or may be taxed and the board may order by whom the costs are to be taxed and to whom the costs are to be allowed and the public utilities board may prescribe a scale under which costs are to be taxed.

(2) All expenses of the public utilities board in connection with a reference or inquiry under this Act to the public utilities board, including costs of counsel, engineers, valuators, stenographers, accountants and other assistants employed by that board as well as the salaries and expenses of the members of that board while employed in and about the reference or inquiry shall, when the public utilities board orders, be paid by the parties concerned in the reference or inquiry.

(3) Where an order for payment of expenses under subsection (2) is made against 2 or more parties, the expenses shall be apportioned between or among them in the proportion that seems equitable to the public utilities board in all the circumstances of the case.

1994 cE-5.1 s28

Back to Top

Rep. by 1995 c37 s18

29. [Rep. by 1995 c37 s18]

1995 c37 s18

Back to Top

Powers under Public Utilities Act

30. (1) In carrying out its duties under this Act, the public utilities board has and may exercise all the powers given to it under the *Public Utilities Act* .

(2) In carrying out its duties under this Act, the public utilities board has all the powers that are or may be conferred on commissioners appointed under the *Public Inquiries Act* .

1994 cE-5.1 s30

Back to Top

Appeal

31. Sections 99 to 102 of the *Public Utilities Act* apply, with the necessary changes, in respect of a reference or inquiry to the public utilities board under this Act.

1994 cE-5.1 s31

Back to Top

Regulations

32. (1) The public utilities board may, subject to the approval of the Lieutenant-Governor in Council, make regulations respecting the information to be furnished by applicants for licences under section 11 and the procedure to be followed in applying for licences and in issuing licences.

(2) The Lieutenant-Governor in Council may make regulations

(a) defining an expression or term used in this Act and not defined in this Act, including for purposes of section 24, production, transmission, distribution or retailing of power or such business or activity as is generally related thereto;

(b) prohibiting or limiting transactions between a producer or retailer and any person holding shares or other ownership interests in excess of the limitations provided for by subsection 23(1);

(b.1) respecting the criteria and required terms and conditions for an agreement under section 5.4 or 5.5, and another matter required to carry out the intent and purpose of an agreement under section 5.4 or 5.5;

(c) [Rep. by 1995 c37 s19]

(d) directing the emergency controller to establish certain preferences and priorities pursuant to paragraph 16(2)(a); and

(e) respecting any matter that in the opinion of the Lieutenant-Governor in Council is necessary or advisable to carry out effectively the intent and purpose of this Act.

1994 cE-5.1 s32; 1995 c37 s19; 2007 c25 s2

Back to Top

Offences and penalties

33. (1) Every person who refuses or neglects to comply with an order, regulation, restriction, prohibition or control, made or exercised by the emergency controller under Part III is guilty of an offence and, in addition to any other penalty, is liable, on summary conviction, to a fine of not more than $500,000 for each day upon which the refusal or neglect is repeated or continued.

(2) Every person who fails to comply with an order of the public utilities board made under this Act is guilty of an offence and is liable, on summary conviction, to a fine not exceeding $100,000 per day for each day that the offence continues.

1994 cE-5.1 s33

Back to Top

Resolving statutory conflict

34. (1) An Act or contract, whether enacted before or after the commencement of this Act relating to a producer or retailer shall be read and construed subject in all respects to this Act, which in a case of conflict shall, notwithstanding a provision to the contrary contained in another Act or contract, prevail over a general or special Act enacted or a contract entered into prior to the commencement of this Act.

(2) A contract referred to in subsection (1) includes a contract authorized by or entered into under an Act.

1994 cE-5.1 s34

Back to Top

RSN1990 cE-5 Rep.

35. The *Electrical Power Control Act* is repealed.

1994 cE-5.1 s35

Back to Top

Commencement

36. This Act or a Part or section comes into force on a day to be proclaimed by the Lieutenant-Governor in Council. (In force, except Part IV (ss.23 to 25 & s.29) on Jan. 1/96) (S.29 was Rep. by 1995 c37 s18))

1994 cE-5.1 s36

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1978 CarswellAlta 141, 7 Alta. L.R. (2d) 370, (sub nom. Northern Utilities Ltd. v. Edmonton (City)) [1979] 1 S.C.R. 684, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, [1978] 3 A.C.W.S. 214

1978 CarswellAlta 141

Northwestern Utilities Ltd., Re

Northwestern Utilities Limited et al. v. City of Edmonton

Supreme Court of Canada

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

Judgment: October 3, 1978
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Counsel: *T. Mayson, Q.C.*, for appellant Northwestern Utilities Ltd.

W. J. Major, Q.C., and *C. K. Sheard*, for appellant Public Utilities Board of Alberta.

H. Patterson, Q.C., for respondent.

Subject: Public

Public Utilities -- Regulatory boards — Practice and procedure — General.

Administrative law — Jurisdiction of Public Utilities Board — Failure to give written reasons for decision — Court unable to decide if rate increase allowed company to recover past losses — Board should not be active adversary on appeal from its decision — Matter referred back to board — The Public Utilities Board Act, R.S.A. 1970, c. 302, s. 62 — The Gas Utilities Act, R.S.A. 1970, c. 158, s. 31 [since re-en. 1977, c. 9, s. 5(2)] — The Administrative Procedures Act, R.S.A. 1970, c. 2, s. 8.

APPEAL from the judgment of the Appellate Division, 2 A.R. 317, setting aside an order of the board granting an interim increase in rates.

The appellant company had made application to the appellant board in 1974 for a rate increase. A rate was decided upon and returned to the company to set up. Before this was submitted for final approval, the company made another application in 1975 because of increased costs. In the second application the board approved an interim increase. The respondent objected to this award on the grounds that it attempted to compensate for past losses. The ruling was appealed, and the Court of Appeal referred the order back to the board for reconsideration. This decision was appealed by the company and board to the Supreme Court of Canada.

Held, the appeal was dismissed. The matter was referred back to the board for reconsideration and to give proper written reasons for its decision. The Public Utilities Board could not increase rates so as to compensate for past losses (s. 31 of the Gas Utilities Act). The only losses suffered by the company that it could take into consideration were those arising from the date of the last application. In its order the board failed to give adequate reasons for its decision, so that it was not possible for the court to determine if the board had overstepped its jurisdiction in allowing com-

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1978 CarswellAlta 141, 7 Alta. L.R. (2d) 370, (sub nom. Northern Utilities Ltd. v. Edmonton (City)) [1979] 1 S.C.R. 684, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, [1978] 3 A.C.W.S. 214

pensation for losses not contemplated by the legislation. The board's decision as to the characterization of the "forecast revenue deficiency in the 1975 future test year" involved a question of law and, such being the case, was subject to appeal under s. 62 of the Public Utilities Board Act. The fact that the order was an interim order did not obviate the necessity to give reasons. The board's part in the appeal should have been limited to an explanatory role, with reference to the record before the board, and to the making of representations relating to jurisdiction. The board should not be an active adversary on one side of the dispute.

Cases considered:

Guardians of Bradford Union v. Clerk of the Peace for Wilts (1868), L.R. 3 Q.B. 604 — *referred to*

Lab Rel. Bd. (Sask.) v. Dom. Fire Brick & Clay Products Ltd., [1947] S.C.R. 336, [1947] 3 D.L.R. 1 — *referred to*

Re Calgary and Home Oil Co. (1959), 28 W.W.R. 353, 19 D.L.R. (2d) 655 (Alta. C.A.) — *referred to*

R. v. Lab. Rel. Bd. (Ont.) — *referred to*

Ex parte Genaire, [1959] O.W.N. 149, 18 D.L.R. (2d) 588 (C.A.) — *referred to*

Lab. Rel. Bd. (N.B.) v. Eastern Bakeries Ltd., [1961] S.C.R. 72, 45 M.P.R. 95, 26 D.L.R. (2d) 332 — *referred to*

R. v. Bd. of Commrs. of Public Utilities (N.B.) — *referred to*

Ex parte Moncton Utility Gas Ltd. (1966), 60 D.L.R. (2d) 703 (N.B.C.A.) — *referred to*

Gill Lbr. Chipman (1973) Ltd. v. United Brotherhood of Carpenters etc. (1973), 7 N.B.R. (2d) 41, 42 D.L.R. (3d) 271 (C.A.) — *referred to*

Re Can. Metal Co. and MacFarlane (1973), 1 O.R. (2d) 577, 41 D.L.R. (3d) 161 — *referred to*

MacDonald v. R., [1977] 2 S.C.R. 665, 29 C.C.C. (2d) 257, 68 D.L.R. (3d) 649, 9 N.R. 271 — *referred to*

Dome Petroleum Ltd. v. Public Utilities Bd. (Alta.), 2 A.R. at 453, 13 N.R. at 301, affirmed [1977] 2 S.C.R. 822, 2 A.R. 451, 13 N.R. 299 — *referred to*

Central Broadcasting Co. Ltd. v. Lab. Rel. Bd. (Can.), [1977] 2 S.C.R. 112, 76 C.L.L.C. 14, 029, 67 D.L.R. (3d) 539 — *referred to*

Re Lab. Rel. Bd. (Can.) and Transair Ltd., [1977] 1 S.C.R. 722, 76 C.L.L.C. 14, 024, 67 D.L.R. (3d) 421 — *referred to*

Edmonton v. Northwestern Utilities Ltd. (No. 2), [1961] S.C.R. 392, 34 W.W.R. 600, 28 D.L.R. (2d) 125, varying 34 W.W.R. 241, 25 D.L.R. (2d) 262 — *applied*

The judgment of the court was delivered by *Estey J.*:

1 This is an appeal by the Public Utilities Board for the Province of Alberta and Northwestern Utilities Limited from a decision of the Appellate Division of the Supreme Court [2 A.R. 317] setting aside an order of the board

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granting an interim increase in rates pursuant to s. 52(2) of the Public Utilities Board Act, R.S.A. 1970, c. 302.

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

3 (1) That the effect of the order was a contravention of s. 31 [since re-en. 1977, c. 9, s. 5(2)] of the Gas Utilities Act, R.S.A. 1970, c. 158, in that Northwestern Utilities Limited was thereby granted recovery of losses incurred before the date of application, namely, 20th August 1975; and

4 (2) That the Board failed to comply with s. 8 of the Administrative Procedures Act, R.S.A. 1970, c. 2, by reason of its failure to give reasons for its decision.

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

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

7 While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application (vide *Edmonton v. Northwestern Utilities Ltd.* (No. 2), [1961] S.C.R. 392, 34 W.W.R. 600, 28 D.L.R. (2d) 125, varying 34 W.W.R. 241, 25 D.L.R. (2d) 262, per Locke J. at pp. 401-402).

8 The rate-fixing process was described before this court by the board as follows:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue

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> 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.

9 The statutory pattern is founded upon the concept of the establishment of rates in futuro for the recovery of the total forecast revenue requirement of the utility as determined by the board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of the Gas Utilities Act that the board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the Act which make this clear, and I take but one example, found in s. 35, which provides:

> 35.(1) No change in any existing rates ... shall be made by ... a gas utility ... until such changed rates or new rates are approved by the Board.
>
> (2) Upon approval the changed rates ... come into force on a date to be fixed by the Board, and the Board may, either upon written complaint or upon its own initiative, herein determine whether the proposed increases, changes or alterations are just and reasonable.

10 Section 32 likewise refers to rates "to be imposed thereafter by ... a gas utility". The 1959 version of the legislation [the Natural Gas Utilities Act, 1944 (Alta.), c. 4] before the court in this proceeding was examined by the Alberta Court of Appeal in *Re Calgary and Home Oil Co.* (1959), 28 W.W.R. 353, 19 D.L.R. (2d) 655, wherein Johnson J.A. observed at p. 360:

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

11 Vide also *R. v. Bd. of Commrs. of Public Utilities (N.B.); Ex parte Moncton Utility Gas Ltd.* (1966), 60 D.L.R. (2d) 703 at 710 (N.B.C.A.); *Guardians of Bradford Union v. Clerk of the Peace for Wilts* (1868), L.R. 3 Q.B. 604 at 616.

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

> 31. It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

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

14 The interpretative difficulties raised by s. 31 are manifold. For one thing, the word "losses", which is not defined in the Act, is employed with reference to the board's power to establish rates with respect to the period after an application has been made and before the board has fully disposed of the application by taking into account "excess revenues" and "losses" which the board determines have been "due to undue delay in the hearing and determining of the application". It is in my view apparent once the statute is examined as a whole that "losses" as the word is employed in s. 31 does not refer to accounting losses in the sense of a net loss occurring in a defined fiscal period but rather refers to the loss of revenue suffered by a utility during a defined period by reason of the delay in the imposition

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during that period of the proposed increased rates. The word, in short, is an abbreviation for "lost revenue" which may indeed be suffered by a utility during a period when the utility is not in a net loss position in the accounting sense of that term. This court had occasion to consider s. 31 collaterally in *Edmonton v. Northwestern Utilities Ltd.* (No. 2), supra. Locke J. writing on behalf of the whole court on this point so interpreted and applied the word "losses" as it appears in this section.

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

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

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

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

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

19 The practice and terminology historically adopted by the board in the discharge of its statutory functions are no doubt clear to the industry and to persons attending upon the board in the discharge of its functions but leave something to be desired in the sense that the terminology does not precisely fit that employed by the legislation to which reference has been made. It is clear, however, that in its order with respect to the August 1974 application the board has attempted to establish in the prospective sense those rates which the company will require to enable it to carry on its business as a gas utility in the future and until such further and other rates are established by the board. Had the company then responded to the 15th September order by filing a proposed schedule of rates, the board would no doubt in completion of its statutory response to the August 1974 application by the company have established the appropriate schedule of rates to be brought into effect by the company in its billings from and after a date prospectively prescribed by the board.

20 The complication which gives rise to these proceedings occurred on 20th August 1975, when the company filed with the board an application (not to be confused with the application filed on 20th August 1974) for an order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by Northwestern Utilities Limited to its customers", together with an application on 25th September 1975 for an interim order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by Northwestern Utilities Limited to its customers pending final determination of the matter". The application of 1975 recites the history of the 1974 application and states that the operating costs and gas costs of the company "have increased substantially over the

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amounts included in the 1974 application and continue to increase". After reciting that the board in reponse to the 1974 application had awarded the applicant "interim refundable rates", the 1975 application went on to state:

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

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

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

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

> 62.(1) Subject to subsection (2) [the requirement of leave], upon a question of jurisdiction or upon a question of law, an appeal lies from the Board to the Appellate Division of the Supreme Court of Alberta.

24 The Appellate Division of the Supreme Court of Alberta set aside the board order of 1st October 1975 and referred the matter to the board [p. 336] "for further consideration and redetermination". One preliminary argument can be disposed of at the outset. It was argued in the courts below, as well as in this court, that the interim order under appeal (dated 1st October 1975) was made pursuant to the 1974 rate application, either as a variance of the 1974 order pursuant to s. 56 of the Public Utilities Board Act, or as an interim order in respect of the 1974 application. That submission, whatever its effect, was rejected by the Court of Appeal and must be rejected here. On the face of the interim order is found a reference to "the application of N.U.L. dated the 20th day of August, 1975". That reference, when read with the transcript of the evidence at the hearing, leaves no doubt that the interim order was made with respect to the 1975 application, which clearly was an independent application to establish, pursuant to the aforementioned sections of the Gas Utilities Act, the statutory prerequisites to a new tariff of rates, and then a new tariff of rates.

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

26 The issue is at this stage very narrow. No contest is raised as to the validity of the 15th September 1975 order or the various interim rates authorized in the 1974 application. The issue is simply whether or not the company by not applying in the 1974 application for a further interim order has caused the board to respond to the new application in 1975 in such a way as to authorize a new tariff which when implemented by the company will have the effect of recovering from future gas consumers revenue losses incurred by the company with respect to gas deliveries made to

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consumers prior to the date of the application in question (20th August 1975) or prior to the advent of the 1st October 1975 rates but in a manner not authorized by s. 31.

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

28 This procedure was the subject of comments by Porter J.A. in *Edmonton v. Northwestern Utilities Ltd.*, supra, at p. 276 [W.W.R.], which comments I find apt in the circumstances now before us:

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

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

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

> ... can recover its cost of service and earn an adequate return on its utility assets for the year 1975. If the interim rates requested are not granted, the costs of providing natural gas service would not be fully recovered.

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

> A. The revenues from gas sales for the test year 1975 of $87,265,000 as shown on line 6 of statement 2.01 (forecast — proposed rates) constitutes $84,480,000 of revenues forecast under existing rates as shown on line 6 of statement 2.01 (forecast — existing rates) and $2,785,000 of additional revenues to earn a utility rate of return

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of 9.93 per cent. The increase is that estimated to be derived from introduction on October 1, 1975, of the requested interim rates, including an increase in franchise tax of $120,000.

Q. On what year are the interim rates designed? A. 1975 was chosen as the test year, and rates were designed to recover 1975 costs.

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

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

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

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

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

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

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

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

36 The terminology "past losses", employed perhaps by all parties before the board and adopted by the board in its order, makes it difficult in reviewing the record as well as the various orders of the board to determine whether or not the board was indeed attempting to isolate the elements to be taken into account by the board in discharging its functions under ss. 27, 28 and 29 [am. 1974, c. 44, s. 10(3)] of the Gas Utilities Act with reference to specific parts of the calendar year 1975. If, for example, the board had assumed that the additional revenue sought in the application of 25th September 1975 for an interim order pending the determination of the application of 20th August 1975 was to match expenses forecast to be incurred by the company in the last quarter of 1975, then there would be no attempt by the board to take into account revenue losses incurred prior to 20th August 1975 and thus no failure on the part of the board to comply with the statute and with s. 31 in particular. The process of matching forecast revenues to be realized

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1978 CarswellAlta 141, 7 Alta. L.R. (2d) 370, (sub nom. Northern Utilities Ltd. v. Edmonton (City)) [1979] 1 S.C.R. 684, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, [1978] 3 A.C.W.S. 214

from the proposed interim rates against the forecast expenses comprising the total revenue requirements for the last quarterly period would be complete.

37 It is impossible to discern whether or not that is the result which is sought to be reflected by the board in its order of 1st October 1975. Such may well be the case, but, on the other hand, it might be, as submitted by the city, that these additional expenses totalling $2.785 million are in whole or in part the result of annualizing expenses incurred before and/or after 20th August 1975 so that the total revenue requirement for the "test year" need be augmented by $2.785 million in order to meet the total revenue requirements for the year.

38 It is in my view wholly unnecessary to enter the debate as to whether or not in making the estimates for future expenses a fiscal period of a year, two years, a half year, etc., need be selected. What is required by the statute is an estimate by the board of the future needs of the utility which are recognized in the statute to be compensable by the operation in the future of the rates prescribed by the board. Similarly the forecast of revenues to be recovered by the proposed rates need not be predicated necessarily upon a hypothetical or real fiscal year or a shorter period. Obviously in a seasonal enterprise such as the gas utility business a full calendar fiscal period represents the marketing picture throughout the four seasons of the year. Equally obviously, recurring cash outlays relevant to expenses unevenly incurred throughout the year can be annualized either by an accounting adjustment where the expense incurred relates to a longer period or extends beyond the fiscal year in question, or can be annualized where the expense incurred relates to a segment of the fiscal period. In any case the administrative mechanics to be adopted in the discharge of the function mandated by the Gas Utilities Act are exclusively within the power of the board. We need not here deal with the question of arbitrariness in the discharge of administrative functions, for there is no evidence on the record before this court raising any such issue. This court is concerned only with the issue as to whether the board in the performance of its duties under the statute has exceeded the power and authority given to it by the legislature. Clement J.A. has observed in his reasons [pp. 331-32]:

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

39 I am not prepared to say that a prima facie case has been established that the effect of the application of the interim rates from 1st October 1975 onwards will be the recovery in the future of revenue shortfalls incurred prior to 20th August 1975. Indeed, in my respectful view, the test is not whether the "new tentative rate base includes an amount for revenue losses", but rather the question is whether or not the interim rates prospectively applied will produce an amount in excess of the estimated total revenue requirements for the same period of the utility by reason of the inclusion in the computation of those future requirements of revenue shortfalls which have occurred prior to the date of the application in question, whether or not those "shortfalls" have been somehow incorporated into the rate base or have been included in the operating expenses forecast for the period in which the new interim rates will be applied, subject always to the board's limited power under s. 31.

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

41 However, it is not possible for the reviewing tribunal in the circumstances in this proceeding to ascertain from the board order whether the board acted within or outside the ambit of its statutory authority. The form and content of the board's order are so narrow in scope and of such extraordinary brevity that one is left without guidance as to the

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1978 CarswellAlta 141, 7 Alta. L.R. (2d) 370, (sub nom. Northern Utilities Ltd. v. Edmonton (City)) [1979] 1 S.C.R. 684, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, [1978] 3 A.C.W.S. 214

basis upon which the rates have been established for the period of 1st October 1975 onwards. Hence this further submission of the company must fail.

42 I turn now to the second issue, namely, the application of s. 8 of the Administrative Procedures Act of Alberta to these proceedings. This provision imposes upon certain administrative tribunals the obligation of providing the parties to their proceedings with written statements of their decisions and the facts upon which the decisions are based and the reasons for them. Section 8 states:

> 8. Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
>
> (*a*) the findings of fact upon which it based its decision, and
>
> (*b*) the reasons for the decision.

43 The "reasons" handed down by the board consist of the following:

> **Interim Order**
>
> UPON THE APPLICATION of Northwestern Utilities Limited, (hereinafter referred to as 'N.U.L.') to the Public Utilities Board for an Order or Orders approving changes in existing rates, tolls or charges for gas supplied and services rendered by N.U.L. to its customers;
>
> AND UPON READING the application of N.U.L. dated the 20th day of August, 1975 and the Affidavit of Dorothea E. Blackwood concerning service by mail and by newspaper publication of a Notice of the matter as directed by the Board and written evidence of witnesses of N.U.L. and other material filed in support of the application;
>
> AND UPON HEARING an application made by N.U.L. on September 25, 1975, for an Interim Order approving changes in existing rates, tolls or charges for gas supplied and services rendered by N.U.L. to its customers pending final determination of the matter;
>
> AND UPON HEARING the application, testimony and submission of witnesses and counsel for N.U.L.;
>
> AND THE BOARD having considered the argument of counsel for Interveners that the application for interim refundable rates by N.U.L. should be rejected, in whole or in part, on the grounds that the increased interim refundable rates are for the purpose of recovering 'past losses' which they claim have been incurred by N.U.L. since January 1, 1975;
>
> AND THE BOARD considering that the forecast revenue deficiency in the 1975 future test year requested by N.U.L. cannot be properly characterized as 'past losses'.
>
> AND THE BOARD considering that delay in granting an interim increase in rates may adversely affect N.U.L.'s financial integrity and customer service;
>
> AND N.U.L. having undertaken to refund to its customers such amounts as the Board may direct if any of the said interim rates are changed after further hearing.
>
> IT IS ORDERED as follows: ...

44 The law reports are replete with cases affirming the desirability if not the legal obligation at common law of

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1978 CarswellAlta 141, 7 Alta. L.R. (2d) 370, (sub nom. Northern Utilities Ltd. v. Edmonton (City)) [1979] 1 S.C.R. 684, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, [1978] 3 A.C.W.S. 214

giving reasons for decisions (vide *Gill Lbr. Chipman (1973) Ltd. v. United Brotherhood of Carpenters etc.* (1973), 7 N.B.R. (2d) 41, 42 D.L.R. (3d) 271 per Hughes C.J.N.B. at p. 47; *MacDonald v. R.*, [1977] 2 S.C.R. 665, 29 C.C.C. (2d) 257, 68 D.L.R. (3d) 649, 9 N.R. 271, per Laskin C.J.C. at p. 262). This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal and, if taken, the opportunity in the reviewing or appellate tribunal of a full hearing which may well be denied where the basis of the decision has not been disclosed. This is not to say, however, that absent a requirement by statute or regulation a disposition by an administrative tribunal would be reviewable solely by reason of a failure to disclose its reasons for such disposition.

45 The board in its decision allowing the interim rate increase which is challenged by the city failed to meet the requirements of s. 8 of the Administrative Procedures Act. It is not enough to assert, or more accurately, to recite, the fact that evidence and arguments led by the parties have been considered. That much is expected in any event. If those recitals are eliminated from the "reasons" of the board, all that is left is the conclusion of the board "that the forecast revenue deficiency in the 1975 future test year requested by the Company cannot be properly characterized as 'past losses'." The failure of the board to perform its function under s. 8 included most seriously a failure to set out "the findings of fact upon which it based its decision" so that the parties and a reviewing tribunal are unable to determine whether or not, in discharging its functions, the board has remained within or has transgressed the boundaries of its jurisdiction established by its parent statute. The obligation imposed under s. 8 of the Act is not met by the bald assertion that, as Keith J. succinctly put it in *Re Can. Metal Co. and MacFarlane* (1973), 1 O.R. (2d) 577 at 587, 41 D.L.R. (3d) 161, when dealing with a similar statutory requirement, "my reasons are that I think so".

46 The appellants are not assisted by the decision of the Appellate Division of the Supreme Court of Alberta in *Dome Petroleum Ltd. v. Public Utilities Bd. (Alta.)*, 2 A.R. at 453, 13 N.R. at 301, affirmed [1977] 2 S.C.R. 822, 2 A.R. 451, 13 N.R. 299, by this court, to the effect that under s. 8 of the Administrative Procedures Act the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal. Nor can the board rely on the peculiar nature of the order in this case, being an interim order with the amounts payable thereunder perhaps being refundable at some later date, to deny the obligation to give reasons. Brevity in this era of prolixity is commendable and might well be rewarded by a different result herein but for the fact that the order of the board reveals only conclusions without any hint of the reasoning process which led thereto. For example, none of the factors which the board took into account, in reaching its conclusion that the amounts contested were not "past losses", are revealed so that a reviewing tribunal cannot with any assurance determine that the statutory mandates bearing upon the board's process have been heeded.

47 The Appellate Division of the Supreme Court of Alberta, after coming to the same result, vacated the board's order and referred the matter to the board for further consideration and determination pursuant to s. 64 of the Public Utilities Board Act. In doing so, it is evident from the reasons for judgment of the said court that the court properly viewed its appellate jurisdiction under s. 64 of the Public Utilities Board Act as a limited one. It is not for a court to usurp the statutory responsibilities entrusted to the board, except insofar as judicial review is expressly allowed under the Act. It is, of course, otherwise where the administrative tribunal oversteps its statutory authority or fails to perform its functions as directed by the statute. Questions as to how and when operating expenses are to be measured and recovered through prescribed rates are, subject to the limits imposed by the Act itself, for the board to decide, and the procedures for such decisions if made within the confines of the statute are administrative matters which are better left to the board to determine (vide *Edmonton v. Northwestern Utilities Ltd.*, (No. 2), supra, per Locke J. at p. 406).

48 As for the participation of the Public Utilities Board in these proceedings, it was pointed out to the court that s. 65 of the Public Utilities Board Act entitles the board "to be heard ... upon the argument of any appeal". Under s. 66 of the Act the board is shielded from any liability in respect of costs by reason or in respect of an appeal.

49 Section 65 no doubt confers upon the board the right to participate on appeals from its decisions, but, in the absence of a clear expression of intention on the part of the legislature, this right is a limited one. The board is given

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locus standi as a participant in the nature of an amicus curiae but not as a party. That this is so is made evident by s. 63(2) of the Public Utilities Board Act, which reads as follows:

> (2) The party appealing shall, within ten days after the appeal has been set down, give to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the secretary of the Board, notice in writing that the case has been set down to be heard in appeal, and the appeal shall be heard by the court of appeal as speedily as practicable.

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

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

52 It has been the policy in this court to limit the role of an administrative tribunal whose decision is at issue before the court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the board and to the making of representations relating to jurisdiction (vide *Lab. Rel. Bd. (N.B.) v. Eastern Bakeries Ltd.*, [1961] S.C.R. 72, 45 M.P.R. 95, 26 D.L.R. (2d) 332; *Lab. Rel. Bd. (Sask.) v. Dom. Fire Brick & Clay Products Ltd.*, [1947] S.C.R. 336, [1947] 3 D.L.R. 1).

53 Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *R. v. Lab. Rel. Bd. (Ont.); Ex parte Genaire*, [1959] O.W.N. 149, 18 D.L.R. (2d) 588 at 589-90 (C.A.):

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

54 Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question (vide *Central Broadcasting Co. Ltd. v. Lab. Rel. Bd. (Can.)*, [1977] 2 S.C.R. 112, 76 C.L.L.C. 14, 029, 67 D.L.R. (3d) 539).

55 In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions. In *Re Lab. Rel. Bd. (Can.) and Transair Ltd.*, [1977] 1 S.C.R.

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1978 CarswellAlta 141, 7 Alta. L.R. (2d) 370, (sub nom. Northern Utilities Ltd. v. Edmonton (City)) [1979] 1 S.C.R. 684, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565, [1978] 3 A.C.W.S. 214

722, 76 C.L.L.C. 14, 024, 67 D.L.R. (3d) 421, Spence J., speaking on this point, stated at p. 440:

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

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

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1980 CarswellAlta 136, 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541

1980 CarswellAlta 136

Coseka Resources Ltd. v. Saratoga Processing Co.

COSEKA RESOURCES LIMITED v. SARATOGA PROCESSING COMPANY LIMITED et al.; PETROGAS PROCESSING LTD. v. PUBLIC UTILITIES BOARD et al.

Alberta Court of Appeal

Clement, Laycraft and Stevenson JJ. A.

Judgment: July 20, 1980
Docket: Calgary Appeal Nos. 13147, 13166

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Counsel: *D. P. McLaws, Q.C.*, for Coseka Resources Ltd.

J. B. Ballem, Q.C., and *L. L. Fryers*, for Saratoga Processing Company and Westcoast Transmission.

J. R. Smith, Q.C., for Husky Oil Operations Ltd.

A. L. McLarty, for Petrogas Processing Ltd.

No one for the Public Utilities Board.

Subject: Natural Resources

Oil and Gas --- Statutory regulation — Provincial boards — Jurisdiction.

Mines and minerals — Oil and gas — Exploration and operating agreements — Miscellaneous agreements — Public Utilities Board — Rate fixing — Possible for final order to leave retroactive effect to date of interim order.

W. purchased raw gas from H. and processed it through a plant operated by S., a wholly owned subsidiary of W. In 1974, the plant, not being used to capacity, was directed by the Public Utilities Board to process gas from C. In May 1975, the board issued an interim order as to rates to be charged, reserving a final order until various unknown costs and factors could be determined. In 1980, a final order was given, adjusting rates back to 1st September 1977. C. appealed the decision, contending that rate adjustment could not be retroactive and that the rates set were applicable only from the date of the final order.

Held:

Order quashed in part.

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The board had jurisdiction to make an interim order under s. 52 of the Public Utilities Board Act. While rates or adjustments could not be made to apply to dates prior to an application, the board had power to amend its interim order and to make adjustments for the period between the interim and final orders. The question of the effective date of the final order was referred back to the board. In making the effective date a date other than that of the interim order, the board had erroneously considered matters outside its jurisdiction.

Cases considered:

Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Ltd., [1980] 3 W.W.R. 1, 20 A.R. 384 Alta. (C.A.) — *considered*

Calgary and Home Oil Co. Ltd. (1959), 28 W.W.R (N.S.) 353, 19 D.L.R. (2d) 655 (Alta. C.A.) — *considered*

Edmonton v. Northwestern Utilities Ltd., Re, [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125 — *considered*

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

Trans Mountain Pipe Line Co. Ltd. v. Nat. Energy Bd., [1979] 2 F.C. 118 (C.A.) — *applied*

Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd., [1980] 3 W.W.R. 313, *(*sub nom. *Re Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd.)* 109 D.L.R. (3d) 698, 22 A.R 24 (C.A.) — *referred to*

Western Decalta Petroleum Ltd. v. Alta. Public Utilities Bd. (1978), 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600, 9 A.R. 175 (C.A.) — *considered*

Statutes considered:

Alberta Gas Trunk Line Company Act, 1954 (Alta.), c. 37.

Gas Utilities Act, R.S.A. 1970, c. 158, ss. 2*(f)*(iii), 5.1 [en. 1976, c. 21, s. 2; am. 1980, c. 21, s. 5], 21, 24 [am. 1980, c. 21, s. 9], 27 [since am. 1980, c. 21, s. 10], 31 [am. 1977, c. 9, s. 5], 35 [am. 1980, c. 21, s. 13], 49.

Natural Gas Pricing Agreement Act, 1975 (2nd Sess.) (Alta.), c. 38.

Public Utilities Board Act, R.S.A. 1970, c. 302, ss. 52, 54.

Appeal from decision of the Public Utilities Board.

The judgment of the court was delivered by *Laycraft J. A.*:

1 The issue raised by these related appeals [from 10 Alta. L.R. (3d) 193 (sub nom. *Re Saratoga Processing Co.* Ltd.)] from the Public Utilities Board of Alberta is the effective date of a board order fixing the charge by Saratoga Processing Company Limited for processing natural gas produced from the North Coleman gas field. In the Coseka appeal the issue is whether the Public Utilities Board ("P.U.B.") exceeded its powers when, in replacing an interim order with a final order, it made the rates in the final order effective on 1st September 1977, a date nearly three years prior to the date of the final order. In the Petrogas appeal the issue is whether the effective date of the final order should have been 2nd May 1975, the date of the interim order which it replaced.

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2 These cases have a lengthy and complex history which it is necessary to review in order to follow the dispute which has now arisen. A large number of producers of natural gas in the North Coleman field and in nearby Savanna Creek gas field are affected by the appeals. Those from the Savanna Creek field are represented by Husky Oil Operations Ltd., and those from the North Coleman field are represented by Coseka Resources Ltd., as the operators of the respective fields. The actions subsequently referred to in this case as being those of Husky or Coseka were on behalf of all the producers represented.

3 In August 1957 Westcoast Transmission Company Limited contracted with Husky to purchase raw, unprocessed natural gas at a central point in the Savanna Creek gas field. Such a transaction was relatively rare, if not unique, in Alberta. Producers usually process the gas themselves in a plant before selling it to a buyer. In this case Westcoast, having purchased raw gas, required a gas processing plant and incorporated Saratoga Processing Company Limited as a wholly owned subsidiary to build the plant and operate it.

4 In September 1960 Westcoast entered into a gas sales agreement with a United States buyer, El Paso Natural Gas Company, which took delivery of the gas at the international boundary. El Paso undertook to pay a fixed price for the gas plus all processing and transportation charges related to it. The stream of gas sold to El Paso included gas from Savanna Creek as well as gas produced from another gas field by Petrogas Processing Limited. Petrogas sold its gas already processed and so its gas did not go through the Saratoga plant. The Savanna Creek producers provided approximately 10 per cent of Westcoast gas volume in its southern Alberta system, and Petrogas approximately 90 per cent.

5 The field volumes of gas from the Savanna Creek field were overestimated. The field never produced the expected volumes of gas, so that the Saratoga plant, built in anticipation of that volume, had excess capacity. In October 1960 Westcoast agreed with its subsidiary, Saratoga, to reimburse it for all costs incurred in the processing plant. Westcoast then recovered all such costs from El Paso, which apparently raised no issue as to costs arising from the excess plant capacity.

6 In 1973 and early 1974 the North Coleman gas field was discovered near the Savanna Creek field. On behalf of the producers of that field, on 2nd May 1974 Coseka made a complaint in writing to the P.U.B. pursuant to the Gas Utilities Act, R.S.A. 1970, c. 158, asking the board to require Saratoga to process its gas, constructing such plant additions as might be required for that purpose. The P.U.B. at that time found that the Saratoga plant had sufficient excess capacity to enable it to process the gas produced by the Coseka producers without major plant additions. The board heard considerable evidence on the share of plant costs which should be borne by Coseka. This was a complex matter since the acid gas content and other specifications of the North Coleman gas were expected to differ considerably from the Savanna Creek gas. On 2nd May 1975, the board issued reasons for judgment in some 14 pages. Under the heading "Interim Order" the board stated:

> As mentioned at the outset of this Decision, the Board was requested to confine its decision to matters stated to be in issue between the parties. Many ancillary questions remain to be resolved, either by agreement to be presented to the Board for incorporation in the final Order or by further direction of the Board at the time of granting a final Order. Most of these questions are outlined in the draft agreement presented with Saratoga's submission. Coseka advised that it had not made a detailed review of such agreement at the time of the hearing.
>
> Furthermore, without a reasonable trial period of actual operations, it is impossible to determine with any real precision the myriad factors, such as capital cost of additions, operating expenses, deliverability of Raw Gas, actual operating capacity of the plant to meet the needs for Residue Gas, and the determination of the actual Acid Gas content together with its effect on plant capacity. The answers to these questions, and to others of equal importance, are fundamental to any attempt to make an exact determination of a rate and the terms relating thereto.

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The Board will therefore exercise its powers under Section 52 of The Public Utilities Board Act and issue an Interim Order directing that commencing with the first delivery of gas by Coseka for processing, the charges to be paid by Coseka will consist of a fixed unit charge per Mcf of 14.4 cents for each Mcf of gas processed with a minimum annual charge of $245,000 payable as previously described. Failing such agreement, the parties may apply to the Board for further direction.

The Interim Order will remain in effect until further application following an adequate period during which reasonable volumes of gas have been processed for Coseka. Direction on the many matters with respect to which the Board has made no decision and which are the subject of uncertainty between the parties is reserved to such further application.

7 Prior to the introduction of the North Coleman gas into the plant the average cost of processing gas was 45 cents per Mcf. The initial charge to Coseka of 14.4 cents per Mcf. was later raised to 15.6 cents per Mcf. by agreement between Saratoga and Coseka. Though contrary to s. 35 [am. 1980, c. 21, s. 13] of the Gas Utilities Act, the change was not submitted to the board for approval.

8 The arrangement whereby El Paso reimbursed Westcoast for all costs of processing and transportation continued until 1st January 1975. On that date Westcoast's license to export natural gas from Canada was amended by the National Energy Board to require Westcoast to charge El Paso a much higher fixed border price, related to the "commodity value" of natural gas as compared to other fuels in the United States. This border price included all costs of processing and transportation of the gas. In the same year the Natural Gas Pricing Agreement Act, 1975 (2nd Sess.) (Alta.), c. 38. was enacted by the Legislative Assembly of Alberta and amendments were also made in 1976 to the Gas Utilities Act. I will refer in more detail to some portions of this legislation later.

9 The general scheme of the new system for sales of natural gas, which was to apply despite contractual provisions to the contrary, was that American buyers of gas paid a price at the United States border fixed by the National Energy Board and computed by reference to the "commodity value" of gas in the United States. Original buyers of gas in Alberta were allowed to recover their "cost of service" including costs of processing and transportation attributable to the gas. These costs deducted from the border price became the field price of gas received by producers. Thus the producers of the gas rather than the consumers were, for the first time, in effect paying processing and transportation charges.

10 The administration of the new system of gas sales was, by the Natural Gas Pricing Agreement Act, entrusted to a new administrative board established by that Act, the Alberta Petroleum Marketing Commission ("A.P.M.C."). It was required to determine the cost of service of an original buyer of gas subject to an appeal to the P.U.B. In May 1977 regulations enacted under the Act specified an appeal procedure to be followed on such appeals.

11 A gas processing plant is a "gas utility" as defined by the Gas Utilities Act. The P.U.B. is authorized by s. 27 [since am. 1980, c. 21, s. 10] of that Act to fix the just and reasonable rates, tolls and charges of a gas processing plant either on its own motion or upon receipt of a complaint. As part of the new scheme of marketing gas, the P.U.B. was forbidden by s. 5. 1 [en. 1976, c. 21, s. 2; am. 1980 c. 21, s. 5], added to the Gas Utilities Act effective 19th May 1976, to hold hearings under a number of sections of the Act, including s. 27, unless authorized to do so by the Lieutenant-Governor in Council of Alberta. The addition of s. 5.1. meant that the P.U.B. was forbidden to hold a further hearing to fix finally the reasonable rates, tolls and charges for processing the North Coleman gas until some party affected applied for and obtained an order of the Lieutenant-Governor in Council permitting the hearing to be held. Until that order was obtained the interim order of 2nd May 1975 would remain in effect.

12 The A.P.M.C. administered the Westcoast cost of service as one single all-inclusive item for all of its operations in southern Alberta. The result was that, in effect, Petrogas with 90 per cent of the volume of gas in the Westcoast southern Alberta system paid 90 per cent of the cost of the Saratoga plant remaining after payments by Coseka were

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deducted, though none of its gas was processed in that plant. Very large sums of money were involved. For September 1977 the Westcoast cost of service was determined by the A.P.M.C. to be $439,298 before adjustments for prior months, of which $206,669 was the processing cost passed on to Westcoast by Saratoga. That charge to Westcoast was simply the total plant cost less the sums recovered from Coseka.

13 Not unnaturally, Petrogas objected. Soon after the appeal procedure was established under the Natural Gas Pricing Agreement Act it filed with the A.P.M.C. a statement of objection for the month of September 1977, requesting a separate cost of service determination for Savanna Creek production and a further collective cost of service for all other areas. The A.P.M.C. allowed this objection and made the order requested, thus relieving Petrogas from paying for the operation of a gas plant it didn't use.

14 While Petrogas indirectly paid a substantial part of the costs of the Saratoga plant, the Savanna Creek Producers had, apparently, not concerned themselves with the processing costs attributed to their gas. When that situation ended with the A.P.M.C. decision for September 1977, the Savanna Creek Producers became concerned that a large portion of the Saratoga processing costs charged to them really related to gas supplied by the Coseka producers. They appealed the A.P.M.C. ruling as to September 1977 to the P.U.B. They also appealed a further A.P.M.C. determination of Westcoast's cost of service for Savanna Creek gas for the month of December 1977.

15 Sitting as an appellate tribunal from the A.P.M.C., the P.U.B. then needed to determine what portion of the Saratoga costs was attributed to Savanna Creek gas and what portion was attributed to North Coleman gas. In doing so however, it faced procedural problems. The determination of costs attributed to the Savanna Creek gas arose in its jurisdiction as an appellate tribunal from the A.P.M.C. Its jurisdiction to determine the Coseka portion of the equation arose under the Gas Utilities Act and it was forbidden by s. 5.1 of the Act to hold that hearing until it received an order in council from the Lieutenant-Governor in Council permitting it to do so. It proceeded to try to determine the Coseka portion of the charge only as a means of determining the Savanna Creek portion but was unable to make any order binding upon Coseka incorporating its finding.

16 In October 1978, as the appeal from the A.P.M.C. got under way, Coseka stated its contention that the board lacked jurisdiction to fix the costs of processing its gas. Though the board requested Coseka to assist it by remaining in the hearing while the board fixed the costs of processing Savanna Creek gas, Coseka declined to do so and withdrew. The board, for its own reasons, chose not to rely upon its general powers to subpoena witnesses and documents. After a lengthy hearing, the board in June 1979, issued a decision allowing Husky's appeal from the A.P.M.C. and fixing the cost of processing the Savanna Creek gas. In the result, the costs attributed to Savanna Creek gas under that decision and the 15.6 cents per Mcf. for processing paid by Coseka fell (as estimated by counsel) approximately $100,000 per month short of the cost of operating the Saratoga plant. Under its contract with Saratoga, Westcoast bore the burden of this shortfall. Westcoast appealed the P.U.B. decision to this court. The appeal was dismissed (Prowse J.A. dissenting) in *Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd.*, [1980] 3 W.W.R. 313, 109 D.L.R. 698 (3d) (sub nom. *Re Westcoast Transmission Co. Ltd. v. Husky Oil Operations Ltd.*), 22 A.R. 24.

17 Meanwhile, Saratoga was attempting to bring Coseka before the P.U.B. Application was made to the Lieutenant-Governor in Council for an order permitting the P.U.B. to hear evidence on the cost of processing the North Coleman gas. An order in council was promulgated in February 1979 but was attacked in the courts by Coseka as being defective. That order in council was replaced by a further order in council, dated 10th October 1979, on the authority of which the board, upon its own motion, convened a hearing and issued the decision which is the subject of these appeals. The order in council specifically authorized the board to proceed by review of the interim order of 2nd May 1975 or otherwise.

18 At the opening of the "Pre-Hearing Conference" on 2nd November 1979 the board made it clear that it was proceeding "to finish the job we started back in 1975". At the hearing the board heard evidence for five days and issued a decision some 80 pages in length. It determined the Saratoga cost of service and allocated it between the Savanna Creek gas and the North Coleman gas. The result was a determination that the rates, tolls and charges to be paid by

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Coseka and fixed by the interim order of 2nd May 1975 were not just and reasonable; indeed, they had not been since a time "at or shortly after the issuance of the interim order". The proper rates, tolls and charges to Coseka as determined by the board would require a substantial increase in payments by it, presumably approximating the $100,000 per month shortfall in plant costs which then existed.

19 In its decision the board discussed the proper effective date for the imposition of the "just and reasonable rates, joint rates, tolls or charges" which it had determined. After reviewing the arguments presented to it by the parties the board said:

> The Board considers that the "charges" to be paid by Coseka fixed in its Interim Order No. C75127 ceased to be just and reasonable at the time of the changes in circumstances that occurred as mentioned in Section 2 hereof. That time was at or shortly after the issuance of Interim Order No. C75127. It is logical that the effective date of this Decision should be at that time as argued by Petrogas. However, as stated by Petrogas, an increase in the charge paid by Coseka up to September, 1977 would result in an unearned windfall to Saratoga unless the Board ordered such windfall amount to be paid to Petrogas and Husky.
>
> The Board considers that it does not have the authority under Section 29 of The Public Utilities Board Act or any other section of that Act or of The Gas Utilities Act to order such a payment, either directly to Petrogas and Husky or through Saratoga. With respect to the subject proceedings the provisions of those two Acts authorize the Board to fix and approve of rates, tolls or charges for services provided by Saratoga to the users or customers of Saratoga. Petrogas is not a customer of Saratoga and never has been. Should Petrogas consider it has a claim against Saratoga and/or Coseka, then it can prosecute such claim before the courts.
>
> The Board considers that it will be just and reasonable to Saratoga and its customers if the effective date of this Decision is September 1, 1977, which is the effective date of Interim Order No. E79083.

20 The narrow issue raised by these appeals is whether the final order of the board dated 12th August 1980 must be effective on the date it was issued or whether at some earlier date. If an earlier date is chosen, should it be 1st September 1977 (the effective date of the relief given Petrogas by the A.P.M.C.) or the date of the interim order itself, 2nd May 1975?

21 During the argument there was repeated mention by the parties of "windfall profits" which would accrue to some or other of them depending on which of the dates is adopted as the effective date, assuming, of course, that this result remains unaffected by subsequent legal action, a point which is not before us. With the premise, as found by the board, that the rates charged Coseka for processing its gas ceased to be just and reasonable at or about the time of their imposition, the following results would follow the choice of each date:

1. If the date adopted is the date of the final order, 12th August 1980, as urged by Coseka, then:

(a) From 2nd May 1975 until August 1980, Coseka would pay approximately $100,000 per month less than the just and reasonable rates.

(b) From 2nd May 1975 until 1st September 1977 Petrogas would pay 90 per cent and Husky 10 per cent of the plant costs after deducting the Coseka payments, though Petrogas did not use the plant. The material before us does not disclose whether the payment by Husky would be more or less than the just and reasonable rate for processing Savanna Creek gas.

(c) From 1st September 1977 to 12th August 1980 Coseka would still pay approximately $100,000 per month less than the just and reasonable rates. The payment by Petrogas would be stopped. Husky would pay the just and reasonable rates fixed by the board on Husky's appeal from the A.P.M.C. The shortfall in plant costs of $100,000 per month would be borne by Westcoast.

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2. If the effective date is 1st September 1977 as fixed by the board, then after that date all parties would be paying or receiving their proper share of costs. For the period between 2nd May 1975 and 1st September 1977, however, the discrepancies would be as set forth in 1(a) and (b) above.

3. If the interim order is simply replaced by the final order as of 2nd May 1975:

(a) Coseka would pay the just and reasonable rates for processing its gas throughout.

(b) The just and reasonable rates for Husky would be determined for the whole period, but there would be no proceeding before the board in which Husky would either be ordered to pay, or entitled to receive, moneys for the period between 2nd May 1975 and 1st September 1977. The material before us does not disclose whether Husky paid more or less than the proper amount during that period.

(c) Saratoga would still have the sums paid by Petrogas from 2nd May 1975 to 1st September 1977 which would be in excess of plant costs, subject to whatever advantage or disadvantage Husky gained during that period.

22 It is urged on behalf of Coseka that to prescribe any effective date, other than the date the order issued, is to offend the well established principle that the P.U.B. may not establish rates retroactively. Authorities cited are *Re Calgary and Home Oil Co. Ltd. (1959)*, 28 W.W.R. (N.S.) 19 D.L.R. (2d) 655 (Alta. C.A.); *Western Decalta Petroleum Ltd. v. Alta. Public Utilities Bd.* (1978), 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600, 9 A.R. 175 (C.A.); *Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125; *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 23 N.R. 565, *(*sub nom. *Northwestern Utilities v. Edmonton); Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Co. Ltd.)* 12 A.R. 449, [1980] 3 W.W.R. 1, 20 A.R. 384 (C.A.). The respondents Saratoga and Petrogas contend that to replace an interim order with a final order would not, in fact, be fixing rates retroactively; rather, it would be a mere finalization of the interim order and the exercise of a jurisdiction reserved by the interim order.

23 The board's original jurisdiction to regulate a gas scrubbing plant is contained in the Gas Utilities Act, as amended. By s. 2*(f)*(iii), a gas scrubbing plant is a gas utility. By s. 21, the board is given a general power of supervision of gas utilities. This section provides:

21. (1) The Board shall exercise a general supervision over all gas utilities, and the owners thereof, and may make such orders regarding equipment, appliances, extension of works or systems, reporting and other matters, as 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.

24 By s. 24 [am. 1980, c. 21, s. 9] a number of prohibitions are imposed on gas utilities, among them a provision that no utility shall "make, impose, or extract" any unjust, unreasonable or discriminatory rate. By s. 27 [since am. 1980, c. 21 s. 10] it is provided:

27. The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested.

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

25 The only power expressly given in the Gas Utilities Act to make orders effective prior to the date of them is

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contained in s. 31 [am. 1977, c. 9, s. 5]. That section, as it read prior to amendments in 1977, which are not applicable to this case, provided:

> 31. It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

26 The Act does not itself contain a provision enabling the board to issue an interim order. By s. 49, however, many of the provisions of the Public Utilities Board Act R.S.A. 1970, c. 302 are imported into the powers of the board when it functions under the Gas Utilities Act. This section provides:

> 49. All the provisions of *The Public Utilities Board Act* relating to the jurisdiction of the Board, hearings, service of notices or orders, regulations, rules and procedure, enforcement of orders, appeals, rights, privileges and immunities of the Board, and applicable in the case of a public utility under that Act, if not provided for expressly in this Act, apply and have effect as if this Act formed a part of *The Public Utilities Board Act*.

27 The power to make interim orders is contained in s. 52 of the Public Utilities Board Act. This section provides:

> 52.(1) The Board may direct in any order that the order, or any portion or provision thereof, come into force at a future fixed time, or upon the happening of any contingency, event or condition specified in the order, or upon the performance, to the satisfaction of the Board or a person named by it for the purpose, of any terms that the Board imposes upon any party interested, and the Board may direct that the whole or any portion of the order have force for a limited time or until the happening of any specific event.
>
> (2) The Board may, instead of making an order final in the first instance, make an interim order and reserve further direction, either for an adjourned hearing of the matter or for further application.

28 There can, in my view, be no doubt that, apart from the powers given in s. 31 of the Gas Utilities Act and s. 52 of the Public Utilities Board Act (with a further power in s. 54 for ex parte interim orders not applicable here), all rates fixed by the board must be prospective. Each of the authorities cited above except *Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Co. Ltd.*, supra, deals with final orders or with the power to pre-date orders where there has been "undue delay". These authorities uniformly hold that a final order fixing rates must be prospective but none of them deals with the problem raised here: whether a final order may affect the past by varying rates specified in an interim order.

29 In *Re Calgary and Home Oil Co. Ltd.*, supra, the board made a number of interim orders while the hearing was in progress but in 1947 issued a final order which purported to reserve a right of review. The precise rates approved were put into effect for the sale of gas to the city of Calgary. Due to the city's rapid growth, however, the rates produced a higher than expected rate of return. When the board came to fix new rates in 1958 it was urged to fix rates lower than then required to take into account the amount by which the previous earnings exceeded the rate of return. It was held that the board had no power to reserve a right of review in a final order; its rate fixing power is prospective only and it cannot make rates retroactively. Similarly this court held in *Western Decalta Petroleum Ltd.*, supra, where a final order issued, that it was required to be prospective. The 1961 decision of *Edmonton v. Northwestern Utilities Ltd.*, supra, dealt with the question whether there had been "undue delay" and the effect to be given that delay in a final order.

30 The 1978 decision of the Supreme Court of Canada in *Northwestern Utilities Ltd. v. Edmonton*, supra, covers the same point. The company applied in 1974 for a rate increase. Before the final order was issued in that application the company made another application in 1975. In the second application the board issued an interim order increasing rates. It was held that the only losses suffered by the company which could be taken into consideration were those arising after the date of the last application. At p. 690 ([1979] 1 S.C.R. 684) Estey J. said:

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While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized *prior to the date of the application (vide Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C., 28 D.L.R. (2d) 125, *per* Locke J. at pp. 401, 402).

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

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

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

31 The board's rate making powers are prospective; nothing permits retrospective operation of rates *prior to the date of the application*. In the last sentence of the quotation which Estey J. took from the board's description of its rate-fixing process, it is recognized that an interim rate already charged and paid may be varied by a final order. He does not dissent from that proposition but the point was not before the court in that case. In my view it is not authority for either view. In the present case, no party seeks to charge rates before the date of the application; indeed none of Coseka's gas was processed prior to that date. One purpose of the application was to require Saratoga to process the gas.

32 The decision of this court in *Alta. Gas Trunk Line Co. Ltd. v. Amoco Can. Petroleum Co. Ltd.*, supra, turned for the most part on the specific terms of the statute involved, the Alberta Gas Trunk Line Company Act, 1954 (Alta.) c. 37. While casting no doubt on the general proposition that the board may not make retroactive orders, Clement J.A., for the majority of the court, held that nothing in that Act prevented the 12-month period for which rates were to be fixed from being applied either retrospectively or prospectively. Clement J.A. referred to the interim order and its effect but did so in the context of the 12-month period specially provided by the applicable statute. Prowse J.A., concurring in the result, held that s. 52 of the Public Utilities Board Act applied. He therefore had to consider whether an interim order made under s. 52 is subject to adjustment by the final order. He concluded that it is. He said (p. 46):

> ... it is open to the board in its final order to fix rates that apply to the period covered by both orders and to direct the necessary adjustment to give effect thereto.

33 I respectfully agree with that statement. It is not necessary to consider in this case the validity of his characterization of the variation of an interim order as "an administrative matter". I would leave that point for the case in which it arises. In my view, s. 52(2), empowering the board to "make an interim order and *reserve further direction*, either for an adjourned hearing of the matter or for further application" (the italics are mine), contemplates the very situation which arose in this case. It was virtually impossible to fix just and reasonable rates for the processing of Coseka's gas and even an approximation of them would have been speculative. So, instead of making a final order, the

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board made an interim order and reserved the matter for a "further direction" which it has now made.

34 In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the board from s. 52 beyond those already contained in either the Gas Utilities Act or the Public Utilities Board Act to make final orders. The board is, by other provisions of the statute, empowered by order to fix rates either on application or on its own motion. An interim order would be the same, and have the same effect, as a final order unless the "further direction" which the statute contemplates includes the power to change the interim order. On that construction of the section the "interim" order would be a "final" order in all but name. The board would need no further legislative authority to issue a further "final" order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to correction to be made when the hearing is subsequently completed.

35 It was urged during argument that s. 52(2) was merely intended to enable the board to achieve "rough justice" during the period of its operation until a final order is issued. However, the board is required to fix "just and reasonable rates" not "roughly just and reasonable rates". The words "reserve further direction", in my view, contemplate changes as soon as the board is able to determine those just and reasonable rates.

36 It was also urged on behalf of Coseko that great injustice will result if interim rates once paid may subsequently be varied. There is no doubt that the board must take careful account of this factor in its determination of what is just and reasonable and the problem becomes the more serious the longer is the delay. Some purchasers of the utility service for whom it is a cost of doing business may be unable to incorporate a changed rate in the price of the goods or services they themselves sell. Other purchasers who made economic decisions on the premise that the utility service had a given cost, may find those decisions invalidated. Nevertheless, all consumers of a utility service must be aware that the rates in an interim order are subject to change and determine their course of action upon the basis of that knowledge. The time involved will usually be relatively short and the board will do its best to minimize the impact of the change. In this case, through no fault of the board, a very long time elapsed before the interim order could be finalized. When the parties to a hearing realize that the rates set in an interim order are subject to variation, they will perceive that there is no advantage to be gained by delay.

37 I am constrained to observe that protestations by Coseka of injustice arising from long delay have a hollow ring in this case. Coseka refused to come before the board or to assist it on Husky's appeal from the A.P.M.C. decision when the board sought to determine the position of Saratoga's costs attributed to Savanna Creek gas. It sought by legal action to prevent the board from acting on the first order in council to finalize the interim order. It gave every appearance of being reluctant to find itself before the board. An officer of the company was frank to explain the reason for this attitude in answer to questions from a board member who pointed out that Coseka had refused to assist the board and had withdrawn from the hearings. The following then appears in the transcript of the hearing:

> Q. "I see, and that's what concerns me. I'm sure you're a very astute businessman, Mr. Kutney, and since you were being so badly treated, you knew this board may be of some assistance, you knew you were a party to these proceedings, yet you didn't wish to give it. What happened to your practical considerations then?"
>
> A. "I guess there was some more that entered into that judgment, possibly the business consideration, *the longer we stayed away from this board, maybe the longer the favourable rate would stay in effect.*" (The italics are mine.)

38 In my view the board was empowered by the provisions of s. 52 of the Public Utilities Board Act to replace the rates in the interim order with different rates with effect from any time back to the date of the interim order.

39 Having rejected Coseka's contention that the order cannot affect rates charged prior to the date it was issued, I turn now to a consideration of the appropriate effective date. That determination is, of course, a function of the board under the terms of the statute. This court may interfere only if the determination was made upon wrong principles. In *Trans Mountain Pipe Line Co. Ltd. v. Nat. Energy Bd.*, [1979] 2 F.C. 118, Pratte J., speaking for the Federal Court of

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Appeal, said at p. 121:

> What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.

40 In my view this language is equally applicable to a review of the decisions of the Public Utilities Board by this court. I must therefore consider whether the board reached its conclusion acting on wrong principles.

41 Having observed that the rates charged Coseka ceased to be just and reasonable "at or shortly after" their imposition, the board characterized as "logical" the Petrogas submission that the effective date should be at the commencement of the interim order. It then declined to reach that conclusion on the ground that if Coseka made the payment, Saratoga would have an unearned windfall and on the further ground that the board has no authority to order payment "to Petrogas or Husky or through Saratoga".

42 At this stage in a complex unfolding story it is desirable to analyze the result of the various hearings, and the course open under the statutes to the board and to the parties. With the board's order effective 1st September 1977 Saratoga, the utility being regulated, has received its full cost of service. In the period prior to 1st September 1977 a large portion of this money came indirectly from Petrogas. Coseka paid less than the proper amount since the rates charged to it were not just and reasonable. Nothing before this court establishes whether the sums charged Husky before 1st September 1977 were proper or not. It must also be realized that sums paid by Petrogas are the result of orders, not by the P.U.B., but by the A.P.M.C. made at a time when no appeal procedures had been established. The board has no jurisdiction at all to overrule those orders.

43 The further complication is that there is no proceeding before the board in which it can fix by order binding on Husky, the just and reasonable rates for Husky for the period prior to 1st September 1977. There is no interim order in existence affecting Husky to which a final order can relate. Any application made now by one of the parties or any proceeding commenced by the board on its own motion will produce rates applicable only to the period after the date of the application or proceeding. The board could not correct past deficiencies or overpayments by means of rate adjustments: *Re Calgary and Home Oil Company Ltd.*, supra.

44 In my view, what the board has done is to decline its jurisdiction to fix just and reasonable rates for Coseka for the period from 2nd May 1975 until 1st September 1977. It has done so not because the utility would not receive its proper cost of service from those rates, but because from another source completely outside the board's jurisdiction the utility has received other moneys. That, in my view, is not a proper ground on which the board may decline to exercise its jurisdiction. Either voluntarily or after legal action the utility may repay that money. That is not before the board or before this court. The board must, in any event, accept its jurisdiction to consider and to rule on the just and reasonable rates which each customer of the utility which it regulates must pay for the service received. I would quash the portion of the board order dealing with its effective date and refer the matter back to the board for determination in accordance with these reasons. Costs may be spoken to.

Order quashed in part.

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ATCO Gas, Re

City of Calgary (Appellant / Applicant) and Alberta Energy and Utilities Board (Respondent / Respondent) and ATCO Gas and Pipelines Ltd. (Respondent / Respondent)

Alberta Court of Appeal

Constance Hunt J.A., Jean Côté J.A., and Marina Paperny J.A.

Heard: January 13, 2010
Judgment: April 23, 2010
Docket: Calgary Appeal 0801-0030-AC

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Proceedings: Reversed, 2005 CarswellAlta 2255, [2007] A.W.L.D. 2449 (Alta. E.U.B.); Reversed, [2009] A.W.L.D. 2640, 2008 CarswellAlta 2238 (Alta. E.U.B.)

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Subject: Public; Civil Practice and Procedure

Public law.

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ATCO Gas South, Re (2008), (sub nom. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*) 392 N.R. 392 (note), 2008 CarswellAlta 1891, 2008 CarswellAlta 1892, [2008] 3 S.C.R. vi (note) (S.C.C.) — referred to

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

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (2009), (sub nom. *Consumers Association of Canada v. Canadian Radio-Television and Telecommunications Commission*) 392 N.R. 323, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.) — considered

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

Edmonton (City) v. Northwestern Utilities Ltd. (1961), 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125, [1961] S.C.R. 392, 1961 CarswellAlta 25 (S.C.C.) — considered

Epcor Generation Inc. v. Alberta (Energy & Utilities Board) (2003), 346 A.R. 281, 320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.) — considered

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

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

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

Northwestern Utilities Ltd., Re (March 18, 1988), Doc. E88018 (Alta. E.U.B.) — referred to

Northwestern Utilities Ltd., Re (1997), 1997 CarswellAlta 1334 (Alta. E.U.B.) — referred to

Cases considered by *Jean Côté J.A.*:

Alberta Power Ltd. v. Alberta (Public Utilities Board) (1990), 1990 CarswellAlta 15, 72 Alta. L.R. (2d) 129, 43 Admin. L.R. 238, 66 D.L.R. (4th) 286, 102 A.R. 353 (Alta. C.A.) — considered

ATCO Gas, Re (2007), (sub nom. *Calgary (City) v. Energy & Utilities Board (Alta.)*) 394 W.A.C. 317, (sub nom. *Cal-*

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gary (City) v. Energy & Utilities Board (Alta.)) 404 A.R. 317, 2007 CarswellAlta 487, 2007 ABCA 133 (Alta. C.A.) — referred to

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

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

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

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (2008), 80 Admin. L.R. (4th) 159, 2008 CarswellNat 544, (sub nom. *Consumers Association of Canada v. Canadian Radio-Television & Telecommunications Commission)* 375 N.R. 124, 2008 FCA 91, 2008 CarswellNat 2390, 2008 CAF 91 (F.C.A.) — considered

Bell Canada v. Canadian Radio-Television & Telecommunications Commission (2009), (sub nom. *Consumers Association of Canada v. Canadian Radio-Television and Telecommunications Commission)* 392 N.R. 323, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, 310 D.L.R. (4th) 608, 92 Admin. L.R. (4th) 157 (S.C.C.) — distinguished

Calgary (City) v. ATCO Gas & Pipelines Ltd. (2006), 2006 ABCA 180, 2006 CarswellAlta 868 (Alta. C.A. [In Chambers]) — referred to

Calgary (City) v. Home Oil Co. (1959), 28 W.W.R. 353, 80 C.R.T.C. 85, (sub nom. *Calgary (City) v. Madison Natural Gas Co.)* 19 D.L.R. (2d) 655, 1959 CarswellAlta 32 (Alta. C.A.) — considered

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

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

Edmonton (City) v. Northwestern Utilities Ltd. (1960), 25 D.L.R. (2d) 262, 34 W.W.R. 241, 1960 CarswellAlta 77 (Alta. C.A.) — considered

Edmonton (City) v. Northwestern Utilities Ltd. (1961), 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125, [1961] S.C.R. 392, 1961 CarswellAlta 25 (S.C.C.) — considered

Epcor Generation Inc. v. Alberta (Energy & Utilities Board) (2003), 346 A.R. 281, 320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.) — distinguished

Germain v. Saskatchewan (Automobile Injury Appeal Commission) (2009), 2009 CarswellSask 176, 2009 SKQB 106, [2009] 7 W.W.R. 509, (sub nom. *Germain v. Automobile Injury Appeal Commission)* 333 Sask. R. 116, 71 C.C.L.I. (4th) 185, 82 M.V.R. (5th) 234 (Sask. Q.B.) — considered

Kin Franchising Ltd. v. Donco Ltd. (1993), 7 Alta. L.R. (3d) 313, 14 C.P.C. (3d) 193, 1993 CarswellAlta 264 (Alta. C.A.) — considered

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Newfoundland (Board of Commissioners of Public Utilities), Re (1998), 1998 CarswellNfld 150, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 164 Nfld. & P.E.I.R. 60, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 507 A.P.R. 60 (Nfld. C.A.) — distinguished

Northwestern Utilities Ltd., Re (1976), 1976 CarswellAlta 201, 2 A.R. 317 (Alta. C.A.) — considered

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

Statutes considered by *Constance Hunt J.A.*:

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

Generally — referred to

s. 15(1) — considered

s. 15(3)(a) — considered

s. 15(3)(d) — considered

s. 15(3)(e) — considered

s. 26(1) — considered

Gas Utilities Act, S.A. 1960, c. 37

Generally — referred to

s. 27 — considered

s. 27(a) — considered

s. 28 — considered

s. 28(1) — considered

s. 31 — considered

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

Generally — referred to

s. 36 — considered

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s. 36(a) — considered

s. 36(e) — considered

s. 37(1) — considered

s. 38(1) — considered

s. 38(2) — considered

s. 40 — considered

s. 40(a)(i) — considered

s. 40(a)(ii) — considered

s. 40(a)(iii) — considered

s. 40(c) — considered

s. 40(d) — considered

Public Utilities Act, R.S.A. 1955, c. 267

s. 67(a) — considered

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

Geneally — referred to

s. 36(1)(a) — referred to

s. 36(2) — referred to

s. 67(1) — considered

s. 67(2) — considered

s. 67(8) — considered

s. 89(a) — referred to

Statutes considered by *Jean Côté J.A.*:

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

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Generally — referred to

Alberta Utilities Commission Act, S.A. 2007, c. A-37.2

s. 11 — referred to

s. 29(1) — considered

s. 29(10) — considered

Gas Utilities Act, S.A. 1960, c. 37

Generally — referred to

s. 31 — considered

Gas Utilities Act, R.S.A. 1970, c. 158

s. 31 — referred to

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

s. 32 — referred to

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

Generally — referred to

s. 40 — referred to

s. 40(a)(i) — considered

s. 40(a)(ii) — considered

s. 40(b) — considered

s. 40(c) — considered

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

Generally — referred to

s. 67(8) — considered

Railway Act, R.S.C. 1985, c. R-3

Generally — referred to

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Telecommunications Act, S.C. 1993, c. 38

Generally — referred to

s. 7(a) — considered

s. 7(c) — considered

s. 7(d) — considered

s. 7(e) — considered

s. 7(f) — considered

s. 7(g) — considered

s. 7(h) — considered

s. 7(i) — considered

s. 35(1) — referred to

s. 42(1) — referred to

s. 46.5(1) [en. 1998, c. 8, s. 6] — considered

s. 47(a) — considered

Rules considered by *Jean Côté J.A.*:

Alberta Rules of Court, Alta. Reg. 390/68

R. 537.1 [en. Alta. Reg. 97/2008] — considered

***Constance Hunt J.A.*:**

1 I agree with Côté J.A. that the orders under appeal should be vacated, but reach that conclusion for different reasons. I would allow the appeal and return the matter to the Alberta Utilities Commission ("Board[FN1]") for reconsideration in accordance with this judgment.

Facts

History of Deferred Gas Accounts (DGA)

2 The modern origin of deferred gas accounts (formerly deferred gas accounting) ("DGA") is a 1988 decision which arose out of a utility's general rate application: *Northwestern Utilities Ltd., Re* [(March 18, 1988), Doc. E88018 (Alta.

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E.U.B.)], In the matter of an application to determine rate base and fix a fair return thereon for the test years 1987 and 1988, Decision E88018, (Public Utilities Board). The use of a DGA was proposed to deal with seasonal price differences in gas costs. It required segregating the sales rate into two components, gas and non-gas. The latter would be determined in a general rate application while the former, the Gas Cost Recovery Rate ("GCRR"), would be determined twice a year using a formal filing process, subject to Board monitoring or review by way of a hearing. Adjustments to actual and estimated costs of gas would be held in the DGA then reconciled for refund to or recovery from consumers.

3 In approving these procedures, the Board emphasized that the outcome would be "customers pay for no more or less than the price of gas actually incurred ... the shareholders would not gain or be penalized as a result of price variations ...": p. 325. The use of a DGA would be beneficial to customers: p. 326. The Board described the GCRR's gas cost component as "interim": p. 327. This early decision demonstrates that the Board intended to scrutinize the use of the DGA on an ongoing basis.

4 The principles from this decision were applied the same year to Canadian Western Natural Gas Company Limited, the respondent ATCO's predecessor: *Re Canadian Western Natural Gas Company Limited*, In the matter of an Application by Canadian Western Natural Gas Company Limited for approval of Deferred Gas Accounting and Reconciliation procedures respecting its gas supply costs, Order E88019, (Public Utilities Board, 1988). The DGAs at issue here were then created.

5 In 2001 ATCO and the appellant City of Calgary (Calgary) were both parties to a hearing that considered, *inter alia*, the methodology for determining the GCRR: Methodology for Managing Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate Unbundling (Unbundling) Proceeding, Part A: GCRR Methodology and Gas Rate Unbundling. Decision 2001-75 (Alberta Energy and Utilities Board, 2001). Its context was the transition to competitive retail gas service. The Board noted its general supervisory power over utilities and its power to fix just and reasonable rates as the basis of its authority to deal with the issues in the hearing: p. 10.

6 The Board described "GCRR/DGA Programs" as follows at p. 56:

> The effect of a Gas Cost Recovery Rate/Deferred Gas Account (GCRR/DGA) mechanism is to spread the cost of gas acquisition and management over a forecast period, keeping consumer gas prices stable during that period. The use of a DGA to keep track of differences between actual and forecast gas costs ensures that customers pay no more and no less than actual costs incurred on their behalf. However, the reconciliation between forecast and actual costs occurs over one or more seasons. [footnote omitted] During periods of rapid gas price increase, as experienced in the winter of 2000/2001, the accumulated balances in the DGA can become large. The current system of GCRRs/DGAs has defined tolerance limits on the size of the DGAs, requiring the utilities to file for gas rate adjustments when the variance between forecast and actual costs becomes too large.
>
> [emphasis added]

7 The Board determined that utilities no longer needed to "file formal GCRR applications with the Board, but would instead file ... on a monthly basis", and monthly adjustments would be made to the GCRR: p. 64. Interested parties would have an opportunity to raise concerns about the monthly GCRRs filed by the utilities. Reconciliation of DGA balances would be done on a three-month rolling basis. The Board set a date for the commencement of this system, "in conjunction with the revised interim rates noted elsewhere in this Decision": p. 64.

8 Since then, the use of DGAs has evolved. For example, in ATCO Gas South Jumping Pound Meter Station - Gas Measurement Adjustment Application No. 1314487, Decision 2004-013, the Board approved adjustments to an ATCO DGA balance to reflect measurement errors caused by equipment malfunction. Part of the Board's rationale was that the adjustment was made in accordance with approved DGA procedures. A related adjustment to the DGA (timing costs) was rejected by the Board because it was not a previously approved DGA adjustment.

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9 In other DGA decisions, the Board considered factors such as the amount of the adjustment, the timeliness of the application, whether the utility had acted responsibly, the foreseeability of the problem, and whether consumers who received the service were bearing the cost of the adjustment, see e.g., Northwestern Utilities Limited, 1996/1997 Winter Period Gas Cost Recovery Rate, [*Northwestern Utilities Ltd., Re*, 1997 CarswellAlta 1334 (Alta. E.U.B.)] Decision U97053 97053; IN THE MATTER of a Gas Cost Recovery Rate Refund for the 2001 Summer Period for AltaGas Utilities Inc. Order U2001-316 [*AltaGas Utilities Inc.* (November 29, 2001), Doc. U2001-316 (Alta. E.U.B.)].

Origin of this Dispute

10 In May 2004, ATCO sought Board approval to correct balances in the DGAs for each of its south and north gas distribution service territories. The proposed adjustment to the DGA for northern Alberta was largely attributable to *overstated* gas costs from January 1998 to February 2004, whereas in southern Alberta the actual gas costs ATCO incurred from January 1999 to February 2004 were *understated.* ATCO proposed that its present southern Alberta consumers would pay the shortfalls and that it would refund excesses to its present northern Alberta consumers. Since this appeal concerns only the adjustment proposed to the southern DGA, I make no further reference to the northern DGA.

11 The adjustments were sought because there had been inaccurate reporting of gas being transported for other entities through ATCO's pipeline network ("transportation imbalances"). It appears the errors began when the administration of ATCO's gas transportation system was moved to a new system, the transportation information system ("System").

12 ATCO had included the transportation imbalances as prior period adjustments in the DGA as part of its December 2003 GCRR filings. While producing supplementary information requested by the Board, ATCO detected additional transportation imbalances. It then refiled its December 2003 GCRR *excluding* the transportation imbalance adjustments. ATCO engaged chartered accountants to review its re-calculation of the imbalances. The Board's treatment of ATCO's subsequent application to record the revised transportation imbalances in the DGA is at the root of this appeal.

Board Decisions

13 Three Board decisions are relevant. Each is described in more detail beginning at para. 16.

14 The first decision partly allowed ATCO's application to use the DGA/GCRR reconciliation process to record the transportation imbalances: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Imbalance and Production Adjustments - Deferred Gas Account Application No. 1347852, Decision 2005-036, ("DGA Decision"). In the second, the Board established a general rule that the DGA/GCRR reconciliation process has a two-year limitation period: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Deferred Gas Account Limitation Period, Decision 2006-042 ("Limitations Decision"). The third focused on the Board's jurisdiction to make the DGA and the Limitations Decisions: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Reconsideration of Decision 2005-036 Deferred Gas Account, Imbalance and Production Adjustments, Application No. 1524763 Proceeding ID. 5, Decision 2008-001 ("DGA Reconsideration Decision).

15 As to the DGA and DGA Reconsideration Decisions, Calgary obtained leave to appeal on the following question: "Whether the Board erred in law or in jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 199[9][FN2] and 2004.": *ATCO Gas, Re*, 2009 ABCA 150 (Alta. C.A.) at para. 9, (Alta. C.A.). ATCO has discontinued its application for leave to appeal the Limitations Decision.

DGA Decision (Decision 2005-036)

16 The Board defined the central issue as "whether or not it is appropriate for the DGA to be a vehicle of all and any updates and corrections other than for price and actual gas sales (or deliveries)": p. 10.

17 In reviewing the history of the DGA/GCRR process, the Board noted that the DGA/GCRR process was originally

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approved to provide a method for adjusting for gas price volatility and that, by April 2002, the process was refined so that monthly (not seasonal) reconciliations were made: p. 10. Over time, DGAs were used without complaint to adjust gas rates for reasons unrelated to price volatility, including measurement corrections. While it had become a "relatively common occurrence" for DGAs to be used for making prior period adjustments, most were made "within a reasonable time period": *Id.*

18 The Board was troubled by the evolution of DGAs into a 'catch all' method for fixing all possible gas cost errors and by the timing of the adjustments. It criticized ATCO for the design errors in the System report and its delay in detecting them, reinforcing its expectation that ATCO's internal controls should detect material errors in a timely way.

19 Notwithstanding these misgivings, the Board permitted ATCO to recover eighty-five percent of the amounts it sought through adjustments to its DGA.

Limitations Decision (Decision 2006-042)

20 The Board's concerns about ATCO's delay in applying for the imbalance adjustments led to a hearing to examine whether it ought to impose a general policy limiting the extent to which adjustments are made to DGAs.

21 In the resulting Limitations Decision, the Board considered its jurisdiction to establish limitation periods for the DGA/GCRR process in the context of its statutory mandate to set just and reasonable rates and court decisions approving their use. It concluded that setting the GCRR requires the use of DGAs. Moreover:

> the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter [citation omitted]. In *EPCOR Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.
>
> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.
>
> p. 4 (emphasis added).

22 The Board adopted a general limitation period of two years prior to the effective date of the proposed GCRR for refunds to and recoveries from consumers. It permitted applications for approval of an adjustment to the DGA, where the cause of the adjustment originates outside the two-year limitation period, provided the following conditions are met:

> (a) the adjustment sought exceeds the threshold value by being greater than 5% of the average monthly DGA gas commodity costs of the previous 12 months; and
>
> (b) the adjustment arose from special circumstances that were not within the utility's control.

p. 17

23 As regards possible 'inter-generational equity' issues (a concept discussed more fully at para. 48 that means utility consumers should pay the costs associated with *their* consumption of the service, and future consumers should not benefit from or be burdened by the cost of services consumed by past consumers), the Board said at p. 12:

> While intergenerational equity questions ... arise ... particularly in relation to deferral accounts, the Board believes in this

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> case that the imposition of a limitation period for DGAs assists in addressing the intergenerational issue raised ... because it limits the adjustments in the ordinary course. [ATCO] is correct in pointing out that deferred accounts have an inherent intergenerational aspect; however, the Board considers that it is important to not allow too long a period before dealing with adjustments.
>
> [emphasis added]

DGA Reconsideration Decision (Decision 2008-001)

24 Calgary was granted leave to appeal the DGA Decision on the question of whether the Board was authorized under its governing legislation to approve any of the adjustments to the Deferred Gas Account applied for by ATCO Gas. Following a hearing, this Court concluded that since the issue of the Board's jurisdiction to grant ATCO's May 2004 application had not been raised before the Board, the evidentiary record necessary for an appeal was lacking: *ATCO Gas, Re*, 2007 ABCA 133, 404 A.R. 317 (Alta. C.A.). The Court returned the matter to the Board, which then considered whether it was "authorized under its governing legislation to approve adjustments to the ATCO Gas DGA in 2005 for costs and expenses incurred between 199[9] and 2004": p. 2.

25 Calgary argued that the Board's jurisdiction was limited by section 40 of the *Gas Utilities Act* (see para. 27) such that "the Board's jurisdiction to consider prior period financial activity of a utility is limited to a 12-month period, even when the financial activity occurs in a deferral account approved by the Board": p. 7. The Board disagreed, partly because of its interpretation of its broad statutory mandate to fix just and reasonable rates. The Board reasoned that DGAs would serve no purpose under Calgary's interpretation because section 40 specifically authorizes the Board to take into account excess revenues or losses in "the whole of the fiscal year" of the rate application (ss. 40(a)(i)) and in any consecutive two-year period thereto (ss. 40(a)(iii)).

26 The Board reiterated its Limitations Decision's conclusion on jurisdiction, found above at para. 21.

Legislation

27 When ATCO applied for this DGA adjustment in 2004, the relevant legislation provided (with emphasis):

> **Alberta Energy and Utilities Board Act, R.S.A. 2000. c. A-17**
>
> ***Powers of the Board***
>
> 15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ... PUB that are granted or provided for by any enactment or by law.
>
> . . . . .
>
> (3) Without restricting subsection (1), the Board may do all or any of the following:
>
> (a) make any order that the ... PUB may make under any enactment;
>
> . . . . .
>
> (d) with respect to an order made by the Board ... in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

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

. . . . .

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

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

The word "Board" is defined as the Public Utilities Board in section 1(b).

Powers of Board

36 The Board ... may ...

(a) fix just and reasonable ... rates, ...

. . . . .

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

Rate base

37(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base. ...

Schedule of rates

38(1) For the purpose of fixing the just and reasonable rates that may be charged to consumers of gas by an owner of a gas utility who purchases gas pursuant to a contract under which provision is made

(a) for the progressive increase in the price of gas to the owner of the gas utility,

(b) for an increase in the price of gas to the owner of the gas utility by reason of changes in any prices received by the owner on resale of the gas,

(c) for an increase in the price of gas to the owner of the gas utility by reason of the payment of higher prices by any purchaser of gas in any gas producing area, or

(d) for the redetermination of the price of gas to the owner of the gas utility either by agreement of the parties or pursuant to arbitration,

the Board ... may receive for filing a new schedule of rates that are alleged by the owner to be occasioned by the rise in the price required to be paid by the owner for purchased gas.

(2) The new schedule may be put into effect by the owner of the gas utility on receiving the approval of the Board to it ....

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. . . . .

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges ...,

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

(i) the whole of the fiscal year of the owner in which a proceeding is initiated ...,

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

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive, and need not consider the allocation of those revenues and costs to any part of that period,

. . . . .

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

(d) the Board shall by order approve

(i) the method by which, and

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

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

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

Jurisdiction and powers

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

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

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

. . . . .

Fixing of rates

89 The Board ... may ...

(a) fix just and reasonable ... rates ...

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Chronology of Legislation

28 Some of the following discussion refers to judicial interpretations of predecessor legislation. An understanding of those decisions requires an appreciation of the interaction between the earlier and current legislation.

29 Subsection 67(a) of the *Public Utilities* Act, R.S.A. 1955, c. 267 provided:

> 67. The Board ... may ...,
>
> (a) fix just and reasonable individual rates ....

30 Section 67 of the *Public Utilities Act* was amended in April 1959 by S.A. 1959, c. 73, s. 9 as follows:

> (a) by renumbering the present section as subsection (1), ... [in other words, s. 67(a) became s. 67(1)]
>
> (d) by adding immediately after the renumbered subsection (1) the following subsections:
>
> . . . . .
>
> (2) In fixing just and reasonable rates, ... the Board shall determine a rate base for the property of the proprietor ... and fix a fair return thereon.
>
> . . . . .
>
> (8) ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

31 In 1960, the *Gas Utilities Act*, S.A. 1960, c. 37 was enacted and provided:

> **Powers of the Board**
>
> 27. The Board ... may ...
>
> (a) fix just and reasonable individual rates ...
>
> **Rate base**
>
> 28.(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner that is used or required to be used in his services to the public within Alberta and fix a fair return thereon.
>
> **Excess revenue or losses**
>
> 31. ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of an application.

32 To summarize, the predecessor of present section 36 of the *Gas Utilities Act* (the power to set just and reasonable rates) is section 27 of the S.A. 1960 version of the *Gas Utilities Act*. The latter's predecessor is subsection 67(a) of the *Public Utilities Act* (later subsection 67(1)). The present section 37 of the *Gas Utilities Act* (fixing just and reasonable rates by de-

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termining rate base and fixing a fair return thereon) was section 28 in the S.A. 1960 version and it, in turn, was based on section 67(2) of the 1959 amendments to the *Public Utilities Act*. The predecessor to the present section 40 of the *Gas Utilities Act* is section 31 of S.A. 1960, which took its wording from ss. 67(8) of the 1959 amendments to the *Public Utilities Act*.

Discussion

33 Calgary sees the central issue as the extent to which the Board can engage in retroactive ratemaking. ATCO says the appeal concerns an exercise of discretion by the Board. In my view, the appeal raises the following issues:

(1) What is the source of the Board's jurisdiction over DGAs?

(2) Did the Board retroactively change rates or did its decision have a prohibited effect?

(3) What standard applies to this Court's review of the Board's decisions?

(4) Against that standard, do the Board's decisions to allow ATCO to use the DGA to record transportation imbalances for 1999 to February 2004 warrant this Court's intervention? The first two are threshold issues; if the decision under appeal falls because of the answer to either of them, the subsequent issues do not arise.

Issue 1. What Is the Source of the Board's Jurisdiction Over DGAs?

34 Calgary acknowledges "the Board has jurisdiction to set up a DGA or what classes of costs or recoveries are to be included or how they are to be allocated.": Factum at para. 43. This Court implicitly approved the use of deferral accounts in regulated utility rate setting: *ATCO Electric Ltd. v. Alberta (Energy & Utilities Board)*, 2004 ABCA 215 (Alta. C.A.) at para. 26, (2004), 361 A.R. 1 (Alta. C.A.) ("*ATCO Electric*").

35 That said, it is critical to identify the source of the Board's jurisdiction over deferral accounts. If it is section 40 of the *Gas Utilities Act*, time limits apply. If, as ATCO argues, it is sections 36 and 37, that legal impediment disappears.

A. Nature and Function of Deferral Accounts in Utility Regulation

36 A consideration of the nature and function of deferral accounts provides context: Deferral accounts allow a utility to accumulate variances between a utility's approved rate based on forecasted costs and the utility's actual costs for a given period. Typically, at the end of the period, a utility will then collect from customers through a rate rider any balances in the deferral accounts owing by them and refund any balances owing to them.

ATCO Electric at para. 26.

In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000

. . . . .

Epcor Generation Inc. v. Alberta (Energy & Utilities Board), 2003 ABCA 374 (Alta. C.A.)) at para. 2, (2003), 346 A.R. 281 (Alta. C.A.) ("*Epcor*").

[D]eferral accounts ... are accepted regulatory tools, available as a part of ... rate-setting powers ... [they] ...'enabl[e] a regula-

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tor to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year' [citation omitted]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.

Bell Canada v. Canadian Radio-Television & Telecommunications Commission, 2009 SCC 40, [2009] 2 S.C.R. 764 (S.C.C.)at para. 54 ("*Bell Aliant*").

37 To summarize to this point, descriptions of the general purpose of deferral accounts and the history of this DGA shows that DGAs in gas utility regulation exist to ensure that consumers pay the cost of the gas they consume, with no resulting profit or loss to the utility's shareholders. This general objective has been fully supported by the courts: *ATCO Electric, Epcor, Bell Aliant, City of Edmonton, infra.*

B. Source of the Board's Authority

38 What, then, is the source of the Board's jurisdiction to permit the use of DGAs as a regulatory tool? As outlined above at para. 3, the DGA at issue was approved in 1988. Nevertheless, before 1988 the Board employed tools with a similar function to regulate gas utilities. Judicial views about the source of the Board's authority to use those tools are instructive.

39 In the late 1950s the Board proposed a "purchased gas adjustment clause". It would permit the utility to recoup from consumers in the future amounts the utility had to pay for gas that proved more expensive than the utility's estimates, and to refund amounts to consumers if the estimates proved to be greater than the actual cost: *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.), at 396-397, (1961), 28 D.L.R. (2d) 125 (S.C.C.) ("*City of Edmonton*"). The Board's jurisdiction to approve such a device was upheld by the Supreme Court, which said that its purpose was to:

> ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in [s. 67(2)] and to comply with the Board's duty ... to permit this to be done. How this should be accomplished...was an administrative matter for the Board to determine ... under the powers ... to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

Id at 406-407 with emphasis added.
The counterparts to the section referred to in this passage are the present sections 36(a) and 37 of the *Gas Utilities Act*.

40 In *Bell Aliant*, the telecommunication regulator, the Canadian Radio Television and Telecommunications Commission's ("CRTC") source of authority to establish deferral accounts was held to be the combined effect of sections 27 and 37(1) of the *Telecommunications Act*, S.C. 1993, c. 38: para. 37. Section 27(1) concerns setting just and reasonable rates, while section 37(1) permits the CRTC to require carriers to adopt any method of identifying the costs of providing services and to adopt any accounting method. The Court added that the "guiding rule of rate-setting under the *Telecommunications Act* is that the rates be 'just and reasonable', a longstanding regulatory principle.": para. 30. The authority to establish the accounts "necessarily includes the disposition of the funds they contain.": *Ibid.*

41 These cases suggest that the Board's authority over DGAs flows from its power to set just and reasonable rates and a fair rate of return on rate base found in sections 36 and 37 of the *Gas Utilities Act*. Underlying that mandate is the "regulatory compact":

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.

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ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140("*Stores Block*") at para. 63.

42 I agree with ATCO that the Board's authority over DGAs does *not* come from section 40. Although that provision uses broad language, its function is limited. It permits, among other things, consideration of utility's revenues and costs for the whole fiscal year in which an application for rates is made. It also authorizes adjustments for regulatory lag, that is, the difference between rates the utility seeks when its general rate application is made, and those appropriate when the rates are approved. But it does not limit the Board's general authority to employ other tools (such as the gas purchase adjustment clause and DGAs) that assist in the discharge of its obligation to set just and reasonable rates.

43 It is worth repeating that this principle flows from *City of Edmonton*, where the Supreme Court considered the newly enacted section 67(8) of the *Public Utilities Act* (section 40's predecessor) in conjunction with the recovery of 1959 transitional losses which arose as a result of the 15-month delay between the utility's rate application (June 1958) and the rate approval (September 1959). As to the second issue before the Court, the Board's jurisdiction to permit the establishment of the gas purchase adjustment clause (the DGA's predecessor), the Court referred to "s. 67(2) of the 1959 amendment" (which the Court of Appeal found did *not* grant the Board the necessary jurisdiction to permit the gas purchase adjustment clause) and held at 407 (emphasis added):

> With great respect, however, the proposed order [establishing the gas purchase adjustment clause] would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.
>
> ... the Board ... propose[s] to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

44 Calgary argues against reliance on sections 36 and 37 as the source of the Board's authority because of the Supreme Court's admonition against employing general statutory authority to ground the exercise of overly-broad Board powers, see e.g., *Stores Block* at para. 50. Elsewhere in the same decision, however, the Court emphasized the need to determine whether the exercise of the proposed power is a "practical necessity for the regulatory body to accomplish the object prescribed by legislation": para. 77. According to the majority, such necessity was lacking in *Stores Block*. Here, for reasons outlined above at paras. 36-37, the use of DGAs is required if the Board is to regulate utilities effectively. Moreover, in *Bell Aliant*, Abella J. explained at paras. 51 - 53 that *Stores Block* did not "preclude the pursuit of public interest objectives through rate-setting". She contrasted *Stores Block* by pointing out that in *Bell Aliant*, the CRTC's rate-setting authority and its ability to establish deferral accounts for that purpose were at the very core of its competence. The same holds true in this case.

Issue 2. Did the Board retroactively change rates or did its decision have a prohibited effect?

45 Calgary argues that by permitting ATCO to use the DGA to make adjustments going back several years the Board engaged in prohibited ratemaking because, in the result, ATCO's present consumers must make up for a past shortfall. I do not agree. I have already explained why I think its power to set just and reasonable rates allowed it to authorize the use of DGAs. It follows that its further orders about *how* to use a DGA did not constitute prohibited ratemaking. As discussed at paras. 69-71, however, this does *not* mean that the effect of its decision on future ratepayers is irrelevant in determining whether the Board reasonably exercised its powers over the DGA.

46 A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 31 A.R. 541 (Alta. C.A.) at para. 29, (1980), 16 Alta. L.R. (2d) 60 (Alta. C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies:

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Northwestern Utilities Ltd., Re (1978), [1979] 1 S.C.R. 684 (S.C.C.), at 691 and 699 ("*Northwestern Utilities*").

47 Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*), [1989] 1 S.C.R. 1722 (S.C.C.), at 1749 ("*Bell Canada 1989*"). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.

48 Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same). "[T]oday's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers": Yvonne Penning, *"The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled"* (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).

49 Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive: *City of Edmonton* at 402.

50 In this case, the proposed accounting adjustments had retrospective effect: past costs would be borne by ATCO's present southern Alberta consumers, not the 1999 - 2004 consumers who received gas utility services when ATCO's gas costs were incurred.

51 In summary, whether termed retrospective or retroactive ratemaking, imposing gas cost shortfalls or surpluses incurred by past consumers on future consumers is generally prohibited. Although this prohibition against retroactive and retrospective ratemaking is relatively clear, how to apply it in practice is less so. A review of key cases illustrates the complexity.

52 A one-time credit order for consumers was upheld despite the fact that it was "retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive": *Bell Canada 1989* at 1749. Although the Board's review was retrospective in manner, the credit order was approved through an adjustment to interim rates. The Supreme Court stressed that the regulator had consistently stated its intention to review the interim rates: at 1755. Gonthier J. stated at 1752:

> ... one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order... the words "further directions" do not have any magical, retrospective content. ... It is the interim nature of the order which makes it subject to further retrospective directions.
>
> [emphasis added]

53 In *Bell Aliant*, the Supreme Court also upheld a CRTC decision to order the disposition of funds that had accumulated in a deferral account. The Court rejected the argument that this constituted retrospective rate-setting because the rates had already been finalized. Abella J. pointed out that it was known at the outset that the CRTC would make subsequent orders about how to use the balance in the deferral accounts. At para. 63 she added (citations omitted and emphasis added):

> In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered reve-

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> nues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting ...

54 Calgary argues that cases such as *Bell Canada 1989, Coseka* and *Bell Aliant* are distinguishable. The first two involved interim rather than final rates. In *Coseka*, it was pointed out at para. 36 that consumers must be aware that interim rates may be subject to change. As for *Bell Aliant*, all the parties knew in advance that the telecommunications companies would be obliged to use the balance of the deferral accounts in accordance with subsequent regulatory decisions: para. 61.

55 Calgary suggests that gas rates here had long been finalized because the DGA had been reconciled in accordance with the Board's earlier orders that required forecast and actual gas costs to reconciled on a three-month rolling basis (see Decision 2001-75 at p. 64). It adds that when the seasonal or monthly DGA/GCRR process was approved it was not expressed to involve interim rates, therefore by definition the rates must be final: Factum at para 67.

56 In *Epcor* Fruman J.A. opined that whether deferred accounts are interim or final depends on the facts: para. 15. The material before the Court makes such a determination impossible. Language in the 1988 decision quoted above at para. 4 suggests that the use of the DGA involved interim rates, but that language is vague. In the DGA Decision, the Board noted in section 4.2 ATCO's argument that deferral accounts are by nature interim and therefore not retroactive. Unfortunately, the Board did not express its views on this topic.

57 Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: were the affected parties aware that the rates were subject to change? If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant.

58 Were these parties aware that gas rates were potentially subject to change through the use of the DGA? If so, whether the rates are characterized as interim or final, the principles in *Bell Aliant* govern.

59 The history of DGAs demonstrates that affected parties knew they would be used from time to time to alter gas rates based on later, actual gas costs. Indeed, the Board so found as a fact in the Limitations Decision at p. 4. It adopted the reasoning from that decision in the Reconsideration Decision. The Board's fact findings are not appealable: *Alberta Energy and Utilities Board Act*, s. 26(1).

60 Reconciliation of the DGA/GCRR would sometimes benefit consumers and sometimes not. Gas rates sometimes changed because of the lack of predictability (volatility) in gas prices and sometimes from other factors such as measuring errors. Whatever the cause, the objective was to ensure that the consumer paid the actual cost of the gas. This legitimate object was accepted by all parties. It strengthened the utility regulatory system by ensuring that the utility received a fair rate of return on its rate base.

61 Therefore, whether the rates should be characterized as final or interim, the use of the DGA in this case did not involve prohibited ratemaking.

Issue 3 - What standard applies to this Court's review of the Board's decisions?

62 The conclusion that the Board had jurisdiction to make the orders about the use of the DGA, and did not thereby engage in prohibited ratemaking, suggests that the reasonableness standard of review should be applied.

63 Abella J. employed this standard in *Bell Aliant* because, in her view, the issues went to the heart of the CRTC's specialized expertise, "the methodology for setting rates and the allocation of proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake.": para. 38, see also para.

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56. The same point applies here.

64 Reinforcing this conclusion are the reasons given for applying the reasonableness standard in *ATCO Gas South, Re*, 2008 ABCA 200, 433 A.R. 183 (Alta. C.A.) at paras. 15 - 18 (leave to appeal refused (S.C.C.)). See also *ATCO Electric*, where the Court determined in its standard of review analysis that "[w]ith ... the widespread use of deferral accounts, determining the appropriate methodology to be used in calculating prudent costs of financing these deferral accounts engages the Board's specialized expertise.": para. 63. Reasonableness is also the standard applied to a gas regulator's decision to permit a utility to recover material and previously unrecorded costs for the provision of gas services: *Natural Resource Gas Ltd. v. Ontario (Energy Board)*) (2006), 214 O.A.C. 236, 149 A.C.W.S. (3d) 889 (Ont. C.A.).

Issue 4. Has the reasonableness standard been breached ?

65

> Reasonableness is a deferential standard ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. ... [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.)at para. 47.

In my view, this standard has been breached.

66 The Board's sole justification for permitting ATCO to recoup eighty-five percent of the gas costs it sought from present consumers is found in the following passage of the DGA Decision at p. 11:

> ... the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years. Accordingly, the Board is inclined to allow [ATCO] substantial recovery of the applied for prior period adjustments.

Stripped to its essentials, two reasons emerge: the nature of the DGA as a deferral account and the fact that the DGA had been used in the past to make adjustments over several years.

67 Presumably the "nature of the DGA" point refers to the Board's historical assessment of the DGA contained in section 2.3, entitled "Nature of DGA Adjustments & Recovery Period". In that section, the Board examined the purpose of the DGA when approved in 1988: "reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR, i.e. the rate it used to recover the commodity costs of gas from sales customers." In describing the change made in 2001 (altering the reconciliation period from a seasonal to a monthly basis), the Board repeated that the purpose of DGA adjustments was "to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred". It is manifest that the costs approved in the decisions under appeal did not fall within the original purpose of the DGA, namely, adjusting for gas price volatility.

68 That brought the Board to its second point, that "during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines.": *Id* at p. 10. Usually those adjustments were made within a reasonable time, although sometimes the periods exceeded one year. This observation boils down to "we previously permitted adjustments over longer periods, so we will do so here".

69 Set against these two rationales for granting the bulk of ATCO's application are the Board's many other comments:

- DGAs have evolved into a vehicle to fix all possible gas cost errors and pass them on to consumers;

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• when first implemented reconciliations of the DGA were not expected to go back further than 12 months. Longer periods were sometimes accepted under special circumstances

• the DGA "was never set up with the intention of permitting all prior period accounting errors, particularly those that would have been subject to ATCO's management and control";

• accounting errors should typically be absorbed by the utility's shareholders;

• the DGA should not be treated as a catch-all for fixing errors, including those with a long history or resulting from human error, when adequate processes have not been in place to capture and correct the problem at an early stage;

• seven years represents a significant lag presenting obvious inter-generational equity issues;

• ATCO had an onus to ensure the System was working properly and was providing correct data;

• it did not appear that ATCO implemented an appropriate and timely review process for System design;

• there was no evidence of actual internal or external audits being performed to ensure the design was valid as the System was being put into service; and

• between 1998 and 2002 there was a lack of oversight by ATCO to test and develop appropriate controls to ensure that the System output generated was as intended.

70 Mirroring these observations were the Board's reasons for concluding that ATCO should bear fifteen percent of the costs claimed:

• it doubted whether it could rely on ATCO's revised imbalance amounts;

• little on the record demonstrated the extent to which the numbers were faulty, perhaps partly because of ATCO's unilateral actions in destroying data;

• there was no demonstration that the System report was adequately tested at the time of inception;

• the System lacked audits;

• ATCO lacked adequate internal controls and supervisory systems;

• there was inadequate proof of corrections and opening balances; and

• there was a lengthy delay in discovering the errors.

71 In summary, the Board's own analysis highlights the accumulation of factors that make unreasonable its decision to allow ATCO to recover eighty-five percent of the transportation imbalances through the DGA. Unlike most previous uses of DGAs, these charges did not result from gas price volatility. Nor did they resemble other past uses of DGAs where errors were attributable to measuring equipment problems and where there had been no suggestion of utility fault. Here the failure to levy appropriate gas charges was entirely due to deficiencies within ATCO's own system, exacerbated by a long delay in discovering the problem. ATCO's destruction of data made data verification impossible. As a result of the delays, at least some who were not consumers when the problems originated would have to absorb the costs of ATCO's carelessness. Even

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though this was not prohibited ratemaking *per se*, the long delays gave rise to inter-generational equity issues which lie at the heart of the prohibition against retrospective ratemaking.

72 As outlined in para. 9, previous DGA decisions took account of matters such as the amount of the adjustment, the timeliness of the application, the extent to which the utility acted responsibly, foreseeability of the problem, and whether consumers who received the service would bear the cost of the adjustment. When such factors are applied to this case, it is apparent why the Board's decision is not defensible on its facts.

73 As the Board intimated, there are compelling reasons why this sort of loss should be borne by shareholders rather than long-after-the-fact consumers. Shareholders have the ability to control or at least influence ATCO's management practices. Consumers do not. Requiring consumers rather than shareholders to bear most of the loss does not encourage utilities to conduct operations in a careful, time-sensitive way. The Board itself appropriately observed at p. 5 of the DGA Decision that allowing ATCO (full) recovery "could be considered ... a reward for poor management".

74 The Board's Limitations Decision at least partly addresses the above concerns because it generally limits DGA claims to a two-year period, except in special circumstances not within the utility's control. That decision is not subject to appeal and it would be inappropriate to comment on it further here. Nevertheless, it seems unlikely that the present DGA adjustments would have passed muster under the Board's criteria in the Limitations Decision.

Procedural Matters

75 I agree with Côté J.A's suggestion at para. 238 that the efficient disposition of an appeal can be hindered if parties neglect to provide sufficient copies of Extracts of Key Evidence in appeals like this that require only one copy of the Tribunal's record to be filed. In this case, that difficulty was largely alleviated because the key Board decisions were included in the parties' Books of Authorities.

Conclusion

76 The appeal is allowed, the orders under appeal vacated and the matter returned to the Board for consideration in accordance with these reasons.

***Marina Paperny J.A.*:**

I concur.

***Jean Côté J.A.*:**

A. Introduction and Issues

77 This is an appeal from what was the Alberta Energy and Utilities Board, the rate-regulating tribunal for natural gas utilities. (Its name has changed over the years and is not up-to-date in the style of cause, but I will call it "the Commission".) The issue is whether that tribunal could let the utility company recover a lump sum from present consumers because of mistakes in accounting for past gas purchases by the utility company extending back about six years.

78 Here is an overview of this judgment. Part B describes the odd and lax way in which the respondent utility's problem arose, and the Commission's three decisions about how to handle the utility's ensuing request, and agrees that the Commission's treatment is unreasonable. Part C describes how the Supreme Court of Canada and our Court of Appeal have consistently interpreted the governing statutes and barred retroactive rate-making; and the very limited amendments which the Legislature made in response. Part D describes Alberta's rate-making procedure and law, and shows how the decision under ap-

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peal is illegal because retroactive. Part E shows how the deferral accounts used here were created for very different purposes and long since reconciled, remaining almost by oversight. Part F describes the recent *Bell* decision and how it does not apply here. Part G similarly distinguishes two other decisions. Part H is about the standard of review. Part I is about the conclusion and remedy, and Part J makes some requests about procedure.

B. Facts

1. ATCO Finds Significant Error

79 An outsider might suppose that it would not be particularly difficult for a gas public utility to keep track of how much gas it bought, sold or transported, particularly when it does not store any significant amount. Similarly, one supposes that the utility would have accounting records reliably keeping track of what it paid for the various amounts of gas which it got. This case suggests that at some times and places it may not be that easy or straightforward.

80 One reason might be that the respondent ATCO divides its operations. A second reason may be that gas supply to consumers in Alberta has become more complex in the last generation. No longer is the owner of a pipe necessarily the owner of the gas flowing through it, and no longer is the owner of a local gas distribution pipe running under a street necessarily the vendor of the gas being bought by the consumers located on that street.

81 The Commission found a bigger third reason. ATCO had set up some inappropriate accounting systems to handle this situation, inconsistently administered them for years, and throughout made inadequate checks of their operation or adequacy. The Commission so finds in its 2005 decision (pp. 4-5, 7-8, 11-12 A.B. pp. F7-8, F10-11, F14-15).

82 For many years, ATCO seems not to have realized the depth of these problems. Helped by some gentle prodding by the Commission in late 2003, ATCO and its outside accountants investigated their accounting problem more deeply. By early 2004, they recognized fairly serious accounting errors that ATCO had made in northern Alberta for all of the years 1998, 1999, 2000, 2001, 2002, 2003, and for early 2004. In the south, the problem started a year later than in the north, but also lasted until early 2004.

83 The amounts were significant. ATCO's recalculations suggested that in southern Alberta its gas costs from 1999 to 2004 had in fact been a total of $11.6 million higher than it had recorded in any of its books or its regular filings with the Commission. In the north, they were almost $2 million lower for 1998 to 2004.

84 In its first (2005) decision on the subject, the Commission (then the Alberta Energy and Utilities Board) explained the errors as follows.

> AG [ATCO Gas] submitted that there were two distinct aspects of imbalances: the management, control and reporting of other gas owners' imbalances that result from the shipment of other owners' gas through the pipeline network (collectively referred to herein as Transportation Processes), and the recognition of the effect that other gas owners' imbalances have on regulated gas supply procurement and the timing of cost recovery from regulated sales customers (DGA/GCRR Processes).
>
> AG submitted that other gas owners' imbalances were made up of transportation imbalances and exchange imbalances. Transportation imbalances are associated with active transportation contracts, which reflect the physical movement of gas through ATCO's pipeline system. AG described Transportation Processes as including, without limitation, measurement, nomination, allocation, reporting, preparing statements, invoicing and receiving payment from other gas owners who contract for transportation service. AG also noted that exchange imbalances are those associated with active exchange contracts, which reflect a physical swap of gas between ATCO and a counterparty and in which there are no monthly imbalance settlement provisions. (§ 2.1, p. 3, A.B. p. F6)

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> The Board [now the Commission] agrees with AG that this Application concerns the disconnection that occurred between the true and correct imbalances reported in the Transportation Processes. . . .
>
> (*id.* at p. 4, A.B. p. F7)
>
> . . . In addition, the Board notes that ATCO did not appear to take the appropriate action to modify the functionality of the TIS system with respect to Rate 11 delivery input which ultimately led AP [ATCO Pipelines] employees to input inaccurate delivery data in order to 'quiet' an error message.
>
> (*id.* at p. 5, A.B. p. F8)

2. ATCO Proposed to Pass on the Shortfall

85 As a result of its belated discoveries, ATCO filed with the Commission's predecessor Application #1347852 of May 31, 2004. ATCO proposed a simple solution: to make ATCO's problem the consumers' problem. The rates for gas delivered from 1998 to 2003 had long since been fixed, charged, and paid, and the gas in question long since sold, delivered, billed, and paid for. Yet ATCO now wanted to turn its old long-undiscovered $11.6 million southern shortfall into a new additional lump-sum charge to present southern customers. Conversely, ATCO volunteered to give a rebate of almost $2 million to present northern customers.

3. The Commission's Three Decisions

86 The Commission responded to ATCO's "error-correction" application in three decisions.

(a) "Imbalance Adjustments" April 2005 Decision # 2005-036

87 In this decision, the Commission made fact-findings about the causes of the errors, which findings are not challenged on appeal by Calgary or ATCO. They reveal ATCO's multifold and long-lasting accounting inadequacies (pp. 7-8, 12 A.B. pp. F10-11, F15). The Commission found as follows:

> . . . The Board [now the Commission] considers that the error in the design of the TIS Report along with the management practices related to process control, including those related to the TIS Report, are of concern.
>
> . . . The Board, however, notes a lack of documented audit evidence that would support the correctness of the imbalances reporting systems in the present case, and is thus concerned with the degree of accuracy that AG [ATCO Gas] contends exists for the present imbalances adjustments. Moreover, the Board is concerned with the amount of time, dating back to 1998, that it took ATCO to find, and ultimately make, the imbalances corrections.
>
> (2005 decision, p. 4, A.B. p. F7)
>
> The Board is troubled by what it considers to be **an apparent lack of diligence exhibited by either of AG or AP or both** of them over the reporting of imbalances in as much as the errors included in the review had occurred since at least 1998.
>
> (*id.* at p. 5, A.B. pp. F8, Emphasis added)
>
> . . . The Board notes that AG stated in the Application that "ATCO found that the original design specification for the monthly TIS Report was not correct." This acknowledgment would indicate that before the imbalances problem was identified there had been a **lack of system control over, and audit of, the design.**

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> . . . It appears to the Board that if AP employees had not entered the inaccurate Rate 11 delivery data, the incorrect TIS Report may not have been noticed by AG in the normal course of business, given that **it does not appear that ATCO tested or planned to test the integrity of the report** . . .
>
> (*id.* at p. 5, A.B. p. F8, Emphasis added)

88 Yet the Commission did little about the utility's various longstanding accounting inadequacies. It merely deducted 15% as a penalty for them. Subject to that deduction, the Commission did as ATCO asked; it ordered the current southern customers to top up ATCO's profits by an amount equal to ATCO's past bookkeeping errors for those five or more past years.

89 The Commission also allowed ATCO to give the current northern customers a rebate. The Commission did not mention the suggestion that the northern refund bear interest for all the years the utility company had had the funds (January 21, 2005 argument, Commission Record Tab 47, p. 29). Instead, the Commission did the reverse: it dictated that that consumer rebate would be *reduced* by 15% (p. 12, A.B. p. F15). There was no explanation for the reduction, and I cannot think of any logical one. It might have been the Commission's desire for aesthetic facial symmetry between north and south. It seems most unlikely that the Commission intended to penalize the northern consumers for ATCO's shortcomings. Maybe it was just an oversight. After various adjustments, on August 23, 2005 the Commission fixed the northern refund at $541,000, and the leave to appeal does not cover the northern errors or rebate. No one in the north has appealed.

90 The Commission noted that since 1987, ATCO has maintained a deferral account. It was originally set up to allow quick reconciliation of unpredictable fluctuating future gas purchase cost estimates, with actual costs for the same period. The Commission said the purpose for the account has nothing to do with the type of errors in question here, and that the accounts were never designed for purposes such as the current errors. See Part E below for details and citations.

91 Though all the reconciliations of that deferral account had been completed years before, the Commission decided that the new error charge (and rebate) described above would be done through or because of that deferred account.

92 Apart from background and recitals, the actual reasoning of the Commission in this 2005 decision was brief, and contained little or no explanation beyond that summarized here.

93 In particular, these 2005 reasons said nothing about the rule against retroactivity, nor whether the governing legislation permits this sort of retroactive adjustment (going back some six or so years). However, the Commission did seem to suggest that such steps are retroactive rate adjustment for past years' errors: (2005 decision, § 2.8, first para., p. 14, A.B. p. F17).

94 It is probably idle to speculate on the reasons for that significant omission.

95 The Commission's later 2008 Decision says that no one raised the rule against retroactivity during this first (2004) application (2008 Decision §4.3, p. 7, A.B. p. F31). The Commission may have got that idea from allegations in ATCO's October 5, 2007 argument (Commission Record on present appeal, Tab 60, pp. 2, 5, 6). ATCO also alleged the same thing to this Court in 2007: see ATCO's February 22, 2007 factum filed for that previous appeal (pp. 1, 4, 7, 8, 9, 11; cf. p. 10). And cf. similar allegations in the Commission's February 21, 2007 factum (pp. 5, 6). The Commission evidently did not recall its own file (though its 2004-2005 record was consolidated with its 2007-2008 record).

96 In fact, the various statements by ATCO and by the Commission alleging Calgary's silence are not correct. Calgary *did* argue the retroactivity issue during the first hearing, especially in its reply written argument of January 28, 2005 (Tab 50 of the Commission's Record). See especially pp. 2-3, quoting s. 40 of the *Gas Utilities Act*, the key legislation. The date, application number, and title of that written argument all confirm that it was filed for this first application which led to this first Commission decision in April 2005. The Commission's 2008 decision says that all argument to the Commission on this first 2004-2005 application had been written, not oral (pp. 2-3, A.B. pp. F5-F6).

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97 ATCO's inaccurate allegations of Calgary's silence are puzzling. Maybe counsel relied on memory alone. Maybe they interpreted Calgary's written 2004-2005 argument in some unreasonable narrow fashion. And ATCO's 2007 factum may have used terms like "jurisdiction" in a narrow way (e.g. excluding non-jurisdictional Calgary arguments). (See Part D.9. below.) In any event, this is an appeal from the Commission's rehearing, and the "alleged silence" point no longer influences the result (if it ever did).

98 The City of Calgary sought leave (May 30, 2005) and got leave (July 6, 2006: see 2006 ABCA 180 (Alta. C.A. [In Chambers])) to appeal from this 2005 Commission decision. The Court of Appeal allowed the appeal. It said the question could not be decided on the record before the court, doubtless relying on ATCO's erroneous factum. The Court sent the matter back to the Commission to rehear and to reconsider: see 2007 ABCA 133, 404 A.R. 317 (Alta. C.A.).

99 On August 23, 2005, the Commission gave decision 2005-093 approving ATCO's computation of the precise amounts ATCO would collect and refund under the April 2005 decision.

(b) "Limitation Period" May 2006 Decision #2006-042

100 Meanwhile, the Commission itself was properly troubled by the implications of its 2005 precedent. If carried to its logical extreme, it could leave gas rates charged to consumers and payments by past customers forever open to alteration, approaching the lengthy uncertainties in Lord Eldon's Court of Chancery. The Commission therefore ordered a second application about whether the Commission should impose its own limitation period, maybe two years. (It proceeded under a further application which the Commission ordered ATCO to make.) Little was said about the existing limitation period (beginning of the fiscal year of application) found in the *Gas Utilities Act*, and described in Part C below.

101 The Commission's decision on this limitation-period hearing was that the utilities statutes did not matter or apply, because of the old deferral account. So the Commission thought that the extent of retroactivity was more or less a matter of its own discretion. The Commission ordered that henceforth (not retroactively) there would sometimes be a new two-year limitation period for retroactive rate changes. I say "sometimes", because the two-year time limit would not apply where the adjustment sought was large and there were "special circumstances" not within the utility's control.

102 It is not clear whether the "special circumstances" phrase referred to what caused the initial problem, or why the application was made after the expiry of two years.

103 I note that ATCO's limitation-period application was filed after Calgary moved for leave to appeal from the Commission's first decision. And the Commission's reasons on that in May 2006 were almost a year after such leave was sought. The Commission likely knew of those events. But we have to look at the 2006 reasons because they are incorporated into the 2008 decision.

104 ATCO filed a motion in the Court of Appeal for leave to appeal this 2006 decision, but by agreement that motion was adjourned from time to time over the years, and was never heard (see 2008 Commission decision, p. 1). That motion was discontinued recently (February 12, 2010). ATCO later argued before the Commission that Calgary's not trying to appeal this 2006 decision somehow estopped it from questioning the 2005 Commission decision which it has twice appealed (October 5, 2007 argument, p. 6, para. 12, Commission Record Tab 60). I cannot see the logic of that, nor do I recall any law to support it (and none was cited). In any event, no such argument was put to the Court of Appeal on this appeal.

(c) "Reconsideration" January 2008 Decision #2008-001

105 This third Commission decision is the fruit of the rehearing directed by the Court of Appeal, as mentioned above (end of subpart (a)), and the consequent reconsideration application.

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106 The Commission refused to let Calgary file any more evidence, despite the Court of Appeal's 2007 direction. (That point is discussed further in Part E.4 below.)

107 The Commission reached the same conclusion as it had in 2005. The key issue was retroactivity.

108 Almost the only significant thing which the Commission said in 2008 about retroactivity was to quote what it had said on the subject in its 2006 limitations decision (subpart (b) above). That is two short paragraphs which read as follows:

> With regard to the issue of retroactive rate-making raised by Calgary, the Board [now the Commission] does not accept the position advanced by Calgary. The Board has broad discretion to set just and reasonable rates and, in the case of setting gas cost recovery and flow-through rates, sets these rates in accordance with the use of DGAs. In doing so, the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter. In *Epcor Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.
>
> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact, the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.
>
> (p. 4 of 2006 decision, § 3.1 near end, and quoted on pp. 7-8 of 2008 decision, A.B. pp. F31-32)

A Commission footnote says that the Supreme Court of Canada approval referred to in the quotation is in *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.).

109 I am not certain, but the Commission's next 2008 paragraph seems to be about retroactivity as well. So I quote it:

> The provisions of the GUA and PUBA relied on by Calgary authorize the Board [now the Commission] to take into account financial information for the whole of the year in which a tariff application is filed in the event that the Board intends to approve a tariff effective prior to the date on which the tariff application is made. The "prior period" is limited to some period in the calendar year before the date of the application, depending on when the application might be filed in the calendar year. Strictly speaking, deferral accounts are unnecessary to account for financial activity in this period, so the Board does not find Calgary's argument persuasive on this basis.
>
> (p. 8, A.B. p. F32)

One curious feature of that paragraph is discussed at the end of Part D.6 below.

110 There is another paragraph in the decision immediately after that one. I am not entirely certain how to interpret it. It contains some assertions and conclusions. But the only actual reason which I can find in it is one. I read it as saying that the Commission has often acted this way, and if it refused to do so now, it would bring into question its previous decisions.

111 To sum up, the basic real reason given by the Commission was the idea that a deferred account bypasses the ordinary rule against retroactivity.

112 Martin J.A. gave leave to appeal this 2008 Decision (order of July 2, 2009). That is the present appeal.

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4. Unreasonable Decision

113 Hunt J.A. concludes that the Commission's decision here is unreasonable. I agree with that conclusion, and with the reasons which she gives for finding unreasonableness. Many other things discussed in my reasons would also help to support that conclusion.

C. Legislative History

1. Introduction

114 The question of whether the impugned Commission decision violates the law forbidding retroactivity requires examining a number of aspects of the nature and policy of that law. I can best start with the history of the relevant legislation and the court decisions about it. That is what this Part C does.

115 A half-century's dialogue between courts and the Legislature is outlined in subpart 2. It reveals a very clear picture. The courts found firm legislative limits which the Legislature adjusted only slightly, and otherwise confirmed, basically keeping them to the present day.

2. Chronology

(a) The *Public Utilities Act*, R.S.A. 1955 c. 267, s. 67 gave the Commission (then the Board of the Public Utilities Commissioners) general powers to fix utility rates, but said little express about time limits or retroactivity.

(b) March and August 1959 saw Commission decisions which were then appealed to the Court of Appeal, whose decision is described in (e) below.

(c) April 1959 the Legislature amended (c. 73, s. 9(d)) the *Public Utilities Act*, adding s. 67(8). Undue delay in hearing and deciding an application henceforth lets the Commission give effect to excess revenues or losses, incurred after filing a utility's rate application, when the Commission fixes just and reasonable rates.

(d) Legislature passed new *Gas Utilities Act* as 1960 c. 37. In its s. 31 has identical wording to the *Public Utilities Act* s. 67(8) just discussed (with one trivial exception).

(e) September 22, 1960 Appellate Division decided ***Edmonton (City) v. Northwestern Utilities Ltd.*** (1960), 34 W.W.R. 241 (Alta. C.A.), considering items (b) and (c) above. The Supreme Court of Canada varied this decision on April 25, 1961 on other grounds (allowing a purchased-gas adjustment clause): [1961] S.C.R. 392, 34 W.W.R. 600. The Supreme Court of Canada held that utility rates must be based on an estimate of future expenses (p. 612 W.W.R.). It apparently accepted the proposition that until the 1959 amendment, the Commission had no power at all to make retroactive rates or allowances, not even for regulatory delay.

(f) Adoption of *Gas Utilities Act* R.S.A. 1970, c. 158, s. 31, which merely reenacted 1960 c. 37, s. 31 (item (d) above) with no change.

(g) December 9, 1976: Appellate Division decided ***Northwestern Utilities v. Edmonton*** 2 A.R. 317 (Alta. C.A.). Its decision was not novel, and is similar to ***Calgary (City) v. Madison Nat. Gas Co.*** (1959) 28 W.W.R. 353, 360. The ***N.W.U.L.*** decision reversed a Commission decision, and held that unexpected shortfalls in revenue or unexpected expenses incurred by a utility before the date of the rate application cannot be considered (paras. 6, 25-26, 34). The Supreme Court of Canada affirmed the Appellate Division in late 1978: (1978), [1979] 1 S.C.R. 684, 12 A.R. 449

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(S.C.C.). The Supreme Court explained the 1959 amendment: its scope is narrow.

(h) 1977: Legislature amended s. 31 of the *Gas Utilities Act*: see c. 9, s. 5(1), (2). That did not affect pending cases. Old s. 31 became new s. 31(c). The rest of the section was new.

(i) That new s. 31 (of 1977) became R.S.A. 1980, c. G-4, s. 32, with no significant change.

(j) That section became the present R.S.A. 2000, c. G-5, s. 40, with only minor changes in drafting style. The *Public Utilities Act*, R.S.A. 2000, c. P-45, s. 91 contains virtually identical words. Section 40 of the *Gas Utilities Act* now reads as follows:

> 40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,
>
> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion **applicable to a period** consisting of
>
> (i) the whole of **the fiscal year of the owner in which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them,
>
> (ii) **a subsequent fiscal** year of the owner, or
>
> (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive, and need not consider the allocation of those revenues and costs to any part of that period,
>
> (b) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner that is in the Board's opinion applicable to the **whole of the fiscal year of the owner** in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
>
> (c) the Board may give effect to that part of any **excess revenue received or any revenue deficiency incurred** by the owner **after the date on which a proceeding is initiated for the fixing of rates**, tolls or charges, or schedules of them, that the Board determines has been **due to undue delay in the hearing and determining** of the matter, and
>
> (d) the Board shall by order approve
>
> (i) the method by which, and
>
> (ii) the period, including any subsequent fiscal period, during which,
>
> any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.
>
> (Emphasis added)

(Presumably the last three lines should be indented more, but I quote them the way that they appear in the Revised Statutes of Alberta. The equivalent lines are indented more in the *Public Utilities Act*.)

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3. Conclusion

116 That legislative history shows that current s. 40 of the *Gas Utilities Act* is the Legislature's limited response to the decisions of the Court of Appeal and Supreme Court of Canada described above (in subpart 2). So the principle of the Court decisions has not changed. The only small change was that the time limits were extended slightly. Though *later* years' expenses or excess revenue can be considered (if they are consecutive), shortfalls or excesses in *previous* years' expenses or excess revenue are still off-limits (as always). Only shortfalls or excesses of revenues and costs back to the beginning of the fiscal year in which the application is filed, can be considered. That was the precise point in issue in the Court of Appeal decision of 1976 (and Supreme Court of Canada affirmation). That is the only legislative amendment to the Court decisions. New para. (d) on methods and periods is vague, but seems to be purely ancillary (on which see the *Stores Block* decision discussed in Part D.5 below).

117 Given this history, this Alberta legislation is incompatible with any Commission power to take into account to base, or adjust, rates on actual shortfalls or excesses of revenues or expenses in a year earlier than the year in which the application by the utility is filed.

118 Precedent is not the only reason for such rules. The Supreme Court of Canada's and this Court's decisions are based on fairness, certainty and logic. That is explained further below in Part D, which describes those court decisions more fully.

D. The Decision Appealed is Retroactive

1. Introduction

119 This Part D approaches the whole topic of retroactivity from several directions. All these subtopics interlock. Retroactivity cannot be properly described without showing the basics of setting utility rates.

2. Final Prospective Rate-Making

120 There are two ways in which one could regulate how much consumers pay for gas from public utilities. The usual and traditional way is to have rates fixed for a period, at least part of which period is in the future. Then one forecasts all the likely expenses (including cost of capital), and sets rates accordingly. There is some risk to the utility company, as it may get fewer revenues or higher expenses than forecast (or both). Conversely, the company also enjoys the chance of making a higher profit, if costs are below forecast, or revenues higher than forecast. That is the traditional way of making utility rates. (See further subpart 6 below.)

121 That is also the practice with respect to Alberta natural gas rates, and the law requires that procedure. The Supreme Court of Canada explains that clearly in *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684, 12 A.R. 449 (S.C.C.), on pp. 452 ff. (A.R.). I quote from that judgment (using A.R. para. numbers):

> [4] The Board [now the Commission] is by the [Gas Utilities Act] directed to "fix just and reasonable . . . rates, . . . tolls or charges . . ." which shall be imposed by the Company . . . The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. . . . It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. . . .

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> [5] While the Statute does not precisely so state, **the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 [now s. 40] there is nothing in the *Act* to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application** (*vide:* City of Edmonton et al. v. Northwestern Utilities Limited, [1961] S.C.R. 392, *per* Locke J. at 401, 402).
>
> [6] The rate-fixing process was described before this Court by the Board as follows:
>
> > The PUB approves or fixed utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. . . .
>
> [7] The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that **the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the *Act* which make this clear** . . . Section 32 likewise refers to rates "to be imposed thereafter by a gas utility".
>
> [22] It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. **It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in**
>
> **any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.**
>
> (emphasis added)

See also Netz, "Price Regulation: a (Non-Technical Overview)", in *Encyclopedia of Law and Economics* 396 (2000), at 401-03. (A version of that paper is cited in the *Stores Block* decision of the Supreme Court of Canada, *infra*.)

122 The word "losses" above is ambiguous. In such discussions of retroactivity, it does *not* have its ordinary meaning of a business not so much as breaking even and running at a loss. Instead, the "losses" referred to in this particular context mean actually making less money in a period than had been forecast for that period, because expenses proved larger than anticipated, or revenues proved smaller than anticipated. See *N.W.U.L. v. Edmonton* (1979), *supra* (p. 455 A.R. para. 10, p. 693 S.C.R.). So it can readily refer to a company which is operating at a profit and making a significant return on its investment.

123 The above shows that even the small degree of retrospectivity permitted by the 1959 and 1977 *Gas Utilities Act* amendments is more limited than it sounds. Rates come into force in the future, and are intended to reflect estimates of *future* costs revenues and conditions when they are in force. The rule against looking at losses (or extra profits) which occurred before the application date is not arbitrary; in part it reflects that rule of future rate-making. Past ongoing expenses can be looked at when predicting future ones, but past unexpected shortfalls (one-time events) in general can never be recovered. I return to the stages of the rate-making process, and some confusion about it in subpart 6 below.

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124 That is orthodox and traditional rate-making law: see 1 Priest, *Principles of Pub. Util. Regulation* 75, including n. 102 (1969); Netz, *loc. cit. supra*. And see subpart 4 below. The legislation confirms that law. What was referred to in the earlier court decisions as s. 31 or s. 32 of the *Gas Utilities Act* is now s. 40. It requires "rates, tolls or charges . . . *to be* imposed, observed and followed *afterwards* by an owner of a gas utility." (emphasis added)

125 The Supreme Court of Canada's 1979 *N.W.U.L.* decision then quoted with approval another decision of this Court also explaining the 1959 amendment to the legislation:

> . . . It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board [now the Commission] retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.
>
> - ***Calgary (City) v. Madison Nat. Gas Co.*** (1959) 28 W.W.R. 353, 19 D.L.R. (2d) 655, 661 (quoted at end of para. 7 (A.R.) of the Supreme Court of Canada's 1979 ***N.W.U.L.*** decision)

126 The Supreme Court also quoted with approval another decision of this Court on the unfairness of retroactive rate hikes:

> One effect of this ruling is that future consumers will have to pay for their gas a sum of money which equals that which consumers prior to August 31, 1959 ought to have paid but did not pay for gas they had used. In short, the undercharge to one group of consumers for gas used in the past is to become an overcharge to another group on gas it uses in the future. When the Board capitalized this sum, it made all the future consumers debtors to the company for the total amount of the deficiency, payable ratably with interest from their respective future gas consumption.
>
> - ***Re N.W.U.L.*** (1961) 34 W.W.R. 241, 25 D.L.R. (2d) 262, 290 (quoted in para. 21 (A.R.) of Supreme Court of Canada's 1979 ***N.W.U.L.*** decision)

127 That danger is acute here, with 2005 customers asked to pay what 1999 customers consumed but allegedly did not pay. And Calgary has a very mobile population and grew rapidly through the early 2000s.

3. Cost-Plus Billing

128 If one were to ignore all the law above, in theory gas utilities could instead use a different system. Consumers could pay them for gas on a cost-plus basis. Cost-plus is the way that government contractors like to be paid, and that law firms often charge. In theory, one could simply set rates for each year after the fact, once all the gas had been consumed, and all the consumption and expense figures were in and verified. In the meantime, consumers would merely pay something on account, and have the actual final figure adjusted later by a refund or extra charge.

129 Such a full cost-plus system would be novel in public utilities. And probably unworkable if done openly. But, in my view, ATCO's request which the Commission approved here is perilously close to that in all but name. That is not just my speculation. The Commission more or less said so itself, in its 2005 decision (p. 10, A.B. p. F13), and its 2006 decision (p. 2), both quoted in Part E.2 below.

130 The cost-plus system has dangers. Of course one is the intergenerational expropriation referred to by this Court, and by the Supreme Court of Canada (in its *N.W.U.L.* 1979 para. 21 quoted at the end of subpart 2 above).

131 When I discuss incentives at various places in this judgment, I am not imputing improper motives. A utility company is not a charity, and its directors and officers have a duty to its shareholders to maximize its profits (to the extent that the regulatory bodies and law and honesty permit).

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132 Here is another danger. If the utility ends by making a profit, and there is no automatic adjustment at year end, the utility can hope that no consumer group will make a fuss, and so the company can hang on to the profit. If consumers do apply to the Commission, the utility can suggest that it is too early to tell, and to wait a few years to see if arguable offsetting losses turn up elsewhere. So what revenues to offset against what expenses becomes almost arbitrary. Conversely, if the utility makes a loss at year end, it can apply immediately for an additional payment by consumers. The utility will have recourse to the regulator only when the facts mean that it will win and the consumers will lose. On the evils of changing the rules in mid-game, see MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 238. Recall that the Alberta deferred rate account is just a number written in a book. It is not a trust account in a bank, or any other type of segregation of funds; nor is it even funds.

133 And of course cost-plus billing contains no incentive to be economical. Cf. Netz, *loc. cit. supra*, at 403 ff.

134 Therefore, routing later claims immediately through an old deferred account to give refunds or extract higher rates, in respect of profits or losses years before, in substance is no fixed rate at all (and so clearly illegal). At best it is simply basing rates to be paid in the future on failure to forecast expenses in past fiscal years. As noted above in Part C.2 and in Part D.2, the legislation forbids that. Section 40 of the current *Gas Utilities Act* (quoted in Part C.2) only lets that process look back to the beginning of the fiscal year in which the rate application was filed. I see no exception there for different accounting methods.

4. Commission Powers are Confined by Legislative Aims

135 In Parts C and D.2 above, I showed that the Supreme Court of Canada and this Court consistently barred retroactive rate-making in general, and banned increasing present rates to cover a past unexpected shortfall in particular, and showed how the Legislature affirmed that (with only small changes).

136 The justice, consistency, and policy underlying those legal rules have since been explained by the Supreme Court of Canada. It also shows how to interpret such legislation. Its latest decision on the Alberta régime in general, and gas utilities in particular, is the "*Stores Block*" decision, cited as *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (S.C.C.). It clearly sets out the Commission's proper approach.

137 The Supreme Court there says that how much discretion utilities or other regulatory tribunals have varies from board to board, but each board must respect the limits of its jurisdiction, and can only act in areas where the Legislature has given it authority (paras. 2 and 35). Utilities regulators regulate rates to protect consumers from natural monopolies (para. 3).

138 The Supreme Court of Canada says that though Alberta's *Alberta Energy and Utilities Board Act* and *Public Utilities Board Act* and *Gas Utilities Act* contain seemingly broad powers, that legislation must be interpreted within the entire context of the statutes, which balance need for consumer protection against owners' private property rights. The main function of the Commission is to fix just and reasonable rates, so ensuring dependable supply (paras. 7, 60). Therefore, imprecise undefined wide statutory provisions letting the Commission make any order, or impose any condition necessary in the public interest, do not give an unfettered discretion. They must be limited to the purpose of the legislation and the context of the regulatory scheme and principles generally applicable to regulatory matters (paras. 46, 48, 49, 50, 51, 60, 61, 64, 73-77). The "power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates" (para. 60).

139 The Supreme Court then examines the history of the Alberta legislation, which is based on similar American traditional utilities rate-regulation legislation (para. 54). Such "public utilities are very limited in the actions they can take" and the Commission has no "discretion . . . to interfere with ownership rights" (para. 58). The 1995 (temporary) merger of the Public Utilities Commission and the Energy Resources Conservation Board (as the Alberta Energy Utilities Board) did not change that, says the Supreme Court (para. 59).

5. Shareholders' Risk

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140 The law's time restrictions are neither mechanical, nor trivial. They are bound up with who enjoys windfall profits, and who risks losses or low returns on investment. The Supreme Court of Canada begins by describing the rate-making process:

> The [Commission] approves or fixes utility rates which are **estimated** to cover expenses plus yield the utility a fair return or profit. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined . . . In Phase II rates are set, which, under normal temperature conditions are **expected** to produce the estimates of 'forecast revenue requirement'. These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.
>
> (***Stores Block***", 2006 SCC 4, para. 65, quoting the Supreme Court of Canada's 1979 ***N.W.U.L. v. Edm.*** decision, emphasis added)

141 Then the Supreme Court shows that the object is to leave key risks to the equity holders, the utility shareholders:

> Despite the consideration of utility assets in the rate-setting process, **shareholders are the ones solely affected** when the actual profits or losses of such a sale are realized; the **utility absorbs losses and gains**, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. (*id.* at para. 69, emphasis added)

142 Therefore, the Commission cannot act retroactively and offload risk onto consumers:

> . . . the Board [now Commission] was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. . . . **The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by the ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates** [citing ***N.W.U.L.***, ***Coseka***, and ***Dow*** cases]. But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility.
>
> (*id.* at para. 71, emphasis added)

143 Striking for the present appeal is the Supreme Court's discussion shortly before that quotation. It says that the utility is not guaranteed a profit, nor a return on its assets, and is merely given a chance to earn them. The utility company owns the assets, and profits or losses accrue to the company (i.e. shareholders), not to the consumers.

> The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process . . .
>
> (*id.* at para. 67)

The customers have no ownership or equity; only shareholders do:

> Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only 'the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator'.
>
> (*id.* at para. 68)

144 The long history of that policy and system are confirmed by an article (also quoted by the Supreme Court): MacAvoy and Sidak (2001) 22 Enr. L. Jo. 233, 235, 237, 241-42, 243-44, 245-46.

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145 This traditional prospective fixed rate-making provides very healthy incentives for the utility company and its shareholders and management. If the utility company can find ways to hold its expenses below those which were forecast, all the extra profit accrues to the shareholders and cannot later be confiscated. In the long run, that approach will benefit both the shareholders and the consumers. For a useful discussion of incentives, see Kahn, *The Economics of Regulation: Principles and Institutions*, v. 1, pp. 47-54, 101-09 (repr. MIT Press 1998).

146 Besides incentives, that system also gives fairness to the utility company's shareholders. If applied consistently, it is just for everyone.

147 Calgary's initial January 21, 2005 argument to the Commission (Tab 47, p. 3), pointed out that ATCO's 2004 error-correction application was in effect a request for a backstop guarantee against unexpected shortfalls in profit, citing previous Commission decisions. The Commission's 2005 decision does not mention that concern. The quotations from the Supreme Court of Canada above show the fundamental error in the Commission's 2008 decision now under appeal. And it is also virtually cost-plus billing, as noted in subpart D.3 above.

148 Indeed, the Commission's own 2005 decision (being reconsidered here) admits that ATCO's proposal "replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder" (p. 11, A.B. p. F14).

6. Stages of a Rate Hearing

149 The term "retroactive" is misleading or confusing in some respects. It is conceivable that it led to some of the unexplained aspects of the present situation. Compounding the problem is the fact that several different things are involved. So expanding on what the Supreme Court of Canada said in *Stores Block* will increase clarity.

150 I will outline simply the traditional and proper process to set or amend rates for a public gas utility in Alberta. (Legal authorities are found above, especially in Part C.2 and subparts D.2 and 5.)

Step A: Utility completes fiscal years #1 and 2, and routinely files or publishes its financial results for those years.

Step B: During fiscal year #3, Utility files an application to the Commission to increase its existing rates to consumers.

(1) This application always includes (and must include) an **estimate** of what expenses, taxes and rate base will be during the (current) fiscal year #3, and during (upcoming) fiscal year #4.

(2) If the Utility wishes, it may choose also to show the Commission that in the past, some of its expenses have been higher than had previously been forecast, or that some of its revenues have been lower than had previously been forecast. However, legislation and case law (see Part C above) allow the Commission to rely upon such discrepancies between past estimates and actual figures (revenue or expenses), only for two possible time periods:

(a) the current fiscal year, during which the application was filed (i.e. fiscal year #3);

(b) any period during which the current rate hearing is still going on, or the rate decision is standing reserved and not yet decided (i.e. fiscal year #3, and also year #4 up to date of decision).

Step C: In Phase I, the Commission sets its own estimate of the expenses and taxes which the Utility will incur, e.g.

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in year #4, plus a reasonable rate of return on its investments (rate base) for the foreseeable period after the application date. That is a lump sum of future needed gross revenue per year (or month). Then in Phase II, the Commission estimates future gas consumption, and designs a set of rates which it estimates will produce that lump sum of needed gross revenue.

It will be seen from this outline that all rates are future.

151 Typically, the word "retroactive" is used in this context to refer to something very specific. That is going outside the time limits in step B(2) above. For example, the Commission cannot set a rate which will yield more than the estimated *future* expense, taxes, and return on investment. It cannot do so even if it is proven that the utility earned much less in year #1 (or earlier) than had been estimated, or than the old rates were designed to cover. That is a past loss and is unrecoverable. Similarly, the Commission cannot set future rates which will yield less than estimated future expenses etc. on the ground that in the past year #1 (or earlier) the utility earned more than had been forecast.

152 Those forbidden acts would not be "retroactive" (or retrospective) in all the common non-technical senses of the word. The common term "retroactive" is appropriate in two senses only. First, all rates should be for the future and known at the time that the consumer decides to consume some (or more) gas. Rates come into force only on the day they are announced (or a later day). (Interim rates are a partial exception, and ignored above for simplicity.) On any given day, a consumer knows what rates apply.

153 The second meaning of "retroactive" is that already described above: that deviation between past estimates and past actual performance is no ground to change future rates for a later period.

154 Therefore, one must not confuse two different topics:

(1) First topic: whether *future* consumption or expenses will be the same as forecast now;

(2) Second topic: whether *past* expenses were the same as previously forecast some years ago.

The first topic (future uncertainty) is sometimes handled by purchased-gas adjustment clauses or deferred gas accounts for gas (raw material) expenses or allied topics. It is in effect a type of temporary interim rate. But the second topic (past discrepancies from budget) is never legitimately allowed for, so long as it is for a previous fiscal year. *A fortiori*, past accounting errors are even less legitimate a topic for later adjustment of rates (even by later surcharges to consumers or refunds to consumers).

155 In my respectful view, what the Commission did here (at ATCO's request) is therefore forbidden by binding case law and statute in two respects.

156 Written argument to the Commission was not exhaustive, and may not have spelled out every implication of these points. Possibly the Commission did not distinguish the "first topic" from the "second topic". Its actual reasons on this topic were not lengthy, but I note two things. In Part B.3(c), I quoted the middle paragraph of the Commission's 2008 reasons ("The provisions of the GUA and PUBA relied on . . ." p. 8, A.B. p. F32.) In the mention of retroactivity, note the phrase there "in the event that the [Commission] intends to approve a tariff effective prior to the date on which the tariff application is made." But no such condition or qualification exists in s. 40 or the case law. The time limit about past under-recoveries applies just as much to rates to come into effect later (as rates almost always do). Parts C and D show that at length. Little in the Commission's 2006 or 2008 reasons reviews or applies the full force of the law recited here in Parts C and D. And the original purpose of the deferred gas accounts (step B(1) above) morphed in 2005 into a repeal of the restrictions in step B(2) above.

7. Interim Rates

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157 For all the reasons above, the only legitimate exception to the bar on retroactivity which I see as even arguable, is interim rates.

158 An interim order must later be replaced by a final order, and the rate will no longer be open to change. See *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 31 A.R. 541 (Alta. C.A.) , and *Calgary (City) v. Home Oil Co.* (*supra*, Part D.2) at 662-63 (D.L.R.) cited with approval by the Supreme Court of Canada in *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.), 1752h-1754f; and also see p. 17600g-1761a.

159 ATCO's October 5, 2007 argument (Tab 60, paras. 23-26, p. 9) is about *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.). But that argument acknowledges that the rates dealt with there which were subject to the "purchased gas adjustment clause" were interim. Note Calgary's reply argument of October 12, 2007 (Tab 65) pp. 6-8.

160 The term "interim" is ambiguous. But the traditional meaning is just that a full rate hearing would take too long, and the company cannot afford to go on that long under the old rates (especially in inflationary times). So a quick and approximate rate increase is put in, in the expectation these new rates will soon be replaced by more careful ones. That usefully leads to an overlapping topic, the purpose of deferral accounts.

161 In Parts D.8 and E below, I show why the rates in question here were not interim, still less permissibly interim.

8. Function of Deferred Accounts

162 The legitimate use of deferred gas accounts fits best here. I will discuss the history of these particular accounts below in Part E.

163 Is a deferred account any exception to all the law given above? Only to a very limited degree. If the Commission sets an *interim* rate which must be later adjusted and made final, then everything done in the meantime under that interim rate is tentative. That creates two needs. First, the utility company's accounts must be flagged to show that. Second, it may be informative and useful to keep track of and total any discrepancies building up in the meantime, such as the difference between anticipated gas costs and actual gas costs. There are doubtless several methods which would meet those two needs; one method is a temporary deferred account to be adjusted and closed out when the final rate is set.

164 Therefore, a legitimate deferred account is a result, not a cause; a mere tool, not an objective. Such an account does not cause or legitimize rate changes any more than fur hats cause or legitimize winter.

165 It is one thing to create a deferred account at the outset of an *interim* rate, to specify what amounts it is to record during that period, and then at the end to reconcile and clear out the account by the final rate, in the way ordained at the outset.

166 It is quite another thing to return later to a fixed *final* rate and change it after the fact by ordering premium payments by (or refunds to) consumers, and then to try to justify that by *creating* for the purpose a *new* deferred account, into which sums will be put retroactively and immediately be removed (by the premium or refund). And in substance it would be the same to find an old page still in the ledger, which had been created for a different specific purpose but long since closed out and reconciled, and then use it. In other words, retroactively to put into that page (account) the new sum and immediately take it out. That is wrong in principle and in law. It is just changing a final rate after the fact, even after the consumption. See Calgary's argument to the Commission of January 21, 2005, p. 2 (Commission Record, Tab 47).

167 Any deferred account which is mere memorandum (calculation) by itself changes nothing, excuses nothing, and is at best a result, not a cause. But if it is regarded as unallocated funds whose later ownership depends on profits or losses, then it likely violates the Court of Appeal and Supreme Court of Canada rulings in *Stores Block* and similar decisions (in Parts D.2 and D.5 above). The refund here to the consumers of the unexpected profits plainly falls within that. And the reverse, recoup-

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ing unexpected profit shortfalls in the deferred accounts, is an even bigger violation of that case law. So for those reasons, I do not see a deferred account as any licence to violate the usual legal rules barring retroactive rates or use of expense overruns too far back.

168 What if the utility (with or without the permission of the Commission) were ahead of time to set up an unrestricted all-purpose "deferred account" intended to last indefinitely and to permit any rate to be adjusted later because of old events? In my view, that would be tantamount to a purported repeal of s. 40 and the Supreme Court of Canada decisions. No one but the Legislature has power to do that.

169 ATCO suggested to the Commission that the 1987-1988 deferred gas accounts were not "closed" but "left open" (para. 28, p. 10, ATCO's October 5, 2007 argument, Comm. Record, Tab 60). The words "left open" are ambiguous. The account was still there, but the relevant years had been reconciled (cleared out) years ago. See Part E below, and the Appendix to this judgment. So in the meaningful sense, ATCO's submission was incorrect. It had some accuracy only in an irrelevant sense.

170 ATCO's same argument (para. 31, p. 11) said that past rates are not changed by the DGA. In a sense, that is of course so. But it says that "future rates reflect, *inter alia*, prior period adjustments occurring . . . in the setting of future rates." That is precisely what the *Gas Utilities Act* and Supreme Court of Canada and Court of Appeal decisions all forbid. See Parts C and D.1-8 above.

171 I stress that using a deferred account is the only real reason which the Commission gave for its 2008 Decision now under appeal.

9. Jurisdiction

172 First, I put to one side a red herring. In its reasons under appeal, the Commission states (without citing authority) that there are no fixed rules about retroactivity, only discretion. The Commission says that such issues "are not, however, jurisdictional impediments" (second last para., p. 8, A.B. p. F32). That seems to echo part of what ATCO had argued (October 12, 2007 argument, p. 4, para. 8, Record Tab 64).

173 The Commission's statement is irrelevant. Errors of law and errors of jurisdiction yield the same result on appeal (if clear and unreasonable). As shown above at great length, retroactivity violates a clear rule of law. This is an appeal, and this Court is not confined to questions of jurisdiction. It has power to reverse decisions of the Commission for errors of law: *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 29(1).

174 Now I turn to another topic. I should emphasize that the above portions of my reasons do not find want of jurisdiction or power on the part of the Commission. The preceding parts of my judgment are not a search for a power. So it cannot be a power which existed somewhere else. My suggestion is not a power, or jurisdiction. Instead, I find a legal statutory prohibition (statutory and judge-made).

175 That distinction imports two things. The first is that powers are very different from rights, and lack of power (technically called a "disability") is very different from a duty. A prohibition and a lack of power operate in different spheres entirely. A power is the *ability* to affect other people's legal position. A right or duty has to do with what the law *requires* or *forbids*.

176 One can have a power but be under a legal duty not to use it, or not to use it a certain way. See *Dias on Jurisprudence*, 53-54, 56-57, 64 (4th ed. 1976) or pp. 33-34, 36-38, 43-44 (5th ed. 1985); *Salmond on Jurisprudence* 229-30 (12th ed. 1966). An example is an agent making a contract forbidden by the principal, but within the agent's authority. Another is a divorced spouse who cuts the children out of his will contrary to a contract with his ex-wife. (Of course, we must remember that the Commission is a tribunal, not a litigant.)

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177 The second thing flowing from rights vs. powers in this case is easy to overlook. I find an applicable statutory (and precedential) prohibition, not mere non-existence of a grant of power. In other words, I rely on the presence of an actual thing, not the absence of something. Silence in one place does not contradict an express statutory provision in another (whether the issue is powers or duties).

178 Probably that is the key point. Existence of even one relevant statutory grant of power *upholds* a positive power; even one statutory provision *prevents* legal action if the statutory provision is a negative prohibition. So if the issue were whether a tribunal or person had *power* to do something, only one source of the power would be necessary, and would suffice. That the power came only from one source or location, would be irrelevant; one source or many would make no difference. If instead the issue is whether there is a statutory *prohibition*, then again it need only be found in one place. Even one such statutory provision means that the tribunal or person has *no* right, and the law forbids it to act. And the provisions on which I rely bar rates based on past losses or optimistic forecasts, not approve it.

179 But there is one difference between the two situations. A statutory grant of power permits effective action; a restriction makes action illegal.

180 An appeal from a tribunal's act will succeed if the tribunal lacked power, *or* if it contravened a statutory or judge-made legal prohibition, *or* both. So a tribunal acting within jurisdiction and with power, must be reversed if it violated a rule of law. The Court of Appeal must quash it.

181 Here the Commission had and has *power* to regulate rates, to enter into a hearing of some sort, to prescribe accounting methods, and to grant a wide variety of remedies. The remedies which the Committee granted here were familiar and within its *powers*. None of that is the issue.

182 The whole issue is what legal rules that hearing was to follow, what considerations or facts were relevant or irrelevant, times for acting, and the limits on reversing earlier decisions. Violation of those legal rules likely produced no nullity. But such violation is illegality, and permits, indeed mandates, appellate reversal.

10. Conclusion

183 This charge to the southern customers to reimburse ATCO for its various accounting deficiencies is illegal retroactive rate-making for ten reasons.

(a) It is all based on events long before the beginning of the fiscal year of the application, indeed totally outside any rate application. That contravenes all the law set out in Part C (history) and in subparts D.2 to D.6 above. If the adjustment application is even a rate application, it is a May 2004 application, but the adjustments go back to 1998 or 1999.

(b) The rates were final years ago, at the latest when the DGAs were reconciled monthly.

(c) The DGAs themselves were thus reconciled years before.

(d) The DGAs were never intended nor ordered to be used for this purpose. See Part D.8 above, and Part E below.

(e) ATCO's and even the Commission's reasoning would imply that the existence of this one continuous deferred account going back to 1987 or 1988 would leave open all future gas rates back to those years! That would be absurd.

(f) This is just errors from lax accounting, discovered belatedly.

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(g) The Commission never even discussed the implications of the fact that on its own fact statements, this is basically cost-plus charges, not fixing rates. The essence of that is at best retroactive rates, at worst no rates at all. See Parts D.2, D.3, and D.5.

(h) The Commission shuffles the risk of shortfalls in profit onto the consumers (or rather different later consumers). See Parts D.3 and D.5.

(i) The Commission's reasons seem to contain errors on their face. See the end of Part D.6.

(j) This is clear and unreasonable error of law. See Part D.9.

E. History of Deferred Gas Accounts

1. Introduction

184 Since the Commission later saw deferred accounts as a way to bypass the retroactivity rule, the nature and history of the accounts in question here is important.

185 These accounts are so old that they were set up 22 years ago for different companies which once had the gas franchises which ATCO now enjoys.

2. Creation and Purpose

186 I quote the Commission's own history of these accounts, to show that they were never intended for the present purposes, and had long since been reconciled (cleared out) for the years in question.

> DGA [deferred gas account] procedures were initially approved by the Board [now Commission] in 1987 and finally approved in 1988 **for the purpose of reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR [Gas Cost Recovery Rate], i.e. the rate it used to recover the commodity costs of gas from sales customers**. These procedures ensured that customers paid only the actual cost of gas consumed by them. In addition, they ensured that the utility neither profited from nor suffered losses in the course of selling the gas. This premise currently remains in effect for the sale of gas under a regulated rate.
>
> **Initially, reconciliation of the DGA was made on a winter and summer seasonal basis** when the application for the respective period's GCRR was filed. **In 2001, the Board approved a change in the methodology for determination of a GCRR from a seasonal to a monthly basis.** This change in methodology was implemented in April 2002. The purpose of allowing prior period adjustments in the DGA was to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred, that would have otherwise impacted the determination of a GCRR.
>
> (2005 decision at p. 8, A.B. p. F11, emphasis added)
>
> The Board concluded from this prior decision that the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas in the DGA process the differences fell to the account of the customer.
>
> It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.

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(2005 decision at p. 10, A.B. p. F13)

. . . the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years.

(2005 decision at p. 11, A.B. p. F14)

Decision E88018, dated March 18, 1988 stated:

The DGA procedure was proposed [by AG's predecessors] to be in place until gas costs could be forecast with a reasonable degree of certainty.

and in a later section also stated:

[AG's predecessor] contended that once gas prices attain some stability and can be forecast with some degree of accuracy, there likely will be no need for a DGA type account. If a DGA mechanism is not approved, [the predecessor] suggested that there would be significant swings to its earnings. [The predecessor] confirmed that when the first reconciliation proceedings are held, the Board and the Intervenors may examine not only the projected gas costs for the next reconciliation period but also those costs that are related to the period under review. (Tr. p. 488) And further:

> There's no attempt in the deferred gas account mechanism that's been proposed to bypass the Board's ability to rule on the prudence of a cost.(Tr. p. 489)

The Board concludes from this prior decision that **the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased** to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas **in the DGA process the differences fell to the account of the customer**.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas. (*id.* at pp. 9-10, A.B. F12-13, emphasis added, footnotes omitted)

In some cases, . . . prior period adjustments have been specifically approved for imbalances resulting from measurement errors that have related to periods of over one year.

(2005 decision at pp. 10-11, F13-14)

Previous to the establishment of the DGAs, a utility treated all estimates for its gas supply, both volume and price, as prospective in its General Rate Application (GRA). The establishment of the DGA provided a means by which a utility could make corrections and adjust for the actual price of the gas supplied and thereby correct the customer rates. The regulated sales rate used to recover the cost of gas was called the gas cost recovery rate (GCRR). Use of the DGA takes into account that, under a regulated gas sales rate, customers pay only the actual costs of the gas consumed by them and **the utility is neither to incur a profit nor suffer a loss** in the course of procuring and selling the gas.

In 1987 parties believed that the DGA would be a temporary feature because the continuing volatility of gas prices was not anticipated. However, contrary to these expectations, the purpose and need for the use of DGAs has continued. Initially, the DGAs were reconciled twice a year on a winter/summer seasonal basis. During the period from 1987 to March 2002, the Board allowed prior seasonal adjustments to be made in reconciliation of the DGA in respect of the

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preceding same season.

(2006 decision, p. 2, emphasis added, footnote omitted)

187 More examples are found in the Appendix.

3. Loose Later Practices

188 However, ATCO's practices later became lax in a number of respects, and sometimes small adjustments of other types were made in the deferral accounts. That had never been the purpose of the accounts. The Commission described that:

> . . . However, the Board [now Commission] is aware that, during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines. Prior period adjustments for various types of corrections have been relatively common occurrences. While the Board and interested parties may not have previously taken issue with these types of corrections, the Board is concerned that the DGA seems to have evolved into a vehicle to fix all possible errors as a cost of gas to be charged to sales customers under a regulated rate.
>
> (2005 decision at p. 10, F13)
>
> . . . **The Board believes that, normally, reconciliations were not expected to look back further than 12 months.** As the process evolved, some prior period adjustments were made which extended back further than 12 months. Under special circumstances, for example, involving measuring equipment malfunctions, prior period adjustments involving longer periods have been accepted by the Board. However, the Board considers that **the DGA was never set up with the intention of permitting all prior period accounting errors**, particularly those that would have been subject to ATCO's management and control, **to be processed and rectified through the DGA.**
>
> **The Board is troubled by the evolutional use of the DGA. The DGA replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder.** It now appears that the DGA is being treated as a catch-all for fixing errors, including those that have a long history, or appear to be the result of human error, where adequate processes have not been in place to capture and correct the problem at an early stage. Notwithstanding that some prior period adjustments previously approved by the Board may have covered an extended period of time, the Board considers that **seven years represents a significant lag presenting obvious intergenerational equity issues.**
>
> (*id.* at p. 11, F14, emphasis added)

4. Calgary's Argument

189 Calgary's factum and book of authorities cite or quote past Commission orders fully confirming the Commission's recitals quoted above (in subparts 2, 3). The appellant also shows that those accounts were promptly reconciled to allow for errors in prediction, and that the Commission gave orders replacing the interim rates initially established with final rates reflecting the reconciliations. After some years, that was done monthly (based on a three-month rolling average).

190 In written argument filed with the Commission on its 2008 application, ATCO had objected that the Commission should not see a full history of its own orders governing the deferred gas account. That objection is hard to reconcile with the arguments which ATCO had made to the Court of Appeal in the 2007 appeal (need for a fuller record). However, ATCO did not object to that evidence in this new appeal. (ATCO's original argument to the Commission that ATCO lacked time to check old Commission decisions was not made again to the Court of Appeal, and of course became moot long ago.)

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191 Old Commission decisions are not exactly evidence (not really fact) and are not much (if at all) law. They are previous process, and are all about the same utility (or its two predecessors). They are not tendered here to prove facts, but for their directions and decisions.

192 In the present appeal, the appellant Calgary, the respondent ATCO, and the Commission itself, all reproduced old Commission decisions in their various books of authorities.

193 Any court can look at its own previous decisions and records. See *Kin Franchising Ltd. v. Donco Ltd.* (1993), 7 Alta. L.R. (3d) 313 (Alta. C.A.), 316 (para. 7); *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 42. Additional authorities are found in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 45-54 (ch. 45, Pt. Z.3) (2003). I see no reason to withhold that power from a formal tribunal like this Commission (with all its powers). See the *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 11, and cf. *Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106, [2009] 7 W.W.R. 509 (Sask. Q.B.). Especially when the tribunal is an ongoing regulator with constant applications over the rates and accounts of the same handful of companies. This Commission has looked at its previous decisions for many many years. A classic decision of the Supreme Court of Canada says that the Commission can get its information in whatever mode it sees fit: *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), 193. And if the Commission can take notice, why cannot the Court of Appeal take such judicial notice on appeal from the Commission?

194 Furthermore, it was ATCO itself which began all this, and its application to that end expressly submitted that the Commission should make the "adjustments" (surcharges) to consumers by looking back to the Commission's old approval of DGAs. (See ATCO's application of May 31, 2004, § 4.1 "History", present Commission Record Tab 1, pp. 4-5.)

195 Therefore, it is not surprising that the Commission did *not* decline to look at any previous decisions by itself. Instead it recited and quoted a number of them in its 2005 original decision, and in its 2008 decision reconsidering that. The Commission did *not* say (in 2005 or 2008) that it (or Calgary) lacked evidence about this.

196 The Commission's public website gives ready access to some decisions from 1996 to 1999, and many thereafter. Quicklaw also reports its decisions from 2002. Print copies of all Commission decisions (to 1999) are available in one Law Society Library and (to 2008) in the Alberta Government Library. (The University of Alberta law library has some Commission decisions.) The Commission will supply copies on request. So the text of past decisions is not open to doubt. Anyone can access them to check the accuracy of quotations or summaries.

197 Therefore, the Commission was correct to inspect its past decisions on DGAs. I have amplified my recitals of this history by quoting two or three additional passages from old Commission decisions (pointed out by ATCO in its October 12, 2007 argument, Tab 64, p. 3, quoting decision 2005-036). I have also described some additional passages from Calgary's argument of October 5, 2007 to the Commission (Tab 61): see an Appendix to this judgment. The description has been checked against the original Commission decisions.

198 In any event, the old controversy about taking notice of the former Commission orders has no effect on the result, because those additional references to past orders reinforce but do not change the factual picture painted by the Commission itself in the 2008 decision now under appeal.

F. The Bell Telephone Decision of the Supreme Court of Canada

1. Introduction

199 Counsel cited *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, [2009] 2 S.C.R. 764 (S.C.C.). It involved telephone companies' infrastructure under federal legislation.

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2. Legislation

200 The Canadian Radio-television and Telecommunications Commission no longer regulates telephones under traditional rate-regulating legislation. Now it must follow Canada's *Telecommunications Act*, 1993 c. 38, whose objectives, duties, and powers are vastly broader, and cover more than telephones.

201 I will outline some features of the *Telecommunications Act*, which have no equivalent in Alberta's 1999-2007 legislation applicable to gas utilities or their rates (the *Alberta Energy and Utilities Board Act*, the *Gas Utilities Act*, and the *Public Utilities Act*.)

202 The *Telecommunications Act* imposes on the C.R.T.C. a mandatory duty to implement a number of very wide and deep policy objectives when it exercises any of its powers or performs any of its duties (s. 47(a)). Among those mandatory objectives are to

- safeguard, enrich and strengthen the social and economic fabric of Canada . . . (s. 7(a))
- enhance . . . efficiency and competitiveness, at the national and international levels . . . (s. 7(c))
- promote . . . ownership and control . . . by Canadians. (s. 7(d))
- promote the use of Canadian transmission facilities . . . within Canada . . . and points outside . . . (s. 7(e))
- foster increased reliance on market forces . . . (s. 7(f))
- stimulate research and development . . . and encourage innovation . . . (s. 7(g))
- respond to the economic and social requirements of users . . . (s. 7(h))
- contribute to the protection of . . . privacy (s. 7(i))

203 The C.R.T.C. also has unusual statutory powers. It can require any telecommunications company to provide any service in any manner (s. 35(1)) or to construct any facility (s. 42(1)). And (most apposite here), the Commission can require the company to "contribute . . . to a fund to support continuing access by Canadians." (s. 46.5(1)). Therefore the C.R.T.C. has positive proactive duties going far beyond fair prices (rates), reliability of service and supply, or even safety, of one company.

3. The Supreme Court's Decision

204 The Supreme Court of Canada (and the Federal Court of Appeal) confirmed the C.R.T.C.'s decision to follow a scheme which it ordered a few years before. That was not to reduce excessive phone rates (for competition reasons), but instead to hold a portion of the revenue in profitable urban markets in a special account to be later spent on infrastructure improvements to benefit consumers.

4. Is the Supreme Court of Canada Decision Distinguishable?

205 I have concluded that the *Bell* decision can and should be distinguished here, for the following eight reasons.

(a) Different Legislative Objectives and Powers and History

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206 The Supreme Court of Canada itself expressly distinguished Alberta's *Gas Utilities Act* and said that the federal C.R.T.C. has broader objectives and power than does Alberta's Commission. See the *Bell* case, paras. 17, 22, 36, 39-43, 45-48, 50-53, 55, 57, 72, 74-75 and 77. The Supreme Court of Canada even distinguishes decisions about the C.R.T.C. in earlier years when that tribunal was governed by the more traditional type of rate-of-return regulation like the Alberta system. (In those days the old system was mandated for telephone companies by the *Railway Act*.) See the *Bell* decision at paras. 39-46, and 62. See subpart 2 above. To the same effect is para. 41 of the Federal Court of Appeal decision (2008 FCA 91 (F.C.A.)) which the Supreme Court of Canada affirmed.

207 In particular, the Supreme Court of Canada pointed out that traditional rate regulation is a two-way contest between the interests of the utility company and its particular consumers. The C.R.T.C. (on the other hand) has to meet objectives for all Canadians in all parts of Canada, e.g. fostering competition: see paras. 45 and 47. What is in issue in the present dispute between Calgary and ATCO is the limited traditional type of rate-making power. See the precise passages in Court of Appeal and Supreme Court of Canada decisions, describing and mandating that Alberta scheme, quoted in Parts C and D above.

208 The present ATCO appeal is about a price (rate or revenue) fair as between the utility and the consumer; nothing more. Though the *Bell* decision's origin had a little to do with such questions, the actual *Bell* decision was about increasing access and competition, and dictating to the various telephone companies compulsory long-term infrastructure competition.

209 See also subpart (b) below, on "price-cap regulation".

210 There is an even more striking distinction between the C.R.T.C. and Alberta's Commission. For most of its history, the Commission has been separate from the Energy Resources Conservation Board. The rate regulator, the Alberta Utilities Commission, is now again separate. The broader policy about the industry and its physical form is no part of the Commission's functions, as illustrated by the Genesee power plant decision: *Alberta Power Ltd. v. Alberta (Public Utilities Board)* (1990), 102 A.R. 353 (Alta. C.A.). Though the Energy Resources Conservation Board had decided that the new second Genesee power plant was needed and gave a permit to build it, after the plant was built, the Public Utilities Board (now the Commission) could and properly did exclude it from the rate base as not "used or required to be used".

211 Alberta's two tribunals were temporarily merged effective February 15, 1995 (by 1994 c. A-19.5). But the merger ended effective January 1, 2008 (by 2007 c. A-37.2), before the decision under appeal. Furthermore, the *legislation* for the two tribunals remained separate even during the period of the merged tribunal, 1995-2007.

212 See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (S.C.C.), (paras. 9-19).

(b) Different Purposes for Setting Up Deferred Accounts

213 I must stress that in *Bell*, the C.R.T.C. was using an entirely new type of utility regulation (invented in the United Kingdom in the 1980s). It is called price-cap regulation. Unlike traditional rate (price) regulation, this does *not* fix rates; in order to give incentives, it merely sets a maximum and makes sophisticated allowances for the result. The difference between the two types of regulation is explained by Netz, *loc. cit. supra*, at 417 ff., especially p. 425-28.

214 One cannot just look at the title of an account, or fixate upon a name like "deferred". One must find the purpose and operation of the account in question. See Part D.8 above.

215 From the outset, the account described in the *Bell* decision was designated expressly to decide later who would own or use the money contained in it. See the Supreme Court of Canada decision, paras. 6, 8-9, 22 (and the Federal Court of Appeal's paras. 43 and 52.) That surplus sum was expected to arise, and did arise, from continuing to charge high urban rates, despite a new theoretical or tentative cap on rates. The difference (surplus) was to be collected and held in the new fund (ac-

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count) (para. 6). That was a scheme very different from the Alberta fixed-rate scheme. Too many such statements in the Supreme Court's *Bell* decision emphasize the fund's very different purpose to list them fully; some are found in its paras. 37, 57, 61, 63, 64, 66, and 67.

216 The Alberta accounts (DGAs) had very different purposes. They came from an old short-term system for handling very unpredictable raw material costs (gas field prices). It seems to have been an accident, oversight or happenstance (not a Commission order) that they lasted for years. See the detailed history above in Part E.

(c) Alberta Balance Was Largely the Product of a Single "Adjustment" Entered After the Fact Years Later, not an Ongoing Thing

217 Alberta's deferral account had already been reconciled years earlier, i.e. settled. I doubt that it still "existed" in any real sense in 2004, still less that the 1998 or 1999 parts did. Revisiting the old Alberta deferral account was just a device invented years later when a longstanding and ongoing error was finally discovered: see Parts B.1, 2 and 3(a), and D.3 and D.8 above. Here the Commission let the utility use an old account which had been set up for one temporary purpose to be used for a totally different purpose than that contemplated before.

218 Conversely, in the *Bell* case, the C.R.T.C. managed an existing fund of money growing steadily. The C.R.T.C. largely and in principle confirmed its original purpose.

(d) Encumbered Fund vs. Deficit

219 The *Bell* judgment and C.R.T.C. order were a final decision about ownership of surplus funds which previously had encumbered or provisional ownership. See the Supreme Court of Canada decision, paras. 63, 65.

220 However, ATCO's account was on balance (and entirely in the south) a deficit, not a surplus. A deficit cannot have an owner, nor be encumbered. Still less was any deficit intended or ordered to have either here.

(e) Limited Term in Bell

221 The *Bell* account had a definite beginning and end, forecast at the outset (2001-7 but later ended early, in 2006). See the Supreme Court of Canada decision, para. 9, cf. paras. 10-13.

222 In *Bell*, the rates were confirmed and adjusted once and for all, to prevent any further accumulations of reserve funds. The fund (account) was to be closed out and cease to exist: see the Supreme Court of Canada decision, paras. 13 and 15 end.

223 But the Alberta Commission's 2005, 2006, and 2008 decisions allowed the old gas companies' deferred accounts to be available in future to do it all again (though usually not beyond two years). See Part B.3 above.

(f) The Bell Rates Were in Effect Interim, Whereas ATCO's Were Final

224 This is stated by the Federal Court of Appeal's decision, paras. 50-52, and by the Supreme Court of Canada's decision, para. 61.

(g) Bell was Confined to Certain Geographic Areas

225 The funds in the telephone companies' deferred accounts were confined to excess revenue in geographic areas where more competition was needed. Structural changes were needed and so the C.R.T.C. authorized them. Those areas were resi-

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dential local services in non-high-cost serving areas basket (mostly urban): see *Bell* paras. 4, 6, 10. But in the present ATCO appeal, all (later) gas customers simply got a retroactive rate increase (or refund).

(h) Bell Refunds were Incidental

226 In principle, the C.R.T.C. ordered the telephone companies to spend all the reserved segregated funds on service improvements (handicapped services and more broad-band capacity). Refunds to customers were just incidental amounts which could not be spent: see the Supreme Court of Canada's decision, paras. 14, 15, and 20.

227 But the only use or remedy even suggested before Alberta's rate-making Commission was a second charge (or refund) to the customers for the same old gas long since consumed.

G. Other Distinguishable Decisions

228 The Commission's decision and some factums cited *Epcor Generation Inc. v. Alberta (Energy & Utilities Board)*, 2003 ABCA 374, 346 A.R. 281 (Alta. C.A.) (one J.A.). Note that a power to change rates retroactively there was conceded; here it is in issue. The rate was agreed there to be interim (paras. 12, 14, 15), not final as here. Calgary's argument to the Commission in the present case (October 12, 2007, Tab 65, p. 2) quotes statements by the Commission in *Epcor* confirming that. The proposed dispute on which leave was sought was only over details, indeed unique sharing ratios (*Epcor*, para. 13), not retroactivity itself as here (paras. 9-10). That motion dealt with a defined time and topic only: the 2000 pool price of electricity. And many issues were factual (paras. 23 ff.). It was a decision by only one Justice of Appeal on a motion for leave, not an appeal. *Epcor* is not on point.

229 One other case cited is *Newfoundland (Board of Commissioners of Public Utilities), Re* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.). This was a split decision. It involved Newfoundland legislation on regulation of electric utilities. Except for the broad outlines, that legislation bears no resemblance to Alberta legislation regulating gas activity rates.

230 The majority of the Newfoundland Court of Appeal held that setting a rate of return for a utility was not just a step in calculations leading to fixing rates (prices). They held that it set a ceiling for rate of return, and if the later actual rate of return exceeded that ceiling, the Commission could later adjust rates to offset that. Such a rate-of-return ceiling enforced later is emphatically not the Alberta practice or legislation. Nor can I reconcile that view with the Supreme Court of Canada's later decision in the *Stores Block* case, *supra*. Indeed the Newfoundland Court of Appeal largely proceeded on its own interpretation of its legislation, and scarcely mentioned any of the Supreme Court of Canada decisions cited above (and none of the Alberta Court of Appeal decisions). I do not find the majority decision persuasive. It is distinguishable, in any event.

H. Standard of Review

1. Conflicting Precedents on This

231 First, the Supreme Court of Canada held that the standard of review was correctness: *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (S.C.C.), (paras. 9-19). Then it gave a somewhat different decision, as follows. Whether the Commission has a given power is determined on appeal on the standard of correctness, but if it is found to have that power, the actual method used to carry out the power attracts a more deferential approach: "*Stores Block*" case, *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (S.C.C.) .

232 I am reluctant to try to create my own *Pushpanathan* analysis here, and then use it to decide which Supreme Court of Canada decision to follow, or to try to distinguish one of the Supreme Court of Canada decisions.

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2. Standard Does Not Matter Here

233 Nor need I do so here, for it would not affect the result. Even on the reasonableness tests, the decision of the Commission under appeal is unreasonable and does not survive. That is so for the reasons given in Part D.10 ("Conclusion") and Part F above. None of those topics is discretionary. The legal limits here are statutory or based on binding precedent, and go to the very nature of the process. The errors are fundamental, and ones of basic principle. Parts D.4, D.5 and D.6 show that. The Commission cannot be acting reasonably when it departs from the fundamental principles laid down by the Legislature and the courts for the Commission to follow. It did depart seriously here, and its decision is unreasonable. See also Part D.9 above.

I. Conclusion

234 It is now about 12 years since the accounting errors in question began, and about six years since ATCO sought relief from the Commission. The Commission has held three hearings on the topic and has declined to hear more evidence. I would fear denying justice by delaying justice, were we merely to tell the Commission to reconsider the topic in yet a fourth hearing.

235 I would have allowed the appeal, and vacated so much of the Commission's 2005 and 2008 orders as allows the (southern) recovery of former costs or expenses. I would have directed the Commission under the *Alberta Utilities Commission Act* s. 29(14), that the law requires it to dismiss that part of ATCO's application entirely. There was no appeal, nor leave to appeal from the (northern) rebate to consumers.

236 I would have awarded costs of the appeal to the City appellant payable by ATCO. There should be no costs to or from the Commission, even though its factum went rather far into the merits. But I would caution the Commission that doing that endangers its position in various respects. See *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684 (S.C.C.), 708-09, paras. 36-37.

J. Procedure

237 The appeal book contains a fuzzy scan of the three Commission decisions in question, and of some court orders. In future, documents should either be printed from electronic copies, or sharp photostats should be made from originals. In contrast, the Commission's filed record has perfect clarity.

238 The Commission filed one copy of its record, as directed by s. 29(10) of the *Alberta Utilities Commission Act*. Rule 537.1 then contemplates that counsel for the appellant will file multiple copies of Extracts of Key Evidence to supplement the Appeal Digest, reproducing only those parts of the full record that are needed (by all parties) to dispose of the appeal. If the appellant overlooks including something, the respondent can also file Extracts of Key Evidence. No party filed any extracts here. A panel contains three justices, usually based in two different cities, so the absence of individual sets of Extracts hinders the efficient disposition of the appeal.

239 The appellant's citations of court cases included no reported citation. That violates the Consolidated Practice Directions, para. D.1(b). In future it would help this Court to have at least one publisher's (or website) citation (as well as the neutral cite).

Appendix — Appendix

More History of Deferred Gas Accounts

N.W.U.L. = Northwestern Utilities

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C.W.N.G. = Canadian Western Natural Gas

1987 Orders E87051 and E87052 (July 3): Commission approved in principle applications by ATCO's predecessors to establish a Deferred Gas Accounting and Reconciliation procedures, to be in place until cost of buying gas could be forecast with reasonable certainty.

1988 Decision E88018 and Order E88019 (March 18): Commission held (on N.W.U.L. and C.W.N.G. rates) that the Gas Cost Recovery Rate was interim and would change at least two times/year. Seasonal rates were to be established, but the Commission would monitor the reconciliations more frequently: monthly. The actual review and finalization would be done two times each year. The cumulative actual balance in the DGA on each March 31 and each October 31 would be refunded to or collected from customers through the GCRRs in the ensuing season.— Thereafter in 1988 further Commission orders did reconcile those accounts two times/year for each gas company.

1989-1991 Further Commission orders also in effect reconciled the accounts. Decision C90041 (December 7, 1990) confirmed the system. Some of these orders said that the rates remained subject to review. Interim Order— E89020 (April 4, 1989) said that DGA balances should be minimized, and so any significant increase in gas supply costs between normal application dates should lead to an application by C.W.N.G. for a change in the GCRR.

1994-1997 By Decision 94072 (October 28, 1994) DGA reconciliations for C.W.N.G. were to be annual, not semi-annual. GCRRs were from time to time approved. Order U97010 (January 16, 1997) quoted and reiterated Order 89020 (of April 4, 1989), which in turn summarized Order 88018. Order U97052 (May 7, 1997) re C.W.N.G. said that the DRA calculation method meant that under- or over-recovery in one-half year cumulated in the DGR would be collected or refunded in the next one-half year's period, given normal weather and accuracy of sales forecasts. This would substantially maintain intergenerational equity. Order U97053 (May 7, 1997) for N.W.U.L. gave final approval of the company's GCRR for 2-1/2 months. Decisions U97129 and U97130 (October 31, 1997): Commission reconciled C.W.N.G.'s and N.W.U.L.'s actual gas cost recoveries.

1998 Decision U98067 (April 13) accepted C.W.N.G.'s reconciliation and refused requests to re-examine the DGA process. Order U98071 (May 4) confirmed C.W.N.G.'s summer GCRR as final.

1999-2000 Various interim orders. Order U2000-161 (April 17) made ATCO Gas-South's GCRR final. More interim orders made for both companies. Order U2000-308 (October 27) deferred acceptance of ATCO North's (former N.W.U.L.'s) reconciliation and set a new interim rate.

2001 Order U2001-001 (January 24) left GCRR rates for ATCO South as interim. Order U2001-002 (January 24) was similar for ATCO North. Order U2001-061 (March 28) was similar; as were Orders 2001-062 (March 28) and U2001-448 (December 14).— In 2001 the Commission held a hearing re methods to set the GCRR. Decision 2001-075 (October 30) (on methodology) described the existing procedures (reconciliation two times/year) (pp. 3-4), but noted the DGA balances had become large. The Commission decided (p. 64) to switch to monthly written reconciliations to minimize DGA balances. A three-month rolling period would be used for reconciliations.

2002 Decision 2002-026 (April 18) (p. 3) recited the Commission's duty and power to fix "the appropriate final share of the deferral account balances due from each customer class". On p. 4 the Commission said it had been hoped under- and over- recoveries in the DGA would balance out but unexpectedly they had not. But in principle, rates should be established prospectively.

2003 Decision 2003-106 (December 18) (p. 135) said that for the DGA and reconciliation the GCFR would be revised monthly.

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FN1 "Board" means the regulator of Alberta's gas industry which has, over time, been the Public Utilities Board, the Energy and Utilities Board and the Alberta Utilities Commission.

FN2 Calgary did not challenge the adjustments the Board approved to ATCO's northern territory DGA arising from transportation imbalances for the 1998 - 2004 period (Board factum at para. 14). Accordingly, 1999 (not 1998, as was stated in the leave decision) is the appropriate starting point.

END OF DOCUMENT

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

1989 CarswellNat 586

Bell Canada v. Canadian Radio-Television & Telecommunications Commission

CDN. RADIO-TELEVISION & TELECOMMUNICATIONS COMM. v. BELL CAN. et al.

Supreme Court of Canada

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

Heard: Febuary 21, 1989
Judgment: June 22, 1989
Docket: Doc. No. 20525

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Kenneth Engelhart , for Canadian Business Telecommunications Alliance.

Michel Ryan , for C.N.C.P. Telecommunications

Andrew Roman and Robert Horwood, for National Anti-Poverty Organization.

Subject: Public

Communications Law — Regulatory commissions — C.R.T.C. (Canadian Radio-Television and Telecommunications Commission) — Powers and duties.

Appeals — Statutory appeal on questions of law and jurisdiction — No scope for curial deference towards agency's decisions -- Specialization of duties requiring respect for decision on matters within expertise — Power of C.R.T.C. to revisit interim rate orders being question of jurisdiction not within C.R.T.C.'s expertise — Method of rectifying unjust or unreasonable rates within realm of C.R.T.C.'s expertise.

Jurisdiction -- C.R.T.C. making order for one-time credit to rectify excessive revenues found to have been earned by Bell Can. as result of interim orders — C.R.T.C. having authority to revisit interim orders and to rectify adverse ef-

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

fects of such orders as part of final order -- Method of rectification for C.R.T.C. provided not unreasonable -- One-time credit for existing customers reasonable albeit not perfect compensation.

In March 1984, BC applied to the C.R.T.C. for a general rate increase. Because of the time it was going to take to deal finally with that application resulting in allegedly severe prejudice to BC's fiscal situation, the C.R.T.C. responded favourably to its request for an interim rate increase. This was set at 2 per cent effective January 1, 1985. In the order allowing the interim rate increase, the C.R.T.C. indicated that it was subject to re-evaluation as part of any final order. Notwithstanding the concerns over profitability that had prompted the interim order, BC's financial situation improved dramatically thereafter. This prompted another interim order by the C.R.T.C. in 1985 which resulted in a roll back of BC's rates (also expressed to be interim) to those in place prior to the March 1984 application. Then, BC itself sought to withdraw its application for a general rate increase. In effect, the C.R.T.C. rejected this application in that it proceeded to a hearing into the financial situation of BC. The upshot of this was a finding that BC's revenues during 1985 and 1986 were $206 million more than were justified in terms of what was held to be an appropriate rate of return. As a result, the C.R.T.C. ordered that BC redistribute those excess revenues to certain classes of customer in the form of a one-time credit.

Under the Railway Act , BC's tolls were subject to approval by the C.R.T.C. as well as revision from time to time. Section 340(1) required that such tolls be "just and reasonable". Subsection 5 of that section also conferred on the C.R.T.C. authority to make orders with respect to tolls "[i]n all other matters not expressly provided for" in the rest of the section.

Under the National Transportation Act , s. 52 the C.R.T.C. was given authority to deal of its own motion with matters assigned to it under the Railway Act , while by s. 60(2) it was given power to make interim orders and reserve further directions for a subsequent hearing. Section 66 then clothed the C.R.T.C. with authority to review, rescind, change, alter or vary its orders and decisions. Finally, under s. 68(1), provision was made for an appeal with leave on law and jurisdiction from C.R.T.C. orders to the Federal Court of Appeal.

BC appealed against the order and the Federal Court of Appeal (Hugesson J. dissenting) allowed the appeal and set aside the credit to customers ((1987), [1988] 1 F.C. 296). The C.R.T.C. then obtained leave to appeal to the Supreme Court of Canada.

Held:

The appeal was allowed. The order of the C.R.T.C. was reinstated.

Where the relevant legislation created a right of appeal to a Court from the decision of an administrative tribunal, there was no place for curial deference to decisions of that tribunal associated with decisions of tribunals protected by privative or finality clauses. Moreover, while even here, the concept of specialization of duties indicated the need for some measure of deference to decisions of the C.R.T.C. within its area of expertise, that did not apply to issues of jurisdiction such as the scope of the authority of the C.R.T.C. to issue interim decisions. On such issues, the Court was entitled to simply disagree with the Tribunal. In contrast, however, on the issue of the choice of the most appropriate remedy from among those available to achieve just and reasonable rates, the C.R.T.C. was entitled to a measure of deference. This, rather than the interpretation of the Railway Act and the National Transportation Act , was what the C.R.T.C. had been established to do.

The statutory scheme of the powers conferred on the C.R.T.C. indicated that its authority to make interim orders was to be interpreted so as to facilitate its task of ensuring that telephone rates were always "just and reasonable".

It was a necessary incident of the authority to regulate tolls and tariffs that the C.R.T.C. could regulate BC's level of revenues and its return on its equity.

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

While the C.R.T.C.'s order of a one-time credit was not strictly retrospective in that it did not actually replace or substitute the rates that were charged during the interim period, nevertheless, it was retrospective in the sense that it was designed to remedy the excessive rates charged during that period. However, even accepting this characterization of the order, the C.R.T.C. had jurisdiction to make it. Indeed, the authority to review interim orders retrospectively was the key distinction between interim orders and final orders, given the authority of the C.R.T.C. to at any time review final orders prospectively. It was inherent in the nature of interim orders that they could, as here, be revised and modified in a retrospective manner by a final decision. This conclusion also followed from the fact that interim rate orders were not based on the same criteria as final orders. The intent of interim rate orders was not to afford a preliminary adjudication on the merits, but rather to relieve the applicant from the deleterious effects of lengthy proceedings. Such was the nature of the order made here. Moreover, throughout, the C.R.T.C. had indicated its intention as part of the final order to review the rates charged during the interim period.

While, unlike other statutes, the power to review interim orders retrospectively was not set out expressly in the legislation, it clearly existed by virtue of necessary implication from the statutory scheme and purpose. To deny the C.R.T.C. this authority would be to sterilize its powers through an overly technical interpretation. More specifically, the whole thrust of the legislation was in the direction of ensuring that rates charged were at all times just and reasonable. To deny the C.R.T.C. the authority to undo unjust or unreasonable interim rate orders would defeat that purpose. In this respect, it mattered not that the regulatory scheme involved was one involving positive approval on application rather than negative disallowance after complaint. The addition of a power to make interim orders as part of a positive approval scheme conferred on the C.R.T.C. the flexibility to make such an order from the date of the application had been made but, as a corollary, also involved the authority to remedy as part of the final order any discrepancy between the rate of return yielded by the interim order and that allowed in the final decision.

Given the C.R.T.C.'s authority to revisit the period during which the interim orders were in effect, this necessarily involved the authority to remedy any unjustness or unreasonableness in those interim rates. The statutory basis for such an order was to be found in the breadth of s. 340(5).

In so doing, the C.R.T.C. was not confined to the extra revenues generated by the 2 per cent interim rate increase but rather had authority with respect to all of BC's revenues generated from the date of the commencement of the proceedings.

While the order did not necessarily benefit the customers who were actually charged excessive rates, nevertheless, the nature and extent of such orders were within the C.R.T.C.'s jurisdiction and the particular order, while not effecting perfect compensation, was clearly reasonable given the difficulties associated with actually compensating all those who had paid excessive rates.

Cases considered:

A.U.P.E. v. Bd. of Governors of Olds College, [1982] 1 S.C.R. 923 -- referred to

B.C. Electric Railway Co. v. Public Utilities Comm. of B.C., [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 -- considered

Canadian Pacific Ltd. v. Canadian Transport Commn. (1987), 79 N.R. 13 (Fed. C.A.) -- considered

City of Calgary v. Madison Natural Gas Co. (1959), 19 D.L.R. (2d) 655 (Alta. C.A.) -- distinguished

Coseka Resources Ltd. v. Saratoga Processing Co.; Petrogas Processing Ltd. v. Pub. Utilities Bd. (1981), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541 (C.A.) -- applied

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Douglas Aircraft Co. of Can. v. McConnell, [1980] 1 S.C.R. 245, 29 N.R. 109, 23 L.A.C. (2d) 143n, 99 D.L.R. (3d) 385, (sub nom. Douglas Aircraft Co. v. U.A.W., Loc. 1967) 79 C.L.L.C. 14,221 – referred to

Eurocan Pulp & Paper Co. and B.C. Energy Commn., Re (1978), 87 D.L.R. (3d) 727 (B.C.C.A.) – considered

McCreary v. Greyhound Lines of Can. Ltd. (1987), 87 C.L.L.C. 17,018, 78 N.R. 192, 8 C.H.R.R. D/4184, 38 D.L.R. (4th) 724 (Fed. C.A.) – referred to

N.B. Liquor Corp. v. C.U.P.E., Loc. 963, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209 – distinguished

Northwestern Utilities Ltd. v. Edmonton, [1929] S.C.R. 186, [1929] 2 D.L.R. 4 – considered

Nova v. Amoco Can. Petroleum Co., [1981] 2 S.C.R. 437, [1981] 6 W.W.R. 391, 38 N.R. 381, 128 D.L.R. (3d) 1, 32 A.R. 384 – referred to

O.P.S.E.U. v. Forer (1985), 52 O.R. (2d) 705, 15 Admin. L.R. 145, 12 O.A.C. 1, 23 D.L.R. (4th) 97 – referred to

Ottawa (City) v. Ottawa Professional Firefighters' Assn. (1987), 58 O.R. (2d) 685, 24 Admin. L.R. 213, 19 O.A.C. 197, 36 D.L.R. (4th) 609 – referred to

R. v. Bd. of Commrs. of Public Utilities (N.B.); Ex parte Moncton Utility Gas Ltd. (1966), 60 D.L.R. (2d) 703 (N.B. C.A.) – distinguished

Trans Alaska Pipeline Rate Cases, Re (1978), 436 U.S. 631 – considered

U.S. v. Fulton (1986), 475 U.S. 657 – referred to

Statutes considered:

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

s. 64

National Transportation Act, R.S.C. 1985, c. N-20 –

s. 47

s. 49

s. 52

s. 60(2)

s. 61

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

s. 66

s. 68(1)

Natural Gas Utilities Act, S.A. 1944, c. 4 –

s. 35a(3)

Public Utilities Act, R.S.B.C. 1948, c. 277 –

s. 16(1)(b)

Public Utilities Act, R.S.N.B. 1952, c. 186.

Public Utilities Board Act, R.S.A. 1970, c. 302 [now R.S.A. 1980, c. P-37] –

s. 52(2)

Railway Act, R.S.C. 1985, c. R-3 –

s. 334

s. 335

s. 336

s. 337

s. 338

s. 339

s. 340

Regulations considered:

National Transportation Act, R.S.C. 1985, c. N-20 C.R.T.C. Telecommunications Rules of Procedure, SOR/795-554 -- Parts III, IV and VII

APPEAL from Federal Court of Appeal, reported at (1987), [1988] 1 F.C. 296 , allowing an appeal from an order of the C.R.T.C.

The judgment of the Court was delivered by *Gonthier J.*:

1 The present case is an appeal against a decision of the Federal Court of Appeal [reported at (1987), [1988] 1 F.C. 296], which quashed one of the orders made by the appellant in Telecom Decision C.R.T.C. ["Decision"] 86-

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

17. The impugned order compelled the respondent to distribute $206 million in excess revenues earned in the years 1985 and 1986 through a one-time credit to be granted to certain classes of customers. The respondent does not contest the factual findings on which Decision 86-17 is based, nor does it claim that this order would unduly prejudice its financial position. None of the other orders made in Decision 86-17 are challenged.

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

I – The Facts

3 On March 28, 1984, the respondent applied for a general rate increase under Part VII of the C.R.T.C. Telecommunications Rules of Procedure, SOR/79- 554 [under the *National Transportation Act* , R.S.C. 1985, c. N-20], which provides for a summary public process to deal with special applications. The respondent claimed that the Canadian Government's restraint program restricting rate increases of federally regulated utilities to 5 per cent and 6 per cent was sufficient justification to dispense with the normal procedure for general rate increase applications set out in Part III of the C.R.T.C. Telecommunications Rules of Procedure. In Decision 84-15, the appellant rejected this application on the ground that the respondent had failed to use the appropriate procedure as set out in Part III of these rules. However, the appellant indicated that if the respondent was to suffer financial prejudice as a result of the delays involved in preparing for the more complex procedure set out in part III, it could always apply for interim relief pending a hearing and a decision on the merits, at pp. 8-9:

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

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

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

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

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

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

> In determining the amount of interim rate increases required under the circumstances, the Commission has taken into account the following factors:
>
> 1) While the company stated that an interest coverage ratio of 4.0 times is required, the Commission regards the maintenance of the coverage ratio of 3.8 times, projected by the Company for 1984, as sufficient for the purposes of this interim decision.
>
> 2) With regard to the level of ROE ['return on equity'], the Commission is of the view that, for 1985, *and subject to review in the course of its consideration of the Company's general rate increase application in the fall of 1985* , 13.7% is appropriate for determining the amount of rate increases to be permitted pursuant to this interim increase application.
>
> 3) With regard to the Company's 1985 expense forecasts, the Commission notes that the inflation factor used by the Company is higher than the current consensus forecast of the inflation rate for 1985 and considers that Bell's forecast of its 1985 Operating Expenses could be overestimated by approximately $25 million.
>
> Taking the above factors into account, the Commission has decided that an interim rate increase of 2% for all services in respect of which rate increases were requested by the Company in the interim application is appropriate at this time. This increase is expected to generate additional revenues of $65 million from 1 January 1985 to 31 December 1985. *To permit the review of the Company's 1985 revenue requirement by the Commission at the fall 1985 public hearing, Bell is directed to file its 4 June 1985 general rate increase application on the basis of two test years, 1985 and 1986* .

(Emphasis added.) The reasons set out in the appellant's decision indicate that the interim rate increase was calculated on the basis of financial information provided by the respondent without placing this information under the scrutiny normally associated with hearings made under Part III of the C.R.T.C. Telecommunications Rules of Procedure. Furthermore, the appellant clearly expressed the intention to review this interim rate increase in its final decision on the respondent's application for a general rate increase, on the basis of financial information for the years 1985 and 1986. Given the content of the appellant's final decision, it is also important to note that the 2 per cent interim rate increase was calculated on the assumption that the respondent's return on equity for 1985 should be 13.7 per cent subject to review in the final decision.

5 The respondent's financial situation later improved thereby reducing the necessity to proceed with an early hearing for the purpose of obtaining a general and final rate increase. By a letter dated March 20, 1985, the respondent asked for this hearing to be postponed to February 10, 1986, suggesting however that the 2 per cent interim increase be given immediate final approval. In C.R.T.C. Telecom Public Notice 1985-30 dated April 16, 1985, the appellant granted the postponement but refused to grant the final approval requested by the respondent without further investigation into this matter. The Commission added that it would monitor the respondent's financial situation on a monthly basis and ordered the filing of monthly statements, at p. 4:

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

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

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

6 After a review of the July financial information filing ordered in C.R.T.C. Telecom Public Notice 1985-30, the appellant asked the respondent to provide reasons why the interim rate increase of 2 per cent should remain in force given its improved financial situation. The respondent was unable to convince the appellant that this interim increase remained necessary to avoid financial deterioration and was accordingly ordered to file revised tariffs effective as of September 1, 1985, at pp. 4-5 of Decision 85-18:

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

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

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

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

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

. . . . .

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

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

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

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

It is important to note that the evidence and the arguments presented by the interested parties as well as interveners were carefully scrutinized by the appellant, at pp. 77-92 of Decision 86-17. It is for all practical purposes impossible to engage in such a meticulous and painstaking analysis of all relevant facts when faced with an application for interim relief. Finally, it is also useful to note that the permissible return on equity of 13.7 per cent allowed by the appellant in its interim decision, Decision 84-28, was increased to 13.75 per cent in Decision 86-17. Thus, the appellant realized that the interim rates approved for 1985 yielded greater rates of return than initially anticipated, and that the rate of return actually recorded for that year even exceeded the greater allowable rate of return fixed in the final decision, Decision 86-17. Such differences between projected and actual rates of return are common and certainly call for a high level of flexibility in the exercise of the appellant's regulatory duties.

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

> *Concerning the excess revenues for the years 1985 and 1986, the Commission directs that the required adjustments be made by means of a one-time credit to subscribers of record, as of the date of this decision, of the following local services* : residence and business individual, two-party and four-party line services; PBX trunk services; centrex lines; enhanced exchange-wide dial lines; exchange radio-telephone service;

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> service-system service and information system access line service. *The Commission directs that the credit to each subscriber be determined by pro-rating the sum of the excess revenues for 1985 and 1986 of $206 million in relation to the subscriber's monthly recurring billing for the specified local services provided as of the date of this decision* . The Commission further directs that the work necessary to implement the above directives be commenced immediately and that the billing adjustments be completed by no later than 31 January 1987. Finally, the Commission directs the company to file a report detailing the implementation of the credit by no later than 16 February 1987.
>
> *The Commission considers that 1987 excess revenues are best dealt with Gthrough rate reductions to be effective 1 January 1987* .

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

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

II – The Issue and the Arguments Raised by the Parties

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

> 1. Whether the appellant had the legislative authority to review the revenues made by the respondent during the period when interim rates were in force;
>
> 2. Whether the appellant had jurisdiction to make an order compelling the respondent to grant a one-time credit to its customers.

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

> 1. The *Railway Act* , R.S.C. 1985, c. R-3 and the *National Transportation Act* , R.S.C. 1985, c. N-20 grant the appellant the power to review the period during which a regulated entity was allowed to charge interim rates, for the purpose of comparing the revenues earned during this period to the appropriate level of revenues set in the final decision;
>
> 2. The power to make a one-time credit order is necessarily ancillary to the power to review the period during which interim rates were charged, and the appellant has jurisdiction to determine the most efficient method of providing a remedy in cases where excess revenues were made.

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

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

> 1. The power to set tolls and tariffs does not include the power to review and make orders with respect to the respondent's level of revenues;
>
> 2. The appellant has no power to make a one-time credit order with respect to revenues earned as a result of having charged rates which the respondent, by virtue of the *Railway Act* , was obliged to charge, whether these rates were set by an interim order or by a final order.

14 Counsel for the National Anti-Poverty organization ("N.A.P.O.") has also argued that the appellant's decisions concerning the interpretation of statutes which grant them jurisdiction to deal with certain matters are entitled to curial deference and cannot be reviewed unless they are patently unreasonable. This argument raises the issue of the scope of review allowed by s. 68(1) of the *National Transportation Act* and must be dealt with prior to any analysis of the relevant statutory provisions claimed to be the source of the appellant's jurisdiction to make the one-time credit order found in Decision 86-17.

15 The present case raises difficult questions of statutory interpretation and it will therefore be necessary to examine the relevant provisions of the *wRailway Act* and the *National Transportation Act* before moving to a detailed analysis of the decision of the Federal Court of Appeal and the arguments raised by the parties.

III – Relevant Legislative Provisions

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

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

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

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

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

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

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

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

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

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

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

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

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

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

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

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

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ders:

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

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

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

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

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

IV – The Decision of the Court Below

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

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

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

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

28 Hugessen J. dissented on the basis that, within the statutory framework set out in the *Railway Act* and the *National Transportation Act* , all orders whether final or interim can, by virtue of ss. 60(2) and 66 of the *National Transportation Act* , be modified by a further prospective order; thus, the proposed rule that interim orders can only be modified by a further prospective order would, in Hugessen J.'s opinion, effectively eliminate any distinction between final and interim orders and defeat the legislator's intention to provide the appellant with a distinct and independent power to make interim orders. In order to differentiate interim orders from final orders, Hugessen J. was of the opinion that the appellant in this Court must have the power to fix just and reasonable rates as of the date at which interim rates came into effect. Thus, only interim rates can be modified in a retrospective manner by a final order. Hugessen J. then stated that the interim rates in force in 1985 and 1986 must not be divided into the previous rate and the interim rate increase of 2 per cent: the resulting rate must be viewed as interim in its entirety because all the rates charged after January 1, 1985 were authorized by interim orders. Finally, Hugessen J. stated that the one-time credit order was a valid exercise of the power to set just and reasonable rates as of January 1, 1985 and that the choice of the appropriate remedy was an "'administrative matter' properly left for the Commission's determination". Hugessen J. also noted that the appellant's order was in substance, though not in form, a "matter relating to tolls and tariffs" within the meaning of s. 340(5) of the *Railway Act* .

V – Analysis

29

a) Curial deference towards the decisions of the C.R.T.C.

30 N.A.P.O. argues that the appellant's decisions are entitled to "curial deference" because of their national importance, and that these decisions should not be overturned unless they are patently unreasonable. N.A.P.O. cites the following cases as authority for this proposition: *N.B. Liquor Corp. v. C.U.P.E., Loc. 963*, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 24 N.R. 341, 79 C.L.L.C. 14,209 ("C.U.P.E."); *Douglas Aircraft Co. of Can. Ltd. v. McConnell*, [1980] 1 S.C.R. 245, 29 N.R. 109, 23 L.A.C. (2d) 143n, 99 D.L.R. (3d) 385, (sub nom. *Douglas Aircraft Co. v. U.A.W., Loc. 1967)* 79 C.L.L.C. 14,221 ; *A.U.P.E. v. Bd. of Governors of Olds College*, [1982] 1 S.C.R. 923 ; *O.P.S.E.U. v. Forer* (1985), 52 O.R. (2d) 705, 15 Admin. L.R. 145, 12 O.A.C. 1, 23 D.L.R. (4th) 97 ; *Ottawa (City) v. Ottawa Professional Firefighters' Assn.* (1987), 58 O.R. (2d) 685, 24 Admin. L.R. 213, 19 O.A.C. 197, 36 D.L.R. (4th) 609 ; *McCreary v. Greyhound Lines of Can. Ltd.* (1987), 87 C.L.L.C. 17,018, 78 N.R. 192, 8 C.H.R.R. D/4184, 38 D.L.R. (4th) 724 (Fed. C.A.) ; and *Canadian Pacific Ltd. v. Canadian Transport Commn.* (1987), 79 N.R. 13 (Fed. C.A.) ("Canadian Pacific").

31 With the exception of the *Canadian Pacific* case, supra, all these cases involved judicial review of decisions which were either protected by a privative clause or by a provision stating that no appeal lies therefrom. Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, Courts of original

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. Thus, this Court has decided in the *C.U.P.E.* case, supra, that judicial review cannot be completely excluded by statute and that Courts of original jurisdiction can always quash a decision if it is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237, S.C.R.). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the *C.U.P.E.* case, Dickson J., as he then was, described the legislator's intention as follows, at pp. 235-36 (S.C.R.):

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

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

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

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

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

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

> On the appeal from that decision to this court, the appellant advanced essentially the same grounds and arguments which it had submitted to the R.T.C. As to the first ground, I am of the opinion that the R.T.C. correctly interpreted the two items from the tariff and since its view was confirmed by the Review Com-

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> mittee, that Committee did not commit an error in construction. No useful purpose would be served by my restating the reasons of the R.T.C. for interpreting the items as they did and I respectfully adopt them as my own. *This court should not interfere with an interpretation made by bodies having the expertise of the R.T.C. and the Review Committee in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong* . Neither situation prevails in this case.

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

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

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

b) The power to regulate Bell Canada's revenues

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

37 The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity. This has been recognized by this Court interpreting provisions similar to s. 340(1) of the *Railway Act* which prescribe that "[a]ll tolls shall be just and reasonable". In *B.C. Electric Railway Co. v. Public Utilities Comm. of B.C.*, [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 , Locke J. said the following about para. 16(1)(b) of the *Public Utilities Act* , R.S.B.C. 1948, c. 277, which provided that in fixing a rate the Public Utility Commission of British Columbia should take into consideration the "fair and reasonable return upon the appraised value of the property of the public utility used ... to enable the public utility to furnish the service", at p. 848 (S.C.R.):

> I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant *these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered* . Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask.

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

(Emphasis added.) In *Northwestern Utilities Ltd. v. Edmonton*, [1929] S.C.R. 186, [1929] 2 D.L.R. 4 , Lamont J. described the relevant factors in the determination of what are just and reasonable rates as follows, at p. 190 (S.C.R.):

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

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

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

c) The power to revisit the period during which interim rates were in force

i) Introduction

39 As indicated above, the appellant has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

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

ii) The distinction between interim and final orders

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

42 In his dissenting reasons, Hugessen J. points out quite accurately that if interim orders are simply orders made

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

43 Both the appellant and Hugessen J. rely heavily on *Coseka Resources Ltd. v. Saratoga Processing Co.; Petrogas Processing Ltd. v. Pub. Utilities Bd.* (1981), 16 Alta. L.R. (2d) 60, 126 D.L.R. (3d) 705, 31 A.R. 541 (C.A.) ("*Coseka* ") for the proposition that interim decisions must be distinguished from final decisions in that they may be reviewed in a retrospective manner. This distinction is based on the fact that interim decisions are made subject to "further direction" as prescribed by s. 60(2) of the *National Transportation Act* which, for convenience, I cite again:

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

(Emphasis added.) The statutory scheme analysed by the Alberta Court of Appeal in *Coseka* , supra, is substantially similar to though more clearly prospective than the statutory scheme established by the *Railway Act* and the *National Transportation Act* . Furthermore, s. 52(2) of the *Public Utilities Board Act* , R.S.A. 1970, c. 302, is identical in wording to s. 60(2) of the *National Transportation Act* . Laycraft J.A., as he then was, cited with approval by Hugessen J., wrote the following with respect to the possibility of revisiting the period during which interim rates were in force for the purpose of deciding whether those interim rates were in fact just and reasonable, at pp. 717-718 (D.L.R.):

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

(Emphasis added.)

44 I agree with Hugessen J. and with the reasons of Laycraft J.A. in *Coseka* where he made a careful review of previous cases. The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect, as well as any discrepancy between the interim order and the final order, may be reviewed and remedied by the final

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order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act* , final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.

45 The importance of distinguishing final orders from interim orders is illustrated by the case of *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655 (Alta. C.A.) ("*Madison* "). In *Madison* , supra, the Public Utility Board (the "Board") was faced with an application by the City of Calgary for the reimbursement of amounts earned in excess of the rates of the rates of return allowed in orders 34 and 41 for the sale of natural gas. The Board had allowed a rate of return of 7 per cent but, due to its lack of useful information to predict the effect of rates on the actual financial performance of the regulated entity, the rates per volume fixed by the Board actually yielded greater profits than anticipated. The Board refused to grant the demands made in the application because it felt it had no jurisdiction to revisit periods during which rates approved in a final decision were in force. This decision was confirmed by the Court of Appeal on the basis that, contrary to arguments made by the City of Calgary, orders 34 and 41 were final orders not governed by s. 35a (3) of the *Natural Gas Utilities Act* , S.A. 1944, c. 4, which read as follows:

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

Order 34 provided that the price was set at 9 cents per mcf and that "if it should turn out that there is a surplus, it can be dealt with when the time arrives" which led to the argument that this order was in fact an interim order. Johnson J.A. dismissed this argument in the following terms, at pp. 662-663:

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

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

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

47 Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

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

48 In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of the following criteria which, for convenience, I cite again, at p. 9:

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

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

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

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

51 The respondent argues that the power to revisit the period during which interim rates were in force cannot exist within the statutory scheme established by the *Railway Act* and the *National Transportation Act* because these statutes do not grant such a power explicitly, unlike s. 64 of the *National Energy Board Act* , R.S.C. 1985, c. N-7. The powers of any administrative tribunal must of course be stated in its enabling statute, but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although Courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the *Railway Act* and the *National Transportation Act* , the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.

52 I am bolstered in my opinion by the fact that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power to make

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appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.

53 It is interesting to note that, in the context of statutory schemes which did not provide any power to set interim rates, the United States Supreme Court has held that regulatory agencies have both the power to impose interim rates and the power to make reimbursement orders where the interim rates are found to be excessive in the final order: see U.S. v. Fulton (1986), 475 U.S. 657 . at pp. 669-671; *Re Trans Alaska Pipeline Rate Cases* (1978), 436 U.S. 631, where Brennan J. wrote the following comments, at pp. 654-656:

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

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

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

iii) The relevance of the distinction between positive approval and negative disallowance schemes of rate regulation

55 Much was said in argument about the difference between positive approval schemes and negative disallowance schemes, with respect to the power to act retrospectively. The first category includes schemes which provide that the administrative agency is the only body having statutory authority to approve or fix tolls payable to utility companies; these schemes generally stipulate that tolls shall be "just and reasonable" and that the administrative agency has the power to review these tolls on a proprio motu basis, or upon application by an interested party. The second category includes schemes which grant utility companies the right to fix tolls as they wish, but also grant users the right to complain before an administrative agency which has the power to vary those tolls if it finds that they are not "just and reasonable". It has generally been found that negative disallowance schemes provide the power to make orders which are retroactive to the date of the application, by the ratepayer who claims that the rates are not "just and reasonable". On the other hand, positive approval schemes have been found to be exclusively prospective in nature and not to allow orders applicable to periods prior to the final decision itself. A full discussion of this issue was made by Estey J. in *Nova v. Amoco Can. Petroleum Co.*, [1981] 2 S.C.R. 437 at 450-451, [1981] 6 W.W.R. 391, 38 N.R. 381,

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128 D.L.R. (3d) 1, 32 A.R. 384 , and I do not propose to repeat or to criticize what was said in that case with respect to the power to review rates approved by a previous final order. I am of the opinion that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* is a positive approval scheme inasmuch as the respondent's rates are subject to approval by the appellant. However, the *Nova* case, supra, only dealt with the power to review rates approved in a previous final decision and, as I have said before, entirely different considerations apply when interim rates are reviewed.

56 It has often been said that the power to review its own previous final decision on the fairness and the reasonableness of rates would threaten the stability of the regulated entity's financial situation. In *R. v. Bd. of Commrs. of Public Utilities (N.B.); Ex parte Moncton Utility Gas Ltd.* (1966), 60 D.L.R. (2d) 703 , Ritchie J.A., as he then was, wrote the following comments on this issue, at p. 729:

> The distributor contends that in the absence of any express limitation or restriction or an express provision as to the effective date of any order made by the board, the jurisdiction conferred on the board by the Legislature includes jurisdiction to make orders with retrospective effect. Reliance is placed on *Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129 which it is contended must be applied when interpreting s. 6(1) of the Act.
>
> The clear object of the Act is to ensure stability in the operation of public utilities and the maintenance of just, reasonable and non-discriminatory rates. That object would be defeated if the board having, on November 14, 1962, made an order fixing the rates to be paid by the distributor for natural gas purchased from the producer, reduced those rates on February 19, 1966, more than three years later, and directed that the reduced rates be effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

and further at p. 732:

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

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

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

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38 Admin. L.R. 1, 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, J.E. 89-994

58 Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in obiter in *Re Eurocan Pulp & Paper Co. and B.C. Energy Commn.* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.) , with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect, so as to achieve just and reasonable rates throughout that period.

iv) The power to make a one-time credit order

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

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

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

VI – Conclusion

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

63 I would allow the appeal and confirm the appellant's decision, with costs in all Courts.

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Appeal allowed. Decision of Canadian Radio-Television Telecommunications Commission affirmed.

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2009 SCC 40, J.E. 2009-1708

2009 CarswellNat 2717

Bell Canada v. Canadian Radio-Television & Telecommunications Commission

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

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

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

Supreme Court of Canada

Abella J., Binnie J., Charron J., Cromwell J., Deschamps J., Fish J., LeBel J., McLachlin C.J.C., Rothstein J.

Heard: March 26, 2009
Judgment: September 18, 2009
Docket: 32607, 32611

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Proceedings: affirming *Bell Canada v. Canadian Radio-Television & Telecommunications Commission* (2008), 80 Admin. L.R. (4th) 159, 2008 CarswellNat 544, (sub nom. *Consumers Association of Canada v. Canadian Radio-Television & Telecommunications Commission)* 375 N.R. 124, 2008 FCA 91, 2008 CarswellNat 2390, 2008 CAF 91 (F.C.A.)

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Michael Koch, Dina F. Graser, for Respondent, MTS Allstream Inc.

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No one for Respondents, Société en commandite Télébec, Arch Disability Law Centre, Bell Aliant Regional Communications, Limited Partnership, Saskatchewan Telecommunications

Subject: Public

Communications law --- Regulatory commissions – C.R.T.C. (Canadian Radio-television and Telecommunications Commission) -- Powers and duties

In 2002, Canadian Radio-televison and Telecommunications Commission (CRTC) imposed price caps on Bell Canada and other incumbent local exchange carriers -- Rather than ordering reduction in rates for certain class of subscribers, CRTC directed carriers to add those amounts to deferral accounts -- In 2006, CRTC directed carriers to use funds in deferral accounts for certain specified initiatives and to rebate any balance remaining -- Consumer groups appealed part of decision directing initiatives – Appeal dismissed – CRTC was not limited in setting rates to traditional economic considerations – CRTC was required by s. 47 of Telecommunications Act to consider policy objectives in s. 7 -- Creation of deferral accounts and directing initiatives promoted listed policies – Consumer groups appealed – Appeal dismissed – CRTC properly considered objectives set out in s. 7 when it ordered use of deferral accounts for expansion of broadband infrastructure and consumer credits – Improving accessibility services and broadband expansion in rural and remote areas was exactly what CRTC was mandated to do by Act – CRTC had statutory authority to set just and reasonable rates, to establish deferral accounts, and to direct disposition of funds in those accounts.

Communications law --- Telecommunication Services – Telephone companies – Regulation of rates

In 2002, Canadian Radio-televison and Telecommunications Commission (CRTC) imposed price caps on Bell Canada and other incumbent local exchange carriers – Rather than ordering reduction in rates for certain class of subscribers, CRTC directed carriers to add those amounts to deferral accounts -- In 2003, CRTC approved rates for those subscribers on final basis – In 2006, CRTC directed carriers to use funds in deferral accounts for certain specified initiatives and to rebate any balance remaining -- Bell appealed from part of decision directing rebate – Appeal dismissed -- Decision was not beyond CRTC's jurisdiction as retrospective rate making – 2002 decision entitled CRTC to make order crystallizing Bell's contingent obligation and directing particular expenditure – Rebate was secondary alternative to proposed initiative but was possible use of funds -- Rebate did not reduce rates determined to be just and reasonable by 2003 decision -- Bell appealed – Appeal dismissed -- CRTC's creation and use of deferral accounts for broadband expansion and consumer credits was authorized by Telecommunications Act – Section 7 set out broad telecommunications policy objectives and s. 47(a) directed CRTC to implement policy objectives when exercising its statutory authority – Balancing interests of consumers, carriers and competitors, and pursuing those policy objectives by exercising its rate-setting power was what s. 47 required CRTC to do in setting rates – CRTC acted reasonably and in accordance with Telecommunications Act when it ordered subscriber credits and approved use of funds for broadband expansion -- There was no inappropriate cross-subsidization between residential telephone services and broadband expansion -- Section 38 set out broad telecommunications policy objectives and directed CRTC to implement them in exercise of its statutory authority.

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The Canadian Radio-televison and Telecommunications Commission (CRTC) imposed price caps for certain services on Bell Canada and other incumbent local exchange carriers in 2002. The CRTC directed carriers to add those amounts to deferral accounts rather than ordering reduction in rates for a certain class of subscribers. In 2003, the CRTC approved rates for those subscribers on a final basis. In 2006, the CRTC directed carriers to use the funds in the deferral accounts for certain specified initiatives and to rebate any balance remaining. Bell appealed from part of the decision directing the rebate. The appeal was dismissed. The Federal Court of Appeal found that the decision was not beyond the CRTC's jurisdiction as it was retrospective rate making. The 2002 decision entitled the CRTC to make the order crystallizing Bell's contingent obligation and directing particular the expenditure. The rebate was a secondary alternative to the proposed initiative, but was a possible use of the funds. The rebate did not reduce rates determined to be just and reasonable by the 2003 decision. Bell Canada appealed.

Held: The appeal was dismissed.

Per Abella J. (McLachlin C.J.C., Binnie, Charron, Cromwell, Deschamps, Fish, LeBel, and Rothstein JJ. concurring): The CRTC properly considered the objectives set out in s. 7 when it ordered the use of the deferral accounts for the expansion of broadband infrastructure and consumer credits. Improving accessibility services and broadband expansion in rural and remote areas through deferral accounts was exactly what the CRTC was mandated to do by the Telecommunications Act. The CRTC had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts.

The CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits was authorized by the Telecommunications Act. Section 7 of the Act set out broad telecommunications policy objectives and s. 47(a) directed the CRTC to implement the policy objectives when exercising its statutory authority. Balancing the interests of consumers, carriers and competitors, and pursuing those policy objectives by exercising its rate-setting power was what s. 47 required the CRTC to do. The CRTC acted reasonably and in accordance with Telecommunications Act when it ordered subscriber credits and approved the use of funds for broadband expansion. There was no inappropriate cross-subsidization between residential telephone services and broadband expansion. Section 38 set out broad telecommunications policy objectives and directed the CRTC to implement them in the exercise of its statutory authority. A wide range of methods were available to the CRTC in determining what is a just and reasonable rate under s. 27. The CRTC also had the power to force carriers to use any accounting method under s. 37.

The encumbered revenues in the deferral accounts were not the variation of final rates. It was always known that the balances of those accounts was subject to the CRTC's direction. A deferral account would have no meaning if the CRTC did not also have the power to order its disposition. The CRTC had the authority to order the disposition of the accounts in the exercise of its rate setting power as long as that exercise was reasonable.

Cases considered by *Abella J.*:

> *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) -- referred to
>
> *Barrie Public Utilities v. Canadian Cable Television Assn.* (2003), 2003 CarswellNat 1268, 2003 SCC 28, 2003 CarswellNat 1226, [2003] 1 S.C.R. 476, 304 N.R. 1, 49 Admin. L.R. (3d) 161, 225 D.L.R. (4th) 206 (S.C.C.) -- distinguished
>
> *Bell Canada v. Canadian Radio-Television & Telecommunications Commission* (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) -- distinguished

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Canadian National Railway v. Bell Telephone Co. (1939), [1939] S.C.R. 308, 50 C.R.C. 10, [1939] 3 D.L.R. 8, 50 C.R.T.C. 10, 1939 CarswellNat 51 (S.C.C.) – considered

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

Edmonton (City) v. 360Networks Canada Ltd./London Connect Inc. (2007), 2007 CarswellNat 1838, 2007 CAF 106, [2007] 4 F.C.R. 747, 361 N.R. 124, 2007 CarswellNat 574, 2007 FCA 106 (F.C.A.) – considered

Edmonton (City) v. 360Networks Canada Ltd./London Connect Inc. (2007), 2007 CarswellNat 3564, 2007 CarswellNat 3565, 380 N.R. 394 (note), [2007] 3 S.C.R. vii (note) (S.C.C.) – referred to

Epcor Generation Inc. v. Alberta (Energy & Utilities Board) (2003), 346 A.R. 281, 320 W.A.C. 281, 2003 CarswellAlta 1813, 2003 ABCA 374 (Alta. C.A.) – referred to

General Increase in Freight Rates, Re (1954), 76 C.R.T.C. 12, 1954 CarswellNat 306 (S.C.C.) – considered

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

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

Newfoundland (Board of Commissioners of Public Utilities), Re (1998), 1998 CarswellNfld 150, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 164 Nfld. & P.E.I.R. 60, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 507 A.P.R. 60 (Nfld. C.A.) – referred to

Telecom, Re (2002), 2002 CarswellNat 5491, 2002 CarswellNat 5492 (C.R.T.C.) -- referred to

Telecom, Re (2003), 2003 CarswellNat 6055, 2003 CarswellNat 6056 (C.R.T.C.) -- referred to

Telecom, Re (2005), 2005 CarswellNat 6973, 2005 CarswellNat 6974 (C.R.T.C.) – referred to

Telecom, Re (2006), 2006 CarswellNat 6317, 2006 CarswellNat 6318 (C.R.T.C.) – referred to

Telecom, Re (2008), 2008 CarswellNat 1061, 2008 CarswellNat 1062 (C.R.T.C.) – referred to

Telecom Decision CRTC 93-9 (July 23, 1993), Doc. 93-9 (C.R.T.C.) – considered

Telecom Decision CRTC 94-19 (1994), 1994 CarswellNat 3191, 1994 CarswellNat 3192 (C.R.T.C.) – considered

Telecom Decision CRTC 97-9 (1997), 1997 CarswellNat 3411, 1997 CarswellNat 3412 (C.R.T.C.) – re-

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ferred to

Telecom Decision CRTC 2003-18 (2003), 2003 CarswellNat 6094, 2003 CarswellNat 6095 (C.R.T.C.) – referred to

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

Statutes considered:

Railway Act, R.S.C. 1985, c. R-3

Generally -- referred to

s. 340(1) – referred to

Telecommunications Act, S.C. 1993, c. 38

Generally -- referred to

s. 7 – considered

s. 7(a) – considered

s. 7(b) – considered

s. 7(c) – considered

s. 7(f) – considered

s. 7(g) – considered

s. 7(h) – considered

s. 24 – considered

s. 25(1) – considered

s. 27 – considered

s. 27(1) – considered

s. 27(3) – considered

s. 27(5) – considered

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s. 32(g) – considered

s. 35(1) – referred to

s. 37 – referred to

s. 37(1) -- considered

s. 37(1)(a) – considered

s. 42(1) – referred to

s. 46.5(1) [en. 1998, c. 8, s. 6] – referred to

s. 47 – considered

s. 47(a) -- considered

s. 52(1) -- considered

APPEAL of judgment reported at *Bell Canada v. Canadian Radio-Television & Telecommunications Commission* (2008), 80 Admin. L.R. (4th) 159, 2008 CarswellNat 544, *(sub nom. Consumers Association of Canada v. Canadian Radio-Television & Telecommunications Commission)* 375 N.R. 124, 2008 FCA 91, 2008 CarswellNat 2390, 2008 CAF 91 (F.C.A.).

***Abella J.*:**

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

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

Background

3 The CRTC issued its landmark "Price Caps Decision"[FN1] in May 2002. Exercising its rate-setting authority, the CRTC established a formula to regulate the maximum prices charged for certain services offered by incumbent local exchange carriers ("ILECs"), who are primarily well-established telecommunications carriers.

4 As part of its decision, the CRTC ordered the affected carriers to create separate accounting entries in their

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

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

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

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

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

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

> The Commission anticipates that an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures. The Commission also anticipates that the deferral account would be drawn down to mitigate rate increases for residential service that could result from the approval of exogenous factors or when inflation exceeds productivity. Other draw downs could occur, for example, through subscriber rebates or the funding of initiatives that would benefit residential customers in other ways.
>
> [Emphasis added; para. 412.]

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

9 The Price Caps Decision was to apply to services offered by Bell Canada, TELUS, and other affected carriers for the four-year period from June 1, 2002 to May 31, 2006. In a decision in 2005, the CRTC extended this price regulation regime for another year to May 31, 2007[FN2] . The CRTC allowed some draw-downs of the deferral accounts following the Price Caps Decision that are not at issue in these appeals.

10 In March 2003, in two separate decisions, the CRTC approved the rates for Bell Canada and TELUS[FN3] . In the Bell Canada decision, the CRTC appeared to contemplate the continued operation of the deferral accounts established in the Price Caps Decision. It ordered, for example, that certain tax savings be allocated to the deferral accounts:

> The Commission, in Decision 2002-34, established a deferral account in conjunction with the application of a basket constraint equal to the rate of inflation less a productivity offset to all revenues from residential services in non-HCSAs. The Commission considers that AT&T Canada's proposal to allocate the Ontario GRT and the Quebec TGE tax savings associated with all capped services to the price cap deferral account is inconsistent with that determination. The Commission finds that Bell Canada's proposal to include the Ontario GRT and Quebec TGE tax savings associated with the residential local services in non-HCSAs basket in the price cap deferral account is consistent with that determination.
>
> [Emphasis added; para. 32.]

11 On December 2, 2003, Bell Canada sought the approval of the CRTC to use the balance in its deferral account to expand high-speed broadband internet service to remote and rural communities. In response, on March 24, 2004, the CRTC issued a public notice requesting submissions on the appropriate disposition of the deferral accounts[FN4] . Pursuant to this notice, the CRTC conducted a public process whereby proposals were invited for the disposition of the affected carriers' deferral accounts. The review was extensive and proposals were received from numerous parties.

12 This led to the release of the "Deferral Accounts Decision" on February 16, 2006[FN5] . In this decision, the CRTC directed how the funds in the deferral accounts were to be used. These directions form the foundation of these appeals.

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

> The attachment to this Decision provides preliminary estimates of the deferral account balances as of the end of the fourth year of the current price cap period in 2006. The Commission notes that the deferral account balances are expected to be very large for some ILECs. It also notes the concern that allowing funds to continue to accumulate in the accounts would create inefficiencies and uncertainties.
>
> . . . . .
>
> Accordingly, the Commission considers it appropriate not only to provide directions on the disposition of all the funds that will have accumulated in the ILECs' deferral accounts by the end of the fourth year of the price cap period in 2006, but also to provide directions to address amounts recurring beyond this period in

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> order to prevent further accumulation of funds in the deferral accounts. The Commission will provide directions and guidelines for disposing of these amounts later in this Decision.
>
> [Emphasis added; paras. 58 and 60.]

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

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

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

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

18 The CRTC also explained that while customer credits would be consistent with the objectives set out in s. 7 of the *Telecommunications Act* and with the Price Caps Decision, these disbursements should not be given priority because broadband expansion and accessibility services provided greater long-term benefits. Nevertheless, credits effectively balanced the interests of the "three main stakeholders in the telecommunications markets" (at para. 115), namely customers, competitors and carriers. It concluded that credits did not contradict the purpose of the deferral accounts, and contrasted one-time credits with a reduction of rates. In its view, credits, unlike rate reductions, did not have a sustained negative impact on competition in these markets, which was the concern the deferral accounts were set up to address (at paras. 112-16).

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

20 On January 17, 2008, the CRTC issued another decision dealing with the carriers' proposals to use their defer-

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ral account balances for the purposes set out in the Deferral Accounts Decision[FN6] . Some carriers' plans were approved in part, with the result that only a portion of their deferral account balances was allocated to those projects. Consequently, the CRTC required them to submit, by March 25, 2008, a plan for crediting the balance in their deferral accounts to residential subscribers in non-HCSAs.

21 Bell Canada, as well as the Consumers' Association of Canada and the National Anti-Poverty Organization, appealed the CRTC's Deferral Accounts Decision to the Federal Court of Appeal. The Deferral Accounts Decision was stayed by Richard C.J. in the Federal Court of Appeal on January 25, 2008. The decision requiring further submissions on plans to distribute the deferral account balances was also stayed by Sharlow J.A. pending the filing of an application for leave to appeal to this Court on April 23, 2008. Both stay orders were extended by this Court on September 25, 2008. The stay orders do not apply to the funds allocated for the improvement of accessibility for individuals with disabilities.

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

Analysis

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

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

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

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

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

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

> 7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives
>
> (a) to facilitate the orderly development throughout Canada of a telecommunications system that

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serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

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

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

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

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

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

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

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

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

. . . . .

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

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

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

29 The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

. . . . .

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> **32.** The Commission may, for the purposes of this Part,
>
> . . . . .
>
> (*g*) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.

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

> **27.** (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.
>
> . . . . .
>
> (3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.
>
> . . . . .
>
> (5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.
>
> . . . . .
>
> **52.** (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.

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

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

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

33 This statutory overview assists in dealing with the preliminary issue of the applicable standard of review. Although the Federal Court of Appeal accepted the parties' position that the applicable standard of review was correct-

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ness, Sharlow J.A. acknowledged that the standard of review could be more deferential in light of this Court's decision in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 S.C.R. 650 (S.C.C.), at paras. 98-100. This was an invitation, it seems to me, to clarify what the appropriate standard is.

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

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

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

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

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

39 This brings us to the nature of the CRTC's rate-setting power in the context of this case. The predecessor statute for telecommunications rate-setting, the *Railway Act*, R.S.C. 1985, c. R-3, also stipulated that rates be "just and reasonable" (s. 340(1)). Traditionally, those rates were based on a balancing between a fair rate for the consumer and a fair return on the carrier's investment. (See, e.g., *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at pp. 192-93 and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 65.)

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

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

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

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

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

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

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

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

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

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

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

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approach was adopted by the CRTC in a decision preceding the Price Caps Decision[FN7] .

46 The CRTC has interpreted these provisions broadly and identified them as responsive to the evolved industry context in which it operates. In its "Review of Regulatory Framework" decision[FN8] , it wrote:

> The Act ... provides the tools necessary to allow the Commission to alter the traditional manner in which it regulates (i.e., to depart from rate base rate of return regulation).
>
> . . . . .
>
> In brief, telecommunications today transcends traditional boundaries and simple definition. It is an industry, a market and a means of doing business that encompasses a constantly evolving range of voice, data and video products and services.
>
> . . . . .
>
> In this context, the Commission notes that the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service.
>
> [Emphasis added; pp. 6 and 10.]

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

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

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

49 I see nothing in this conclusion which contradicts the ratio in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 (S.C.C.). In that case, the issue was whether the CRTC could make an order granting cable companies access to certain utilities' power poles. In that decision, the CRTC had relied on the Canadian telecommunications policy objectives to inform its interpretation of the relevant provisions. In deciding that the language of the *Telecommunications Act* did not give the CRTC the power to grant access to the power poles, Gonthier J. for the majority concluded that the CRTC had inappropriately interpreted the Canadian telecommunications policy objectives in s. 7 as power-conferring (at para. 42).

50 The circumstances of *Barrie Public Utilities* are entirely distinct from those at issue before us. Here, we are dealing with the CRTC setting rates that were required to be just and reasonable, an authority fully supported by

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unambiguous statutory language. In so doing, the CRTC was exercising a broad authority, which, according to s. 47, it was required to do "with a view to implementing the Canadian telecommunications policy objectives ...". The policy considerations in s. 7 were factors that the CRTC was required to, and did, take into account.

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

52 In holding that the Board had no such authority, Bastarache J. relied in part on the conclusion that the Board's statutory power to make orders or impose conditions in the public interest was insufficiently precise to grant the ability to distribute sale proceeds to ratepayers (at para. 46). The ability of the Board to approve an asset sale, and its authority to make any order it wished in the public interest, were necessarily limited by the context of the relevant provisions (at paras. 46-48 and 50). It was obliged too to adopt a rate base rate of return method to determine rates, pursuant to its governing statute (at paras. 65-66).

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

54 The fact that deferral accounts are at issue does nothing to change this framework. No party objected to the CRTC's authority to establish the deferral accounts themselves. These accounts are accepted regulatory tools, available as a part of the Commission's rate-setting powers. As the CRTC has noted, deferral accounts "enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year"[FN9] . They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another. While the CRTC's creation and use of the deferral accounts for broadband expansion and consumer credits may have been innovative, it was fully supported by the provisions of the *Telecommunications Act*.

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

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

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

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

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

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

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

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

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

63 In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*Epcor Generation Inc. v. Alberta (Energy & Utilities Board)*, 2003 ABCA 374, 346 A.R. 281 (Alta. C.A.), at para. 12, and *Newfoundland (Board of*

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Commissioners of Public Utilities), Re (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

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

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

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

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

68 It is also worth noting that in approving Bell Canada's rates, the CRTC ordered it to allocate certain tax savings to the deferral accounts[FN10] . Neither the CRTC, nor Bell Canada, could possibly have expected that the company would be able to keep that portion of its rate revenue representing a past liability for taxes that it was in fact not currently liable to pay or defer.

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

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

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

72 As previously noted, the deferral accounts were created and disbursed pursuant to the CRTC's power to approve just and reasonable rates, and were an integral part of such rates. Far from rendering these rates inappropriate, the deferral accounts *ensured* that the rates were just and reasonable. And the policy objectives in s. 7, which the CRTC is always obliged to consider, demonstrate that the CRTC need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. The statute contemplates a comprehensive national telecommunications framework. It does not require the CRTC to atomize individual services. It is for the CRTC to determine a tolerable level of cross-subsidization.

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

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

75 In deciding to allocate the deferral account funds to improving accessibility services and broadband expansion in rural and remote areas, the CRTC had in mind its statutorily mandated objectives of facilitating "the orderly development throughout Canada of a telecommunications system that serves to ... strengthen the social and economic fabric of Canada" under s. 7(*a*); rendering "reliable and affordable telecommunications services ... to Canadians in both urban and rural areas" under s. 7(*b*); and responding "to the economic and social requirements of users of telecommunications services" pursuant to s. 7(*h*).

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

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

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

Appeal dismissed.

FN1. *Telecom, Re* CRTC 2002-34 [2002 CarswellNat 5491 (C.R.T.C.)].

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FN2. *Telecom, Re* CRTC 2005-69 [2005 CarswellNat 6973 (C.R.T.C.)].

FN3. *Telecom, Re* CRTC 2003-15 [2003 CarswellNat 6055 (C.R.T.C.)], and *Telecom Decision CRTC 2003-18* [2003 CarswellNat 6094 (C.R.T.C.)]

FN4. Telecom Public Notice CRTC 2004-1

FN5. *Telecom, Re* CRTC 2006-9 [2006 CarswellNat 6317 (C.R.T.C.)].

FN6. *Telecom, Re* CRTC 2008-1 [2008 CarswellNat 1061 (C.R.T.C.)].

FN7. *Telecom Decision CRTC 97-9* [1997 CarswellNat 3411 (C.R.T.C.)].

FN8. *Telecom Decision CRTC 94-19* [1994 CarswellNat 3191 (C.R.T.C.)].

FN9. *Telecom Decision CRTC 93-9* (July 23, 1993), Doc. 93-9 (C.R.T.C.).

FN10. Telecom Decision CRTC 2003-15, at para. 32.

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Canadian Radio-television and Telecommunications Commission / Conseil de la radiodiffusion et des télécommunications canadiennes

Canada

Telecom Decision CRTC 2010-302

Ottawa, 21 May 2010

Application to review and vary Telecom Order 2009-497 regarding 800/888 Carrier Identification service

File number: 8662-R2-200911744

In this decision, the Commission determines that (1) the higher rates for the 800/888 Carrier Identification service approved on a final basis in Telecom Order 2009-497 for the period from 12 September 2006 to 13 August 2009 are not just and reasonable; and (2) the lower final rates approved in Telecom Order 2009-497 are just and reasonable for that period, and, accordingly, are to be applied for that period. The incumbent local exchange carriers are to reimburse or credit relevant competitors accordingly.

Introduction

1. The Commission received an application by Rogers Communications Inc. (RCI), dated 19 August 2009, requesting that the Commission review and vary Telecom Order 2009-497 by rescinding its determination not to apply the lower final rates approved in that order for 800/888 Carrier Identification service (Carrier ID service) retroactively to 12 September 2006. RCI requested that these rates be applied retroactively to 12 September 2006. It requested that, in the alternative, the rates submitted by the incumbent local exchange carriers (ILECs)[1] with their October 2006 cost studies be applied retroactively to 12 September 2006.

2. The Commission received comments from Bell Aliant Regional Communications, Limited Partnership; Bell Canada; and Saskatchewan Telecommunications (collectively, Bell Canada et al.); as well as from TELUS Communications Company (TCC) and MTS Allstream Inc. (MTS Allstream). Bell Canada et al. and TCC opposed the application, while MTS Allstream supported it. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Background

3. The Commission received an application by MTS Allstream, dated 8 June 2006, requesting that it reduce the ILECs' rates for Carrier ID service on an interim basis while it reviewed the costs associated with this service.

4. In Telecom Decision 2006-57, which disposed of MTS Allstream's application, the Commission made the rates interim, effective 12 September 2006, and directed the ILECs to file proposed amended tariff pages with supporting cost studies for their Carrier ID service. The ILECs filed this material with the Commission on 27 October 2006.

5. On 30 March 2007, the Commission issued Telecom Public Notice 2007-4 to initiate a proceeding to review certain Phase II costing issues (the Phase II costing review proceeding).

6. By letter dated 22 June 2007, the Commission deferred further consideration of a number of applications before it, including the Carrier ID service applications, pending the completion of the Phase II costing review proceeding. In that letter, the Commission noted that the proposed amended tariff pages raised issues that could be materially affected by the Commission's determinations in the Phase II costing review proceeding. The Commission also stated that it expected that the rates would not be applied retroactively when approved on a final basis.

7. The Commission set out its determinations regarding Phase II costing issues in Telecom Decision 2008-14. Subsequent to the issuance of that decision, the ILECs filed revised cost studies and proposed tariff pages.

8. In Telecom Order 2009-497, issued 14 August 2009, the Commission approved lower rates on a final basis for Carrier ID service, effective the date of the order. The Commission determined, however, that these rates should not apply retroactively. As a result, the rates approved in Telecom Order 2009-497 were higher for the period prior to 14 August 2009.

Issues

9. In Telecom Public Notice 98-6, the Commission outlined the criteria to consider review and vary applications filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision.

10. The Commission considers that this proceeding raises the following issues:

I. Did the Commission fetter its discretion?

II. Is the Commission's determination legally deficient because its reasons were not sufficient?

III. Does the Commission have jurisdiction to grant the relief sought and, if so, should it do so?

I. Did the Commission fetter its discretion?

11. RCI and MTS Allstream submitted that the Commission had fettered its discretion, and had effectively prejudged the matter, when it stated in its 22 June 2007 letter that it did not expect that the final rates would be applied retroactively.

12. The Commission notes that it expressed an expectation in its letter but did not make a determination, let alone a final determination, as submitted by RCI and MTS Allstream. The Commission therefore considers that it did not fetter its discretion when it stated that it did not expect the final rates to be applied retroactively.

II. Is the Commission's determination legally deficient because its reasons were not sufficient?

13. RCI and MTS Allstream submitted that in Telecom Order 2009-497, the Commission had failed to give sufficient reasons for its determination not to make the lower final rates retroactive. RCI submitted that this constitutes a fundamental error in law and in fact and, accordingly, the determination should be rescinded.

14. The Commission considers that if the determination in question was not supported by sufficient reasons in Telecom Order 2009-497, any insufficiency has been adequately addressed by the reasons set out in this decision.

III. Does the Commission have jurisdiction to grant the relief sought and, if so, should it do so?

15. TCC submitted that the Commission has no authority to grant the relief requested by RCI because it involves the retroactive variation of rates that have been made final. TCC submitted that, except when rates are made interim, the Act only allows for rates to be varied prospectively.

16. The Commission notes that it has a legal duty to ensure that rates are just and reasonable at all times. If the Commission approves rates that are not just and reasonable, such rates must necessarily be void given that the Commission has no authority to approve rates that are not just and reasonable. Further, the Commission notes that where final rates are void, the applicable rates are those that were in effect immediately prior to the rates being finalized.[2]

17. In this case, the previously applicable rates were made interim in Telecom Decision 2006-57. Because the Act expressly allows final rates to be effective from the date rates were made interim, the Commission considers that if the higher final rates approved for the period prior to 14 August 2009 are not just and reasonable, and hence void, it has the necessary statutory authority to apply for that period the lower final rates approved in Telecom Order 2009-497.

18. In Telecom Order 2009-497, the Commission determined, based on the detailed costing information on the record of the proceeding leading to that order, that the existing interim rates were too high. The Commission approved the lower final rates as just and reasonable on a going-forward basis. Despite these findings, the Commission decided not to adjust the interim rates for the period from 12 September 2006 to 13 August 2009.

19. The Commission considers that the ILECs' cost studies and proposed rates filed on 27 October 2006 and 27 October 2008, except those of TCC, demonstrate that as of 2006 the costs for Carrier ID service had significantly decreased and the existing interim rates were too high.

20. Regarding TCC, the Commission considers that the company's October 2006 cost study and revised cost study for October 2008 did not reflect the appropriate economic service costs for the purpose of determining just and reasonable rates for the service. The Commission notes that it posed interrogatories with respect to both sets of cost studies filed by TCC. The Commission also notes that TCC's estimated costs were significantly higher than the estimates submitted by other ILECs. In particular, the Commission considers that in 2006 and 2008, TCC applied an inappropriate methodology that significantly overestimated its associated software capital costs. The Commission further notes that in its 3 April 2009 revised cost study, TCC significantly reduced its estimates for associated software capital costs. In Telecom Order 2009-497, the Commission found these lower estimated costs to be appropriate for establishing just and reasonable rates for TCC, effective 14 August 2009.

21. In light of the above, the Commission finds that the rates approved in Telecom Order 2009-497 for the period from 12 September 2006 to 13 August 2009 are not just and reasonable.

22. Having found that the higher final rates are not just and reasonable, it is necessary to examine what rates are just and reasonable for this period. The Commission notes that it approved updated costing methodologies on 21 February 2008, in Telecom Decision 2008-14. The Commission further notes that the revised cost studies and proposed rates filed by the ILECs on 27 October 2008 were based on the updated costing methodologies set out in that decision. The 2008 revised cost studies and proposed rates revealed little change from the cost studies and proposed rates filed by the ILECs on 27 October 2006. Except for TCC, the lower final rates approved in Telecom Order 2009-497 were based on those updated cost studies.

23. In the case of TCC, the lower final rates were based on TCC's cost study filed on 3 April 2009, which, as noted above, revealed significantly reduced estimated software capital costs. Further, as noted above, the Commission considers that until it filed its 3 April 2009 cost study, TCC's cost studies had failed to reflect the appropriate economic service costs to allow the Commission to determine just and reasonable rates as far back as 2006.

24. In the circumstances, the Commission considers that the costs found to be appropriate for the purpose of setting just and reasonable rates on a going-forward basis in Telecom Order 2009-497 are also appropriate for the period from 12 September 2006 to 13 August 2009. Accordingly, the Commission finds that the lower final rates approved in Telecom Order 2009-497 on a going-forward basis are also just and reasonable for the period from 12 September 2006 to 13 August 2009 and, as a result, that they should be applied for that period.

Conclusion

25. The Commission concludes that because the higher final rates for the period of 12 September 2006 to 13

August 2009 are void, there is substantial doubt as to the correctness of its determination in Telecom Order 2009-497 to apply the higher final rates for that period. The Commission also concludes that Telecom Order 2009-497 should be varied by finding that the lower final rates approved in that order are also the just and reasonable rates for the period of 12 September 2006 to 13 August 2009.

26. The Commission considers that its determinations in this decision advance the telecommunications policy objectives set out in paragraphs 7(*b*), (*f*), and (*h*) of the Act.[3] The Commission further considers that its determinations are consistent with the Policy Direction[4] requirements that (a) the measures in question be efficient and proportionate to their purposes, and that they minimally interfere with competitive market forces to meet the above policy objectives; and (b) the measures neither deter economically efficient competitive entry into the market nor promote economically inefficient entry.

27. The Commission directs the ILECs to credit or reimburse their relevant customers of Carrier ID service, within 45 days of the date of this decision, the difference between the rates that applied for the period from 12 September 2006 to 13 August 2009 and the rates found to be just and reasonable in this decision for that period. Further, the Commission directs the ILECs to issue revised tariff pages, within 15 days of the date of this decision, reflecting the revised rates for the period from 12 September 2006 to 13 August 2009.

Secretary General

Related documents

- *Review of rates for the 800/888 Carrier Identification service*, Telecom Order CRTC 2009-497, 14 August 2009
- *Review of certain Phase II costing issues*, Telecom Decision CRTC 2008-14, 21 February 2008, as amended by Telecom Decision 2008-14-1, 11 April 2008
- *Review of certain Phase II costing issues*, Telecom Public Notice CRTC 2007-4, 30 March 2007
- *MTS Allstream Inc. – Request to review rates for 800/888 Carrier Identification service*, Telecom Decision CRTC 2006-57, 12 September 2006
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: http://www.crtc.gc.ca.

Footnotes:

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[1] In this decision, "ILECs" refers to the companies listed in paragraph 2.

[2] *TELUS v. CRTC et al.* [2005] 2 F.C.R. 388.

[3] The cited policy objectives of the Act are
(*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and
(*h*) to respond to the economic and social requirements of users of telecommunications services.

[4] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

Date Modified: 2010-05-21

2003 CarswellAlta 1813, 2003 ABCA 374, 346 A.R. 281, 320 W.A.C. 281, [2004] A.W.L.D. 125

2003 CarswellAlta 1813

Epcor Generation Inc. v. Alberta (Energy & Utilities Board)

Epcor Generation Inc. (Applicant / Appellant) and Alberta Energy and Utilities Board (Respondent)

Alberta Court of Appeal

Fruman J.A.

Heard: December 12, 2003
Judgment: December 22, 2003
Docket: Calgary Appeal 03-0178-AC, 02-0033-AC

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Counsel: F.R. Foran, Q.C., C. Hustwick for Applicant / Appellant

J.R. McKee, A.E. Domes for Respondent

Subject: Natural Resources; Civil Practice and Procedure

Oil and gas --- Practice and procedure — Appeals — Leave to appeal — Grounds

Alberta Energy and Utilities Board made decision creating deferral accounts to deal with uncertainty of future pool prices, including 50/50 sharing of surplus or shortfall between energy generator and customer — When actual pool prices resulted in significant surplus, customer successfully applied for change in sharing ratio to prevent windfall to energy generator — Energy generator applied for leave to appeal Board's decision altering ratio and Board's refusal to review and vary decision — Application for leave to appeal was dismissed — Board did not exceed jurisdiction in varying 50/50 sharing ratio and did not engage in retroactive ratemaking — Board's order instituting 50/50 sharing ratio was interim in nature — Rule against retroactive ratemaking was based on forecast-based approach to tariff-setting and deferral accounts were necessarily subject to adjustment after end of deferral period — Board's procedure in holding hearing after year end in question was not unfair as deferral accounts could only be assessed when all accrued amounts could be assessed — Board's finding regarding extent to which surplus was attributable to improved performance was within its area of expertise and was supported by evidence — Although Board may have misstated test in dismissing review application by omitting error of fact as ground, reasons indicated Board correctly applied test.

Cases considered by *Fruman J.A.*:

Blanchard v. Control Data Canada Ltd. (1984), 14 D.L.R. (4th) 289, 55 N.R. 194, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, [1984] 2 S.C.R. 476, 1984 CarswellQue 75, 1984 CarswellQue 94 (S.C.C.) — referred to

Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux) (2001), 2001 SCC 41,

2001 CarswellQue 1272, 2001 CarswellQue 1273, (sub nom. *Mount Sinai Hospital Center v. Quebec (Minister of Health & Social Services))* 200 D.L.R. (4th) 193, (sub nom. *Mount Sinai Hospital Centre v. Quebec (Minister of Health & Social Services))* 271 N.R. 104, (sub nom. *Mount Sinai Hospital Center v. Quebec (Minister of Health & Social Services))* [2001] 2 S.C.R. 281, 36 Admin. L.R. (3d) 71 (S.C.C.) — referred to

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

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

Edmonton (City) v. Northwestern Utilities Ltd. (1961), [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125, 1961 CarswellAlta 25 (S.C.C.) — referred to

Nycan Energy Corp. v. Alberta (Energy & Utilities Board) (2001), 2001 ABCA 31, 2001 CarswellAlta 112, 277 A.R. 391, 242 W.A.C. 391 (Alta. C.A. [In Chambers]) — considered

S.C.F.P., Local 301 c. Québec (Conseil des services essentiels) (1997), (sub nom. *Syndicat canadien de la fonction publique, section locale 301 v. Montréal (Ville))* 210 N.R. 101, (sub nom. *C.U.P.E., Local 301 v. Montreal (City))* 144 D.L.R. (4th) 577, (sub nom. *C.U.P.E., Local 301 v. Montreal (City))* [1997] 1 S.C.R. 793, (sub nom. *City of Montreal v. C.U.P.E., Local 301)* 97 C.L.L.C. 220-028, 1997 CarswellQue 82, 1997 CarswellQue 83, 8 Admin. L.R. (3d) 89 (S.C.C.) — considered

Statutes considered:

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

s. 26 — considered

Electric Utilities Act, R.S.A. 2000, c. E-5

s. 57(2)(c) — considered

s. 57(2)(d) — considered

Rules considered:

Alberta Energy and Utilities Board Rules of Practice, Alta. Reg. 101/2001

R. 46(5)(a)(i) — considered

APPLICATION by energy generator for leave to appeal decision of Alberta Energy and Utilities Board regarding sharing of deferral account.

Fruman J.A.:

1 The applicant, EPCOR Generation Inc., seeks leave to appeal several decisions of the Alberta Energy and Utilities Board: Decisions 2001-45 and 2001-95 (as amended by 2001-115), which altered the sharing ratio between

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EPCOR and its customers in relation to a deferral account; and the Board's decision not to review and vary Decision 2001-95 (as amended by 2001-115).

Facts

2 In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000 pursuant to Decisions U99099 and 2000-5. The difference between the actual hourly pool prices and the forecast hourly pool prices would be calculated and recorded in the deferral accounts.

3 The decisions included a sharing formula pursuant to which EPCOR and its customers would share the deferral account balances. The original sharing ratio in Decision U99099 contemplated the customer alone would bear any surplus or shortfall, but the ratio was changed to 50/50 on February 1, 2000, in Decision 2000-5. In making the change, the Board indicated it did not want to "inappropriately dampen the hour by hour incentives" to EPCOR, but also wanted to "safeguard against inappropriate windfall gains or losses that have little to do with generation performance" (at 8).

4 In Decision U99099, the Board directed EPCOR to apply to the Board by April 1 in the following year in order to "collect or refund the balance in all their deferral accounts" (at 204). The Board recognized "that there will be further adjustments due to the disposition of deferral accounts" (at 12).

5 On March 30, 2001, EPCOR applied to the Board for termination of the 2000 pool price deferral account, which contained a surplus of approximately $70 million. On April 10, 2001, the Industrial Power Consumers and Cogenerators Association of Alberta (IPCCAA) applied to have the Board review and vary Decisions U99099 and 2000-5 to change the sharing ratio from 50/50 to 98/2 in favour of the customer. It argued that retention of $35 million by EPCOR would be a windfall gain.

6 In Decision 2001-45 the Board decided IPCCAA had met the threshold to review the sharing ratio, and indicated it would examine the ratio at the hearing initiated by EPCOR to close the 2000 deferral account. In Decision 2001-95 (as amended by 2001-115) the Board found that the test for variation of the sharing ratio had been met. It noted that the variance between actual and forecast pool prices was expected to be small, based on information provided primarily by EPCOR. However, the difference turned out to be anything but small, and the resulting surplus of approximately $70 million represented a substantial and unforseen change in circumstances (Decision 2001-95 at 27). The Board found that the majority of the surplus was due to high pool prices, not improved performance by EPCOR, and concluded the 50/50 sharing ratio resulted in a windfall gain to EPCOR that rendered the sharing formula unjust and unreasonable (at 29). The Board decided it had to distinguish between that portion of the surplus resulting from improved performance that should flow to EPCOR's shareholders, and that portion of the surplus resulting from unanticipated higher pool prices that ought to be returned to its customers (at 28). Based on the Board's consideration of the financial information, it changed the sharing ratio from 50/50 to 80/20 in favour of the customer (at 36).

7 On March 21, 2002, EPCOR submitted a review and variance application to the Board, seeking a review of Decision 2001-95 (as amended by 2001-115). This application was denied by the Board by letter dated May 26, 2003.

Test for Leave

8 Pursuant to s. 26 of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, leave to appeal decisions of the Board may be granted on questions of jurisdiction or law. The proposed appeal must raise a serious arguable issue: *Nycan Energy Corp. v. Alberta (Energy & Utilities Board)* (2001), 277 A.R. 391, 2001 ABCA 31 (Alta. C.A. [In

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Chambers]), at para. 3. In considering whether to grant leave, it may be appropriate to consider the standard of review this Court would apply, should leave to appeal be granted.

Decisions 2001-45 and 2001-95 (as amended by 2001-115)

9 In seeking leave to appeal Decisions 2001-45 and 2001-95 (as amended by 2001-115), EPCOR argues the Board committed a number of errors: first, the Board erred in determining it had jurisdiction to vary the sharing ratio because this was retroactive ratemaking; second, the Board was estopped from varying the sharing ratio or alternatively, it was procedurally unfair for the Board to make the variation after the conclusion of the year 2000; third, the Board erred in failing to provide adequate reasons for its conclusion about the surplus; and fourth, it erred in disregarding or rejecting EPCOR's evidence.

10 With respect to the first ground, EPCOR argues the Board erred in determining it had jurisdiction to vary the 50/50 sharing ratio and, by altering the ratio, engaged in retroactive ratemaking.

11 The Board based it jurisdiction on s. 57(2)(c) of the *Electric Utilities Act*, R.S.A. 2000, c. E-5, which states:

> 57(2) Any person affected by an order approving a tariff may ask the Board to review the order [. . .]
>
> (c) if, since the date of the order, circumstances have changed in a substantial and unforseen manner that renders the continuation of the tariff unjust or unreasonable [. . .]

12 EPCOR argues the word "continuation" indicates a tariff can only be varied on a prospective, not a retroactive, basis. The Board agrees with this interpretation and confirms that it is not permitted to engage in retroactive ratemaking. The parties also agree the Board has jurisdiction to vary interim orders, deferral accounts are usually interim rather than final orders, and distribution of deferral accounts does not constitute retroactive ratemaking. See *Edmonton (City) v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 (S.C.C.); *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 31 A.R. 541 (Alta. C.A.), leave to appeal to S.C.C. refused, [1981] 2 S.C.R. vii (S.C.C.).

13 However, EPCOR argues its situation is unique and, indeed, the Board acknowledges that most orders creating deferral accounts do not establish sharing ratios. EPCOR submits that because the Board fashioned the sharing ratio in consideration of its particular costs and risks, the ratio was a final order of the Board, and the Board engaged in retroactive ratemaking in varying it. It contends that nothing more than accounting or mathematical corrections were expected at the time it applied to terminate the deferral account.

14 The Board submits the order is not final until the deferral account is closed and the balance is paid in or disbursed. It argues the rule against retroactive ratemaking is based upon a forecast-based approach to tariff setting. Deferral accounts are not forecast-based. They are established when a cost item is not subject to reasonable forecast and consist of actual gains or losses realized during the applicable period. These gains or losses are addressed through payments into, or out of, the deferral account, as directed by the Board after the deferral period. The Board contends the order establishing the deferral account and sharing ratio is interim in nature and adjustments to either do not contravene the rule against retroactive ratemaking.

15 EPCOR's retroactive ratemaking argument hinges on the characterization of the original order as interim or final, which in turn depends largely on the facts. EPCOR contends that because of unique factual circumstances, the sharing ratio was neither an interim order nor a standard deferral account provision, but a final order.

16 The Board viewed the circumstances differently. In deciding to vary, the Board relied on the fact Decision U99099 contemplated Board review of the deferral account balances, and recognized that adjustments might be re-

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quired as a result of that review. The Board decided the deferral accounts were therefore "left open" and "continued" within the meaning of s. 57(2)(c) of the *Electric Utilities Act*, *supra* and, because the deferral accounts had not been reconciled or the moneys disbursed, a decision to review the sharing ratio and the ultimate collection and disbursement of funds would be prospective in nature (Decision 2001-45 at 23). These findings are within the Board's jurisdiction and expertise and, on judicial review, this Court would defer to the Board on such matters.

17 Other facts are also important, including previous changes to the sharing ratio. EPCOR contends that to avoid retroactive ratemaking, any change to the sharing ratio had to be made during the 2000 calendar year and would only affect accruals to the deferral account on a going-forward basis, that is, after the sharing ratio was altered, but not before. However, the sharing ratio was changed on February 1, 2000, at EPCOR's request, from 100/0 in favour of the customer to 50/50. That change was retroactive to January 1, 2000, which is inconsistent with EPCOR's present position.

18 Moreover, EPCOR's argument that changes to the sharing ratio had to be made during the 2000 calender year poses a number of practical difficulties. Deferral accounts are created in response to uncertainty, which may result from rapidly changing circumstances. In theory, significant price swings could justify variations to the sharing ratio on a daily or even hourly basis, which would be unworkable given the time and cost of hearings. While EPCOR might have some idea of the running balance in the deferral account, a customer would have to request and wait for the results of an audit, then assemble and submit an application. During the intervening time period, further changes in circumstances could make the application moot. These problems support the Board's position that the sharing ratio was an interim and not a final order, and that adjustments to the sharing ratio should be handled the same way as other adjustments to the deferral account.

19 Given the strong factual component that underlies this ground of appeal, the inconsistency and logistical difficulties associated with EPCOR's position, and the applicable standard of review, the first ground does not meet the test for leave.

20 With respect to the second ground, EPCOR argues the Board was estopped from varying the ratio or, alternatively, it was procedurally unfair for the Board to vary it after the year-end. The estoppel argument fails to establish a basis on which to grant leave. EPCOR concedes public estoppel may not apply. See *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281 (S.C.C.). Private estoppel depends on a proper factual foundation, including a promise intended to be acted upon and detrimental reliance. Estoppel of any kind was not raised before the Board, evidence was not led to address these factors and the Board did not make fact findings about them. An application for judicial review is not the appropriate forum in which to raise this issue.

21 Nor can it be said that it was procedurally unfair for the hearing to be held after the year 2000. The status of the deferral accounts could only be properly assessed when all the accrued amounts had been calculated, which could only occur after year-end. EPCOR applied for termination of the accounts, the variation application was heard at the same time, and EPCOR participated fully in the proceedings. Accordingly, the second ground also fails.

22 The third ground, that the Board did not provide adequate reasons, does not raise a serious arguable legal issue.

23 EPCOR's submission that the Board erred in disregarding or rejecting evidence raises issues of fact, not law or jurisdiction. The Board is free to accept or reject evidence presented by the parties and, as an expert tribunal, it is entitled to use its expertise to arrive at different conclusions than the parties. Indeed, the highly technical nature of the disputed evidence demonstrates why evaluation of such evidence properly falls within the Board's purview.

24 EPCOR argues the Board's rejection of evidence is patently unreasonable and amounts to a jurisdictional error or an error of law: *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 (S.C.C.). However, this standard is very difficult to meet and will only be satisfied when the evidence is incapable of supporting the tribunal's findings:

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S.C.F.P., Local 301 c. Québec (Conseil des services essentiels), [1997] 1 S.C.R. 793 (S.C.C.).

25 Here the Board rejected EPCOR's submission that the increased surplus was entirely attributable to improved performance, and therefore did not accept EPCOR's calculations. The Board had the raw data before it. It identified the components of the increased surplus that reflected improved performance and those that reflected windfall, then used its expertise to calculate each of them. While EPCOR may disagree with the results, it cannot be said that the evidence was incapable of supporting the Board's conclusions. Nor can it be said that it was procedurally unfair for the Board to proceed in this fashion.

26 Accordingly, leave to appeal Decisions 2001-45 and 2001-95 (as amended by 2001-115) is dismissed.

Review and Variance Application

27 EPCOR seeks leave to appeal the Board's decision not to review and vary Decision 2001-95 (as amended by 2001-115). Pursuant to s. 57(2)(d) of the *Electric Utilities Act,* a person may ask the Board to review an order if, in the Board's opinion, the order contains an error of law or fact. Section 46(5)(i) of the *Alberta Energy and Utilities Board Rules of Practice*, Alta. Reg. 101/2001, provides that a review application is to be dismissed if an applicant fails to raise a substantial doubt as to the correctness of the Board's order when an error of law, jurisdiction or fact is alleged.

28 EPCOR argues the Board misapprehended the test for review. The Board dismissed the review application and referred to EPCOR's failure to "raise a substantial issue as to [an] error of law or jurisdiction." EPCOR points out that this wording omits an error of fact, which is part of the statutory test.

29 The evidence and argument submitted by EPCOR in the review application were fact-based and technical. In its decision, the Board noted EPCOR "failed to bring any evidence or argument which shows that these decisions were wrong or contrary to the evidence." This indicates that although the Board may have misstated the test for review, it applied the test correctly.

30 The Board found no basis for further review. Because the test for variation in s. 57(2)(d) of the *Electric Utilities Act* invokes the Board's discretion, its conclusions on matters within its jurisdiction and expertise would attract considerable deference on appeal. Here, the major challenge was EPCOR's disagreement with the Board's allocation and calculation of the surplus, which fits comfortably within the Board's jurisdiction and expertise. No question that meets the test for leave has been demonstrated.

31 EPCOR also complains about the adequacy of the Board's reasons and its dismissal of EPCOR's evidence. These grounds do not meet the test for leave to appeal.

Application dismissed.

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1961

GOV'T. OF CANADA v. GOV'T. OF PROV. OF NFLD.

ATTY. GEN. OF CANADA v. GOV'T. OF PROV. OF NFLD.

Cartwright J.

For these reasons I would dismiss the motions with costs.

Motions dismissed with costs.

Solicitor for the respondent, appellant: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitors for the claimant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1961

*Jan. 31
Feb. 1
Apr. 25

CITY OF EDMONTON, TOWN OF JASPER PLACE, CITY OF RED DEER AND TOWN OF VEGREVILLE (*Respondents*) ..... } APPELLANTS;

AND

NORTHWESTERN UTILITIES LIMITED (*Applicant*) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Public utilities—Jurisdiction of Board in fixing rates to allow for transitional losses between date of application and date of decision—Meaning of statutory phrase "undue delay"—Jurisdiction to approve of purchased gas adjustment clause—The Public Utilities Act, R.S.A. 1955, c. 267, as amended by 1959 (Alta.), c. 73.

In June 1958 the respondent utility company applied to the Public Utilities Board to fix a new schedule of rates. The hearing of the application commenced in the following December and continued intermittently until February 26, 1959. The Provincial Legislature amended *The Public Utilities Act* on April 7, 1959, to provide by s. 67(8) as follows: "It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application".

Effect was given to this amendment in an order of August 28, 1959, by which the Board approved an increase in the utility's rates as of September 1, 1959. An application was then made on behalf of the appellants under s. 49 of the Act for leave to appeal from the Board's order on the grounds that (i) the Board erred in law and had no jurisdiction to fix rates enabling the respondent to collect through its rates an additional amount for transitional losses during 1959, and that

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

(ii) the Board erred in law and had no jurisdiction to approve the principle of a purchased gas adjustment clause. Another question raised was as to whether there had been "undue delay" within the meaning of the amendment to s. 67. Leave to appeal was granted and the Appellate Division, by a majority decision, dismissed the appeal on the first ground. The appeal on the second ground was allowed unanimously. The appellants appealed to this Court on the first question and the respondents cross-appealed on the second.

Held: The appeal should be dismissed. The cross-appeal should be allowed, and in lieu of the answer made by the Appellate Division to the second question, judgment should be entered declaring that the Public Utilities Board did not err in law and had jurisdiction to approve the principle of a purchased gas adjustment clause.

Per Kerwin C.J. and Cartwright J.: It was not necessary to express an opinion on the contention of the respondent that the question whether there had been undue delay in the hearing and determination of the application to the Board was not open to the appellants. On the assumption that the question was open the Board had decided it correctly.

Per Locke, Abbott and Judson JJ.: The language of subs. 8 of s. 67 of the Act, which gave the Board power to provide for transitional losses, made it clear that the amendment was intended to be retroactive. *Sussex Peerage* case (1844), 11 Cl. & Fin. 85 and *Vacher v. London Society of Compositors*, [1913] A.C. 107, referred to. It is only, however, such losses as have been due to undue delay in the hearing and determining of the application which may be permitted to be recovered. In the decision to authorize the utility to collect an additional amount for 1959 it was implicit that the Board held that the delay after December 31, 1958, was undue within the meaning of that expression in the subsection. It was clear that the Board attributed to the expression the meaning "more than was reasonable in the circumstances", and it was correct in doing so. As to whether the delay after December 31 was more than was reasonable, this was a question of fact as to which there could be no appeal under the statute.

The proposed order, with respect to the purchased gas adjustment clause, would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in s. 67(2) and to comply with the Board's duty to fix just and reasonable rates to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine.

APPEAL and cross-appeal from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing in part a decision of the Alberta Board of Public Utility Commissioners. Appeal dismissed and cross-appeal allowed.

A. F. Macdonald, Q.C., and *W. R. Sinclair*, for the City of Edmonton.

G. J. Bryan, Q.C., for the Town of Jasper Place.

[1] (1961), 34 W.W.R. 241, 25 D.L.R. (2d) 262.

1961

CITY OF EDMONTON et al. v. NORTH-WESTERN UTILITIES LTD.

J. W. Beames, for the City of Red Deer.

W. H. Hurlburt, for the Town of Vegreville.

George H. Steer, Q.C., and *B. V. Massie, Q.C.,* for the applicant, respondent.

THE CHIEF JUSTICE:—Subject to the same reservation expressed in the reasons of Mr. Justice Cartwright and on the same assumption that he makes, I agree with the reasons of Mr. Justice Locke.

The judgment of Locke, Abbott and Judson JJ. was delivered by

LOCKE J.:—The respondent is the owner and operator of a natural gas transmission and distribution system serving large numbers of domestic, commercial and industrial consumers in the City of Edmonton, the Town of Jasper Place, the City of Red Deer and the Town of Vegreville and some 55 other municipalities or places in the Province of Alberta. The respondent is a public utility within the meaning of *The Public Utilities Act,* R.S.A. 1955, c. 267, as amended.

On June 13, 1958, the respondent applied to the Public Utilities Board, constituted under the said Act, for an order:

> fixing and approving as of the return date of this motion, or such other date as the Board may deem proper, such new rates as are necessary to meet the applicant's costs, including its return.

The hearing of the said application commenced on December 9, 1958, and continued intermittently until February 26, 1959.

On June 29, 1959, the Board rendered its decision fixing a rate of depreciation, working capital allowance and estimated expenses of operation, and held the respondent entitled to a rate of return of 7.5 per cent upon its property used or required to be used in its service to the public within Alberta as determined and that the respondent was entitled to an increase in its revenue of $2,817,929 for the year 1959 and $3,019,792 for 1960, and directed that the respondent file schedules of rates for the approval of the Board, indicating how it suggested such amounts should be obtained.

The value of the properties of the respondent upon which it was permitted the annual return above stated was fixed for the year 1959 at $48,568,892 and for the year 1960 at $51,412,702. The respondent has large natural gas reserves of its own but, in addition, purchases large quantities, for use in the operation, from the owners of other gas wells and operators of oil wells. The Board's estimate of its expense for this purchased gas for the year 1959 was $3,825,690 and for the year 1960 $3,722,300.

Section 67(*a*) of the Act reads:

> The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested,
>
> (*a*) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation, mileage and other special rates, which shall be imposed, observed and followed thereafter by any proprietor.

During the lengthy proceedings before the Board it was contended on behalf of the respondent that the Board had power to make provision for the loss sustained by the respondent between June 13, 1958, the return date of its motion, and the date of the coming into effect of new rates. This loss referred to in the proceedings as "transitional loss" was the difference in the revenue of the respondent under the old rates, which remained applicable throughout the time consumed by the hearings and until the new rates became effective, and the amount which would have been received had the new rates to be authorized been in effect throughout this period. It was contended by the present appellants that the Board was without jurisdiction to make any such order, a contention which was upheld by the Board. As to this, the decision made in March 4, 1959, read in part:

> The board has no doubt that the application of the principle of transitional loss is in effect fixing rates retroactively. The principle results in rates which are determined being dated back to the time of the application. The board can find no authority for it to do this either in The Public Utilities Act or elsewhere. The language used in The Public Utilities Act is prospective rather than retrospective. The authority of the board in this regard is limited to fixing rates for the future. The board accordingly has come to the conclusion that it cannot give effect to the principle of transitional loss.

1961

CITY OF EDMONTON *et al.* *v.* NORTH-WESTERN UTILITIES LTD.

Locke J.

On April 7, 1959, the Legislature amended section 67 of the Act by, *inter alia,* adding thereto the following:

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

The amendment and the matter of the delays which had occurred between the filing of the application and the date of the Board's decision were dealt with in the following terms in the decision of June 29, 1959:

Counsel for the consumers have asked that the decision upon transitional loss given by this board respecting the application of Canadian Western Natural Gas Company Limited be applied to this case. In the Canadian Western case this board came to the conclusion that it could not give effect to the principle of transitional loss as it could find no authority for it to do so either in The Public Utilities Act or elsewhere. Since that decision The Public Utilities Act has been amended and Section 67(8) now provides:—(reciting the above amendment).

In this case, as has been pointed out above, the company's motion was returnable June 13, 1958. The hearing commenced December 9, 1958. There were unavoidable adjournments from December 19, 1958 to January 15, 1959, and from January 24, 1959, to February 24, 1959, and the hearing finally concluded February 26, 1959. There has been an inevitable delay from that date to the date of this decision and it appears that it will not be possible to have the new rates effective until August 1 at the earliest. It is apparent that the losses due to undue delay in the hearing and determining of the application have been considerable. The Board considers that it is only fair, in the circumstances, to reserve this question until the hearing of the second phase of this application.

It was impossible in the circumstances disclosed by the evidence for the respondent to determine with certainty in advance the amounts it would expend for purchased gas from year to year, and the figures above mentioned were, of necessity, estimates only. The respondent, accordingly, asked that the order to be made by the Board should contain what was called a purchased gas adjustment clause, a provision which, it was said, was approved by public utility boards in various states of the Union. The practical effect of such a clause would be that, assuming by way of illustration that the estimate of the cost of purchased gas for the year 1959 should prove to be $800,000 less than the actual expenditure for that purpose, this amount would be recouped by the company by an increase in the price of gas to consumers for the year 1960.

Should, however, the estimated figure for this cost, used in approving the rates for the year 1959, be greater than the actual expenditure, the rates fixed for the year following would be reduced to give to the purchasers of gas the benefit of the saving. The details of the manner in which this would, in practice, be worked out was given by the witness Wilson, the executive vice-president of the respondent, and was explained in Exhibit 3 filed before the Board. It is unnecessary for the disposition of this aspect of the matter to examine these details in any more particularity.

In its decision of June 29, 1959, the Board said:

> The evidence disclosed that the company faces a serious problem in estimating, with any degree of accuracy, the volumes of oil field gas which it will be required to purchase in any particular year. Added to this is the problem resulting from the fact that contracts between producers and exporters contain escalation and favoured nations clauses which affect future prices. In view of these problems the company led evidence as to a possible purchased gas adjustment clause which might be inserted in the board's order. Counsel for the company point out in argument that the company's proposal at no time involved, and does not now involve, rate changes without board approval.

After pointing out that a further amendment had been made to the Act as s. 42(*a*) which might affect the matter, the Board reserved judgment until further representations might be made to it.

As to the transitional losses, the company was, as above stated, given permission to file rate schedules for the approval of the Board, calculated to produce an increase in its revenue for the calendar year 1959 of $2,817,929. In preparing these schedules the respondent company proceeded on the basis that the Board had decided that the delay in disposing of the application from January 1st onward had been undue delay within the meaning of s. 67(8), since the figure of $2,817,929 included, according to the respondent's computation, $1,845,000 as the transitional loss from January 1st to August 31, 1959. The schedule of rates filed proposed that this amount should be recouped from the rates to be imposed during the four and one-third years immediately succeeding September 1st, 1959. After further hearings for the purpose of hearing objections to the rates proposed, the Board rendered its decision on August 26th.

1961

CITY OF EDMONTON *et al.* v. NORTH-WESTERN UTILITIES LTD.

Locke J.

In dealing with the question of transitional loss, the Board quoted that portion of its decision of June 29th, above referred to, and said:

> The board in its decision of June 29 last quoted above, after citing the many adjournments and delays held that there had been undue delays and is still of the same opinion.

After saying that the amendment to s. 67 permitted it to allow for losses sustained before the amendment was passed, the decision read in part:

> In its decision of June 29th the Board held:
>
> > Subject to the above the board finds that the additional revenue to meet the deficiency as set out in detail in Schedule "B" amounts to $2,817,929.00 for 1959 and $3,019,792.00 for 1960. The company may now file schedules of rates for the approval of the board indicating how it suggests such amounts should be obtained.
>
> It will be noted that there is no mention of transitional loss in Schedule "B" which gives the details of the computation of the deficiency. It is considered clear that the board by this finding authorized the company to collect an additional $2,817,929.00 for the year 1959. The manner of collecting that amount was not broken down by months, the intention, which appears obvious, being that an additional amount of $2,817,929.00 would be collected for the entire year. Since new rates cannot be made effective until September 1 at the earliest it is apparent that to recover such an amount in the four remaining months of the year would result in very high rates for those months. The company accordingly designed its rates to recover the amount over a period of several years and this commends itself to the board.

Dealing with the proposed purchased gas adjustment clause and the objections raised to the application of any such principle, the Board said in part:

> The board undoubtedly has jurisdiction to fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof as well as other special rates which shall be imposed, observed and followed thereafter by any proprietor. It appears to the board that it has jurisdiction to say that the rate would be a certain amount per MCF. or per therm plus the cost of purchased gas or a certain rate plus or minus an adjustment for any variation in the cost of purchased gas which is in effect what is done by the adoption of a purchased gas adjustment clause.

After pointing out that the cost of purchased gas was one of the main items of expense of the company and that it was obvious that it is entitled to recover this expense through the rates charged, the Board said:

> After reviewing very carefully all the evidence in this respect and giving consideration to what was said in argument this board is convinced that a provision for purchased gas adjustment is in the best interests of the consumer and is essential to the company if its financial integrity is to

be maintained, which of course is also in the best interests of the consumer. The detailed provisions of the necessary order need not be discussed in this decision as these can be worked out between representatives of the consumers and the company subject to the approval of the board. The right is reserved to the company to file revised estimates of its purchased gas expense if for any reason it is found to be impossible to make such order effective.

By a formal order dated August 28, 1959, the Board approved the proposed rates as interim rates, to become effective on and after September 1, 1959, and dealt with the proposed purchased gas adjustment clause in the following terms:

> The principle of a purchased gas adjustment clause as proposed by the Applicant is approved and the form of Order submitted in evidence by the Applicant is referred to the Applicant and the Respondents to consider whether agreement can be reached among them as to the wording of such a clause to be submitted to the Board for its approval. Failing such agreement the Applicant on ten (10) days' notice to the communities or persons who appeared on the said hearings may submit for the approval of the Board a form of Order providing that the rates as shown in Schedule "A" may be increased or decreased by Order of the Board to reflect changes in the average cost to the Applicant of gas and to reflect surpluses or deficiencies in revenue which have accrued to the Applicant due to the over or under provisions in the said rates for such average cost of gas.

No agreement was reached as to the wording of such a clause and the record does not indicate that the Board made any further order thereafter dealing with the question.

Section 49 of *The Public Utilities Act* provides that leave to appeal to the Appellate Division of the Supreme Court of Alberta upon a question of jurisdiction or upon a question of law may be obtained from a judge of the Court of Appeal upon application within a defined time. Such an application was made to Johnson J.A. who, by order dated October 20, 1959, gave leave to appeal upon the following grounds:

> (*a*) That the said Board erred in law and had no jurisdiction under the provisions of The Public Utilities Act or otherwise to fix rates enabling the Respondent to collect through its rates an additional $2,817,929 for the year 1959, as provided in the said decision;
>
> (*b*) That the Board erred in law and had no jurisdiction to approve the principle of a purchased gas adjustment clause as referred to in the said decision and order.

The questions upon which leave to appeal was granted are, according to the reasons delivered by the learned judge, those proposed on behalf of the City of Edmonton. Another question raised on the argument before him was as to

1961

CITY OF EDMONTON *et al.* v. NORTH-WESTERN UTILITIES LTD.

Locke J.

whether there had been "undue delay" within the meaning of the amendment. This would appear to be a question which would arise in considering the first question upon which leave was granted. Whether the applicants proposed that a separate question should be submitted as to this is not clear. Johnson J.A. said that the question was not a question of law but, at the highest, a mixed question of fact and law. I mention the matter because it was contended by the respondent that the question of whether there had been undue delay within the meaning of that expression in the amendment was not open to the appellants, a contention with which I do not agree.

The Appellate Division, by a decision of the majority of the court, dismissed the appeal on the first ground, Porter J.A., with whom Milvain J. agreed, dissenting. The appeal upon the second ground was allowed by a unanimous judgment of the court.

The appellants have appealed to this Court from the judgment on the first question and the respondent has cross-appealed from the judgment dealing with question (*b*).

A public utility, such as the respondent, in Alberta may not change a rate theretofore fixed by the Public Utility Board without its approval (s. 83(1)). The rates, we are informed, had last been fixed several years earlier. The Board was empowered at the time of the application to require the utility to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so (s. 67(*d*)(ii)) and to make extensions to its facilities when, in the judgment of the Board, to do so was reasonable and practicable (s. 67(*d*)(iii)). These powers were continued in the 1959 amendments to ss. 66 and 67. The utility was further under the obligation to supply and deliver gas at such rates and upon such terms as the Board might direct (s. 67(*d*)(viii); s. 67(1)(*e*) as amended). The rates thus to be fixed from time to time were such as the Board considered to be just and reasonable.

Unlike the British Columbia Act, considered by this Court in *B.C. Electric Railway Company v. Public Utilities Commission*[1], the expression "unjust and unreasonable rates" is not defined. Section 66(*b*), however, as it read prior

[1] [1960] S.C.R. 837, 25 D.L.R. (2d) 689.

to the 1959 amendment, empowered the Board to value the property of the public utility, and the purpose of these powers was explained and they were amplified in the amendment of 1959. This required the Board, in fixing just and reasonable rates, to determine a rate base for the property of the proprietor that is used or required to be used in his service to the public within Alberta and to fix a fair return thereon.

There is no explanation in the record of the delay in considering the respondent's application between June 13, 1958, and December 9, 1958. While the respondent might have applied for an interim order increasing the rates under s. 41(2), this was not done, presumably because in a matter involving so many varied interests this was deemed impractical. A further delay occurred between the conclusion of the main hearings on February 26 and the rendering of the decisions of June 29 and August 26 and, as shown, the new rates did not come into effect until September 1, 1959.

The right of the consumers to require the respondent to supply them with gas, conferred by the statute, would, in my opinion, even in the absence of any statutory provision, impose upon them an obligation at common law to pay for the service on the basis of a *quantum meruit*. In such circumstances, I consider that the position of the utility would be similar to that of a common carrier upon whom is imposed, as a matter of law, the duty of transporting goods tendered to him for carriage at fair and reasonable rates (*Great Western Railway v. Sutton*[1]). Here the duty of determining what rates are fair and reasonable is imposed upon the Board. In the result, in the present matter the consumers paid less than a fair price for a period of something more than a year.

As shown by the decision of March 4, 1959, while on various earlier occasions the Board had made provision for the recovery of transitional losses in fixing rates, this had apparently been done by consent of the parties. When its power to do so was questioned in the present matter, the Board came to the conclusion that its powers were limited to fixing rates to apply in the future. While the reasons given do not explain the grounds upon which the Board proceeded, it may, I think, be fairly assumed that it was

[1] (1869), L.R. 4 H.L. 226 at 237, 38 L.J. Ex. 177.

1961

CITY OF EDMONTON *et al.* v. NORTH-WESTERN UTILITIES LTD.

Locke J.

based upon the language of s. 67(*a*) which speaks of rates which shall be imposed, observed and followed thereafter by any proprietor. The amendment adding subs. (8) to s. 67 was passed in the following month and the Board acted upon the powers which it considered were given to it.

There has been much discussion in argument before the Appellate Division and in this Court as to whether the amendment was retroactive, or whether it was simply declaratory of the law as it stood before its enactment. In my opinion, it is unnecessary to determine this question since, in agreement with the majority of the learned judges of the Appellate Division, I consider that the language of the amendment is perfectly clear.

Under the decision approving the new rate schedule made on August 26, 1959, authority was given to add to the rates over a term of years the amount by which the revenue of the company fell short of what it would have been, had the new rates been in effect throughout the year 1959. No doubt, the vast majority of the consumers who purchased gas from the utility during the first eight months of the year 1959 continued as customers thereafter. Those persons had paid the rates approved by the Board during this period and, while they were less than what was fair and reasonable, it is clear that in the absence of an order of the Board the utility had no enforceable claim against them for any difference. The new rates while prospective created a new obligation in respect of transactions already past in the case of these consumers and, in that respect, were retroactive (Craies on Statute Law, 5th ed. 357).

This, however, is exactly what the amendment authorized since it empowered the Board to give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates, to the extent that the Board may determine these to have been due to undue delay in the hearing and determining of the application. The amendment applies to both losses and gains and, if during the prescribed interval it were shown that the proprietor had earned amounts in excess of what were determined to be fair and reasonable, the continuing consumers might be given the benefit in the rates to be fixed. Since in the interval between the return date of the application and

the going into effect of the new rates the customers would be required to pay the existing rate on the former date, of necessity an order made under the subsection would be retroactive in its effect, whether the proprietor had suffered losses or realized excess revenues in the sense that these expressions are used.

In the *Sussex Peerage* case[1], Tindal C.J. said that:

> the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

In *Vacher v. London Society of Compositors*[2], where the question was as to the interpretation of a section of the *Trade Disputes Act*, of 1906, Haldane L.C. said (p. 113) that he proposed:

> to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

Section 9 of *The Interpretation Act of Alberta*, R.S.A. 1955, c. 160, declares that every Act shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In my opinion, the language of the subsection makes its meaning perfectly clear and it is unnecessary to resort to any outside aid to interpretation. If, however, it were otherwise, as the evidence shows, the state of the law as of March 5, 1958, was considered by the Public Utility Board to be that it was without power to provide for transitional losses, a state of affairs which the amendment passed so soon thereafter was clearly and obviously designed to remedy.

It is only, however, such losses as have been due to undue delay in the hearing and determining of the application which may be remedied. As to this, it must be said that the finding of the Board might have been expressed

[1] (1844), 11 Cl. & Fin. 85 at 143, 8 E.R. 1034.
[2] [1913] A.C. 107, 82 L.J.K.B. 232.

1961

CITY OF EDMONTON *et al.* *v.* NORTH-WESTERN UTILITIES LTD.

Locke J.

with greater clarity. The passage from the decision of June 29, 1959, above quoted recites the various delays, referring particularly to the adjournments after December 19, 1958, and the delay in giving the decision following the conclusion of the hearings on February 26. As has been shown, however, at the same time the Board held that there would be a deficiency of revenue for the years 1959 and 1960 and authorized the company to file rates for the approval of the Board, suggesting how such amounts should be obtained. In referring to this in its final decision the Board said that it was clear that it had by this finding authorized the company to collect an additional amount of $2,817,929 for the year 1959. In my opinion, it is implicit in this decision that the Board held that the delay after December 31, 1958, was undue within the meaning of that expression in the subsection. I think it is clear that the Board attributed to the expression the meaning "more than was reasonable in the circumstances" and, in my opinion, it did not err in doing so. As to whether the delay after December 31 was more than was reasonable, that is a question of fact as to which there can be no appeal under the statute.

Porter J.A. has criticized the manner in which effect was given to the Board's order permitting the recovery of the transitional loss for the year 1959, in various respects. The schedule approved by the Board appears to have capitalized the actual net deficiency of revenue after income tax, and added the income tax which would have been paid by the company if the new rates had been applicable for the year 1959. I think there is much to be said for these views but the questions are not those in respect of which leave to appeal was granted, and it is, no doubt, for that reason that they were not raised before the Appellate Division. The question is whether the Board erred in law and was without jurisdiction to fix rates enabling the respondent to collect the transitional loss for the year 1959, and not as to whether, granted the Board had power to do this, the method approved to carry the decision into effect was authorized by the statute. In these circumstances, I express no opinion upon these matters.

The respondent cross-appeals from the judgment of the Appellate Division by which the decision of the Board upon the purchased gas adjustment clause was set aside, on the ground that there was no jurisdiction to make such an order.

As I have pointed out, no formal order was made by the Board, the order of August 29 simply approving the principle of such a clause as proposed by the utility but referring the settlement of the form of the order to the parties in the hope that they could agree. Failing such agreement, permission was given on ten days' notice to submit an order for the approval of the Board. The respondent contends that since no formal order was made there was no right of appeal to the Appellate Division. Section 49(2) reads that leave to appeal may be obtained from a judge of the Court of Appeal within one month after the making of the order, decision, rule or regulation sought to be appealed from. I agree with the learned judges of the Appellate Division that there was such a decision from which the appeal was properly taken.

In approving rates which will yield a fair return to the utility upon its rate base, it is, of course, essential for the Board to estimate the expenses which will necessarily be incurred thereafter in rendering the service. The fair return permitted is, after deducting from the gross revenue these necessary estimated expenditures and such necessary outgoings as taxes, including income taxes. The Board can only come to a conclusion as to what rates should be approved by determining as closely as may be done in advance the probable amount of these expenditures.

Upon the application in the present matter, the expense which would be incurred for purchased gas in the year 1959 was estimated by the applicant as an amount which, as of August 1959, appeared to be approximately $800,000 less for that year than the amount which would necessarily be expended. For the year 1960, in respect of which an estimate had been given for the use of the Board in considering the application, the amount that would be expended for this purpose had been underestimated, in the opinion of the executive vice-president of the applicant, by $1,300,000. The reason for these inaccurate estimates was explained at length in the evidence of this witness.

1961

CITY OF EDMONTON *et al.* v. NORTH-WESTERN UTILITIES LTD.

Locke J.

That, in determining what was a fair return and deciding what rates should be authorized to earn such a return, the expenses of operation must be estimated as accurately as is reasonably possible is not questioned by anyone. The Board was apparently satisfied that, in the circumstances, it was not possible to estimate for years in advance the cost to which the respondent would be put for purchased gas from year to year, and concluded that such a provision as was proposed was in the best interests of the consumers and essential to the company if its financial integrity was to be maintained.

What was proposed was that the utility should submit to the Board, and to such other interested parties as the Board might direct should be notified, not later than November 1st in each year, the figures as to its cost for purchased gas during the first nine months of the year and its estimate of the amounts required for such purpose during the months of October, November and December. Dependent upon whether these costs were in excess of or less than the amount estimated, in approving the rates the Board would be asked to make such adjustments in the rates for the following year to carry out the purpose above explained.

Macdonald J.A., with whom the Chief Justice and Johnson J.A. agreed, was of the opinion that in adopting the proposed clause the Board intended to fix gas rates without compliance with s. 67(2) of the 1959 amendment which reads:

> In fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed thereafter by a proprietor, the Board shall determine a rate base for the property of the proprietor that is used or required to be used in his service to the public within Alberta and fix a fair return thereon.

With great respect, however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

As pointed out by Porter J.A., s. 67(5) does not touch the matter and this the respondent concedes, but the Board has not assumed to act under that subsection. Rather did it propose to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

I would dismiss the appeal with costs. I would allow the cross-appeal with costs and direct that, in lieu of the answer made by the Appellate Division to the second question, judgment be entered declaring that the Public Utility Board did not err in law and had jurisdiction to approve the principle of a Purchased Gas Adjustment Clause, as referred to in the said decision and order.

CARTWRIGHT J.:—I agree with the reasons of my brother Locke subject only to one reservation. I do not find it necessary to express an opinion on the contention of the respondent that the question whether there had been undue delay in the hearing and determination of the application to the Board was not open to the appellants and I wish to reserve my opinion on that contention.

On the assumption that the question was open I would agree, for the reasons given by my brother Locke, that the Board decided it rightly.

I would dispose of the appeal and the cross-appeal as proposed by my brother Locke.

Appeal dismissed with costs, cross-appeal allowed with costs.

Solicitor for the City of Edmonton: A. F. Macdonald, Edmonton.

Solicitors for the Town of Jasper Place: Bryan, Foote, Andrekson & Wilson, Edmonton.

Solicitors for the City of Red Deer: Kirby, Murphy, Armstrong & Beames, Red Deer.

Solicitors for the Town of Vegreville: Kane, Hurlburt and Kane, Edmonton.

Solicitors for the applicant, respondent. Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

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Sullivan and Driedger on the Construction of Statutes

Fourth Edition

by

Ruth Sullivan

Professor of Law
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law are not rationally or fairly distributed. This not only affects the individuals involved but tends generally to undermine trust in the fairness and stability of the law. For these reasons interference with vested rights is avoided in the absence of a clear legislative directive.

In *Upper Canada College*, the plaintiff had negotiated a contract that was valid and enforceable at the time it was made. Under the new legislation it became unenforceable. Applying the new legislation to this contract would have produced a windfall for the defendants and unfair loss for the plaintiff. In the absence of evidence to the contrary, the court concluded that the legislature could not have intended these effects.

Recognizing vested or accrued rights. In their efforts to determine what is a vested or accrued right, the courts focus sometimes on the common law presumption, sometimes on the language of the Interpretation Acts. Regardless of focus, the central problem is the same. The court must decide whether the particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued.

Some vested rights are easily recognized. Property rights, contractual rights, and rights to damages or other common law remedies are well established categories. So are defences and immunities from suit.[156] For the most part, these are "private law" rights with a respectable common law pedigree; their importance is taken for granted. Moreover, it usually is possible to identify a specific point at which these rights arise and can be said to "belong" to a claimant. The acquisition of property rights, for example, normally occurs at a particular and well documented moment, in accordance with statutory or common law rules. Rights under instruments like wills or contracts arise on the effective date of the instrument. Rights of action arise the moment the last fact necessary to constitute the cause of action is complete. Rights to plead limitation periods arise the moment the action is statute-barred.

Outside these traditional categories it is difficult to predict when a given interest or expectation will be recognized as a vested or accrued right. There is a vast range of claims that may be made pursuant to statute for benefits, authorizations, exemptions, remedies, orders and the like. The methods of establishing and enforcing those claims follow no fixed pattern. Sometimes entitlement depends on a favourable exercise of discretion by a Minister or official. In each case the court must decide whether at the moment of repeal[157] the individual's statutory claim was sufficiently defined and developed, and sufficiently in his or her possession, to count as a vested right.

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156 See *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at 266-67; *Martin v. Perrie* (1986), 64 N.R. 195, at 199, 203 (S.C.C.).

157 Whether the legislation is simply repealed, or repealed and replaced by new law, the issue for the court is whether the repealed law should continue to govern.

Some claims to vested rights are obviously compelling while others are obviously unwarranted. However, there is a large grey area in which the courts struggle to distinguish expectations and interests that warrant protection from those that do not. In *Scott v. College of Physicians & Surgeons of Saskatchewan*[158] the Saskatchewan Court of Appeal reviewed the extensive case law in this area. By way of introduction, Vancise J.A. wrote:

> An acquired or accrued right is an illusory concept. Not many judicial attempts at definition can be found. Bissonette J. in *Syndics des Ecoles protestantes d'Outremont v. Outremont*[159] ... defined the right as "... ces droits qui font partie de notre patrimoine et qui ne peuvent nous être enlevés, sans causer une grave injustice et sans nous depouiller de ce qu'on avait raison d'en attendre." They are rights which are part of our estate and which cannot be taken away without causing a grave injustice. That definition, however, is of little use because it does not differentiate between rights which are vested and those which are not.[160]

Despite the pessimism of his introductory remarks, Vancise J.A. went on to summarize the best efforts of courts and scholars to capture the elusive distinction between vested and unvested rights. He identified two criteria. First, the right claimed must be "particularized" and "personalized":

> The individual claiming the right must have placed himself in a distinctive legal position, that is, ... in a position different from other members of society.[161]

Second, the right claimed must have been acted upon and effectively claimed as one's own.

> ... [S]ome step must have been taken or some event must have occurred toward the realization of the right....[162]

In addition to these general criteria, the courts have established a number of specific points. It is said, for example, that a right will not be defeated simply because the procedural steps necessary to claim the right have not all been taken prior to repeal.[163] In the case of a statutory benefit or advantage, if the last thing needed to establish an entitlement occurs before the legislation is repealed, the courts will recognize the entitlement as a vested right even though certain formalities must still be completed.[164] But if a substantive condition precedent to the

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158 (1992), 95 D.L.R. (4th) 706 (Sask. C.A.).

159 [1951] K.B. 676, at 692; affd [1952] 2 S.C.R. 506.

160 *Supra* note 158, at 727.

161 *Ibid.* See *Abbott v. Minister for Lands*, [1895] A.C. 425, at 431 (P.C.); *M.N R. v. Molson*, [1938] S.C.R. 213; *Gustavson Drilling (1964) Ltd. v. M.N.R.*, *supra* note 94.

162 *Ibid.*, at 728. See also *Rhys-Jones v. Rhys-Jones* (2000), 48 O.R. (3d) 193 (C.A.) in which Rosenberg J.A. offers a helpful review of the authorities at 198ff.

163 See *Re Falconbridge Nickel Mines Ltd. and Minister of Revenue for Ontario* (1981), 121 D.L.R. (3d) 403, at 413 (Ont. C.A.); *Abell v. R.C.M.P. Commissioner* (1979), 3 Sask R. 181, at 191 (C.A.).

164 See, for example, *Esso Resources Candda Ltd. v. M.N.R.*, *supra* note 147.

2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

2008 CarswellNfld 225

Hibernia Management & Development Co. v. Canada-Newfoundland Offshore Petroleum Board

HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LTD. (FIRST APPELLANT) AND PETRO-CANADA (SECOND APPELLANT) AND CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD (RESPONDENT) AND HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR (INTERVENOR)

Newfoundland and Labrador Court of Appeal

B.G. Welsh, M. Rowe, L.D. Barry JJ.A.

Heard: March 13-14,18-20, 2008
Judgment: September 4, 2008[FN*] [FN**]
Docket: 07/21, 07/22

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Proceedings: affirming *Hibernia Management & Development Co. v. Canada-Newfoundland Offshore Petroleum Board* (2007), 2007 CarswellNfld 31, 2007 NLTD 14, 798 A.P.R. 40, 263 Nfld. & P.E.I.R. 40 (N.L. T.D.)

Counsel: Augustus Lilly, Q.C., Maureen Ryan for First Appellant

James Thistle, Q.C., Jacqueline Penney for Second Appellant

Ian Kelly, Q.C., Daniel Glover for Respondent

Donna Ballard for Intervenor

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

Natural resources --- Oil and gas — Practice and procedure — Evidence

Canada-Newfoundland Offshore Petroleum Board (board) established under Canada-Newfoundland Atlantic Accord Implementation Act (Act), decided offshore project operators (operators) were not living up to research and development (R & D) investment expectations in province, so board developed guidelines for R & D expenditures (guidelines) and applied them to operators' projects which were already in final production phase — Operators brought unsuccessful application for judicial review of board's decision to develop and implement guidelines — Applications judge found that appropriate standard of review for board's interpretation of Act and own decisions was that of reasonableness but that, whether according to reasonableness or patent unreasonableness, board did not err in interpreting Act — Operators appealed and preliminary issue arose as to whether operators could make new submissions not made before applications judge and file and refer to documents not provided before applications judge — Operators could make new submissions, and 2000 and 2002 documents were admissible but not 2006 documents — Operators were

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granted leave to make new submissions because there was adequate record to support submissions, issue was fully argued in facts, and there was no reason to conclude board would be prejudiced — 2000 and 2002 documents on which guidelines were based could be filed as board acknowledged documents' relevance and did not suggest documents' inclusion would prejudice board — 2006 documents, however, were inadmissible because data would not have been available to board when guidelines were established and had not been raised before applications judge.

Natural resources --- Oil and gas — Statutory regulation — Judicial review — Miscellaneous

Standard of review — Canada-Newfoundland Offshore Petroleum Board (board) established under Canada-Newfoundland Atlantic Accord Implementation Act (Act), decided offshore project operators (operators) were not living up to research and development (R & D) investment expectations in province, so board developed guidelines for R & D expenditures (guidelines) and applied them to operators' projects which were already in final production phase — Operators brought unsuccessful application for judicial review of board's decision to develop and implement guidelines — Applications judge found that appropriate standard of review for board's interpretation of Act and own decisions was that of reasonableness but that, whether according to reasonableness or patent unreasonableness, board did not err in interpreting Act — Operators appealed — Appeal dismissed — Reasonableness was appropriate standard in assessing whether board had authority to apply guidelines to projects — Concept of patent unreasonableness was eliminated by recent Supreme Court of Canada decision, so question was now whether standard of review was correctness or reasonableness — Board had broad authority as to approval of benefits plans, was assigned extensive decision-making authority by legislation, and was intended to be specialized tribunal with expertise in offshore petroleum development — Reasonableness standard was generally applicable to regime such as board's which was discrete and special administrative regime in which decision-maker had special expertise — Board's decisions were protected by partial privative clause, and even in absence of such clause, other factors, such as mandate and expertise of board, indicated that board's decisions should be shown deference by applying reasonableness standard — Nor did question of whether board had authority to apply guidelines to projects involve questions of law of central importance to legal system, suggesting that correctness standard was not necessarily engaged — Finally, question of board's authority to issue and apply guidelines was not true question of vires as board had broad authority to approve plans and issue guidelines, and question of whether guidelines could be applied to operators already in production phase depended primarily upon interpretation of benefit plans as approved by board's decisions.

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

Canada-Newfoundland Offshore Petroleum Board (board) established under Canada-Newfoundland Atlantic Accord Implementation Act (Act), decided offshore project operators (operators) were not living up to research and development (R & D) investment expectations in province, so board developed guidelines for R & D expenditures (guidelines) and applied them to operators' projects which were already in final production phase — Operators brought unsuccessful application for judicial review of board's decision to develop and implement guidelines — Applications judge found that appropriate standard of review for board's interpretation of Act and own decisions was that of reasonableness but that, whether according to reasonableness or patent unreasonableness, board did not err in interpreting Act — Operators appealed — Appeal dismissed — Reasonableness was appropriate standard in assessing whether board had authority to apply guidelines to projects — Concept of patent unreasonableness was eliminated by recent Supreme Court of Canada decision, so question was now whether standard of review was correctness or reasonableness — Board had broad authority as to approval of benefits plans, was assigned extensive decision-making authority by legislation, and was intended to be specialized tribunal with expertise in offshore petroleum development — Reasonableness standard was generally applicable to regime such as board's which was discrete and special administrative regime in which decision-maker had special expertise — Board's decisions were protected by partial privative clause, and even in absence of such clause, other factors, such as mandate and expertise of board, indicated that board's decisions should be shown deference by applying reasonableness standard — Nor did question of whether board had authority to apply guidelines to projects involve questions of law of central importance to legal system, suggesting that correctness standard was not necessarily engaged — Finally, question of board's authority to issue and apply guidelines was not true question of vires as board had broad authority to approve plans and issue guidelines, and question of

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whether guidelines could be applied to operators already in production phase depended primarily upon interpretation of benefit plans as approved by board's decisions.

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

Canada-Newfoundland Offshore Petroleum Board (board) established under Canada-Newfoundland Atlantic Accord Implementation Act, decided offshore project operators (operators) were not living up to research and development (R & D) investment expectations, so board developed and applied guidelines to operators' projects which were in final production phase — Operators brought unsuccessful application for judicial review — Applications judge found that standard of review was reasonableness, that board's ongoing monitoring and enforcement role authorized establishing and implementing reasonable levels of R & D expenditures, that operators accepted this in accepting approval of benefits plans (plans), that functus officio principle did not apply, that guidelines did not affect vested rights, and that board did not err in creating fund to deal with expenditure shortfall during certain periods or in making production authorizations conditional on compliance with guidelines — Operators appealed — Appeal dismissed — Partial privative clause, special administrative regime of which board was part, board's authority to approve plans, extensive decision-making authority assigned board by legislation, and status as specialized, expert tribunal, suggested that deference be shown and that reasonableness was applicable standard and, as authority to apply guidelines was not of central importance to legal system, correctness standard was not necessarily engaged — Authority to issue and apply guidelines was not true question of vires and question of guidelines' application to operators depended mainly on interpretation of plans approved by board decisions — Guidelines were neither law nor alteration of legislative regime and it could not be said their application to projects interfered with vested rights — Board was not functus officio once plans were approved, and was reasonable to conclude its monitoring authority was on-going — Applications judge did not err in deciding board had authority to set expenditure levels, and these were not invalid tax — Guidelines considered nature of industry and limitations of data, and parameters were acceptable approach to monitoring expenditures — In establishing and administering fund, board was exercising necessary power to carry out mandate — Plans provided manner for satisfying expenditure requirement and it was reasonable to infer board's authority to issue production authorization was subject to determination that company was complying with plans, so board could make compliance with plans and guidelines requirement of production authorization — Board's interpretations fell within range of possible, acceptable outcomes and satisfied standard of reasonableness.

Natural resources --- Oil and gas — Statutory regulation — Judicial review — Grounds

Canada-Newfoundland Offshore Petroleum Board (board) established under Canada-Newfoundland Atlantic Accord Implementation Act, decided offshore project operators (operators) were not living up to research and development (R & D) investment expectations, so board developed and applied guidelines to operators' projects which were in final production phase — Operators brought unsuccessful application for judicial review — Applications judge found that standard of review was reasonableness, that board's ongoing monitoring and enforcement role authorized establishing and implementing reasonable levels of R & D expenditures, that operators accepted this in accepting approval of benefits plans (plans), that functus officio principle did not apply, that guidelines did not affect vested rights, and that board did not err in creating fund to deal with expenditure shortfall during certain periods or in making production authorizations conditional on compliance with guidelines — Operators appealed — Appeal dismissed — Partial privative clause, special administrative regime of which board was part, board's authority to approve plans, extensive decision-making authority assigned board by legislation, and status as specialized, expert tribunal, suggested that deference be shown and that reasonableness was applicable standard and, as authority to apply guidelines was not of central importance to legal system, correctness standard was not necessarily engaged — Authority to issue and apply guidelines was not true question of vires and question of guidelines' application to operators depended mainly on interpretation of plans approved by board decisions — Guidelines were neither law nor alteration of legislative regime and it could not be said their application to projects interfered with vested rights — Board was not functus officio once plans were approved, and was reasonable to conclude its monitoring authority was on-going — Applications judge did not err in deciding board had authority to set expenditure levels, and these were not invalid tax — Guidelines considered nature of industry and limitations of data, and parameters were acceptable approach to monitoring expenditures

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2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

— In establishing and administering fund, board was exercising necessary power to carry out mandate — Plans provided manner for satisfying expenditure requirement and it was reasonable to infer board's authority to issue production authorization was subject to determination that company was complying with plans, so board could make compliance with plans and guidelines requirement of production authorization — Board's interpretations fell within range of possible, acceptable outcomes and satisfied standard of reasonableness.

The Canada-Newfoundland Offshore Petroleum Board (board) established under the Canada-Newfoundland Atlantic Accord Implementation Act (Act), was responsible for managing and regulating petroleum resources offshore Newfoundland and Labrador and regulating companies (operators), including H Ltd., the licensed project operator for the H Project, and PC, the operator of the T Project. In 1986, the board approved the H Project development benefit plans and in 1997, the T Project plans. Each operator's plan listed potential areas in which operator made non-specific commitments to investing back in province by the way of research and development (R & D), and proposed reporting and monitoring by the board. While the projects were in the production phase, the board reviewed R & D expenditures and found that H Ltd.'s had declined by over 50 per cent from 1998 to 2001 and that PC projected spending only $300,000 to $400,000 in R & D and education and training expenditures for 2002 to 2004. In response, the board developed R & D guidelines (guidelines) for existing and future offshore oil projects for calculating the amount operators would have to put back into R & D in the Province. The board used a five-year average for R & D expenditure norms by oil and gas extracting companies in Canada to arrive at a percentage of total annual revenue during each of an operator's exploration, development, and production phase which operators would be required to contribute towards R & D expenditures, including fund to deal with expenditure shortfalls during certain periods. After the operators calculated that their R & D expenditures under the guidelines would be significantly higher than the board's estimations, the operators brought an unsuccessful application for judicial review of the board's decision to implement the guidelines.

The applications judge applied the then-prevailing functional pragmatic approach and determined that the board's decisions interpreting its constitutive statute and its own decision were reviewable on the standard of reasonableness, and that its decisions within its jurisdiction were reviewable on the standard of patent unreasonableness. The applications judge determined that the board had the power to impose the guidelines in furtherance of its obligation to ensure that benefits plans provided that expenditures be made for R & D in the province. The applications judge went on to determine that it was not unreasonable for the board to establish a level of expenditure based on industry norms, to impose compliance with the guidelines as a condition in a production operations authorization, or to establish an R & D fund as part of its enforcement power under the Act, into which unexpended monies from the research and development requirements were to be paid and which was to be administered by the board in consultation with the offshore operators. The applications judge observed that the offshore developments spanned decades, that the benefits plans proposed regular reporting by the operators and ongoing monitoring by the board to ensure compliance with the commitments undertaken, and that the operators, by accepting the board's approval of their respective benefits plans, had accepted the board's ongoing obligation and authority to assess and monitor the appropriateness of the levels of R & D and education and training, and that their ability to proceed with their developments were dependent on board approval, that they accepted the approvals which were subject to the board's ongoing role in determining the appropriateness of the expenditures being made in compliance with their obligations for the duration of the project. The applications judge found that the principle of functus officio had no application to the board's continuing power to monitor and assess the operators' R & D expenditures, and that the guidelines did not interfere with any vested rights. Finally, the applications judge decided that the board did not err in establishing and implementing guidelines for levels of expenditure based on industry norms as a condition in production operations authorization. The operators appealed.

Held: The appeal was dismissed

Per Welsh J.A. (Barry J.A. concurring): The applications judge did not err in concluding that the board had authority to apply the guidelines to the operators' projects, that the parameters in the guidelines were reasonable, that the board had the authority to establish and administer the R & D fund, and to make compliance with the benefits plan, which included the guidelines, a requirement of production authorization. The board had broad authority as to the approval of

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benefits plans, was assigned extensive decision-making authority by its constitutive legislation, and was intended to be a specialized tribunal with expertise in offshore petroleum development. The reasonableness standard was generally applicable as the board was part of a discrete, special administrative regime in which the decision-maker had special expertise. The board's decisions were protected by a partial privative clause, and even were there no such clause, other factors suggested that deference should be shown to the board's decisions. Furthermore, the fact that the board's authority to apply the guidelines was not a question of central importance to the legal system, suggested that the correctness standard was not necessarily engaged. The board's authority to issue and apply the guidelines was not a true question of vires as the board had broad authority to approve plans and issue guidelines, and the question of whether the guidelines could be applied to the operators already in the production phase depended primarily upon the interpretation of benefit plans as approved by the board's decisions. Ultimately, the board's interpretation of its constitutive Act and the benefits plans it approved fell within the range of possible, acceptable outcomes which were defensible in respect of the facts and the law and, accordingly, its interpretation satisfied the standard of reasonableness.

It could not be said that the application of the guidelines to the operators' projects interfered with any vested rights as the guidelines were neither law nor an alteration of a legislative regime. Nor could it be said that the board was functus officio in respect of the benefits plans once the board approved them, and the board was reasonable in concluding that it had a continuing responsibility and authority to monitor the operators' R & D expenditures. Neither had the applications judge erred in deciding that the board had the authority to set reasonable levels of R & D expenditures, and these were not an invalid tax.

The Guideline parameters were an acceptable approach to monitoring the R & D expenditures which the operators were legislatively required to make within the Province. The guidelines took into account the unique nature of the offshore petroleum industry and the limitations of the Statistics Canada data. Also, as the applications judge noted, the R & D fund was an administrative vehicle to accommodate the expenditure shortfall caused by the nature and timing of projects in particular periods, so in establishing and administering the fund, the board was exercising a necessary power to carrying out its legislated mandate. Finally, the board's authority to issue production authorizations was subject to a provision in the Act establishing the requirement for benefit plans and requiring that the R & D expenditures be carried out. The benefit plans provided a manner for satisfying the expenditure requirement and the reasonable inference that followed was that the board's authority to issue production authorization was subject to the board's determination that the operators were in compliance with its benefits plans, including, in this case, compliance with the guidelines. The board's interpretation of s. 138 was reasonable, and the board had authority to make compliance with the operators' benefits plan, including the guidelines, a requirement of production authorization.

Per Rowe J.A. (dissenting): Section 45(3)(c) of the Act did not grant the board authority to put in place guidelines for R & D of the nature established by the board in 1994. The expenditures required by the guidelines had no logical or factual connection with the R & D needs of the projects and vastly exceeded those needs. The board had no authority to create a gigantic reservoir of cash that the board would control jointly with operators to endow research chairs at the university, build new facilities at the marine institute, fund port infrastructure, or whatever the board conceived from time to time as "creating a lasting economic legacy for the people of the province." In establishing the guidelines, the board got out of the business of being a regulator and into the business of government. It used its regulatory power in a way that exceeded its grant of authority. Changing rules upon which reliance was placed to make multi-billion dollar investments constituted an example of erratic public administration. When the operators received approval, they had to have confidence that the decision would not be reversed or fundamentally altered.

Cases considered by *B.G. Welsh J.A.*:

Chandler v. Assn. of Architects (Alberta) (1989), [1989] 6 W.W.R. 521, 36 C.L.R. 1, [1989] 2 S.C.R. 848, 70 Alta. L.R. (2d) 193, 40 Admin. L.R. 128, 62 D.L.R. (4th) 577, 99 N.R. 277, 101 A.R. 321, 1989 CarswellAlta 160, 1989 CarswellAlta 620 (S.C.C.) — referred to

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans) (1997), 142 D.L.R. (4th) 193, 43 Admin.

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L.R. (2d) 1, 1997 CarswellNat 10, 1997 CarswellNat 11, 206 N.R. 363, 31 C.C.L.T. (2d) 236, [1997] 1 S.C.R. 12 (S.C.C.) — referred to

Decision 86.01 (June 18, 1986), Doc. 86.01 (Can.-N.L. O.P.B.) — referred to

Decision 97.02 (December 1, 1997), Doc. 97.02 (Can.-N.L. O.P.B.) — considered

Dikranian c. Québec (Procureur général) (2005), 2005 SCC 73, 2005 CarswellQue 10752, 2005 CarswellQue 10753, (sub nom. *Dikranian v. Québec (Procureur Général))* 260 D.L.R. (4th) 17, (sub nom. *Dikranian v. Quebec (Attorney General))* 342 N.R. 1, [2005] 3 S.C.R. 530 (S.C.C.) — distinguished

Eurig Estate, Re (1998), (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar)* 114 O.A.C. 55, 1998 CarswellOnt 3950, 1998 CarswellOnt 3951, 40 O.R. (3d) 160 (headnote only), [2000] 1 C.T.C. 284, 165 D.L.R. (4th) 1, (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar)* 231 N.R. 55, 23 E.T.R. (2d) 1, [1998] 2 S.C.R. 565 (S.C.C.) — referred to

Gustavson Drilling (1964) Ltd. v. Minister of National Revenue (1975), 1975 CarswellNat 330, [1976] C.T.C. 1, 75 D.T.C. 5451, 66 D.L.R. (3d) 449, 7 N.R. 401, 1975 CarswellNat 376, [1977] 1 S.C.R. 271 (S.C.C.) — considered

Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board) (1994), 1994 CarswellNfld 277, 163 N.R. 27, 21 Admin. L.R. (2d) 248, 115 Nfld. & P.E.I.R. 334, 360 A.P.R. 334, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1, 1994 CarswellNfld 211 (S.C.C.) — considered

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

Newfoundland (Board of Commissioners of Public Utilities), Re (1998), 1998 CarswellNfld 150, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 164 Nfld. & P.E.I.R. 60, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 507 A.P.R. 60 (Nfld. C.A.) — considered

Cases considered by *L.D. Barry J.A.*:

Decision 86.01 (June 18, 1986), Doc. 86.01 (Can.-N.L. O.P.B.) — considered

Decision 97.02 (December 1, 1997), Doc. 97.02 (Can.-N.L. O.P.B.) — considered

National Corn Growers Assn. v. Canada (Canadian Import Tribunal) (1990), 4 T.T.R. 267, 45 Admin. L.R. 161, (sub nom. *American Farm Bureau Federation v. Canadian Import Tribunal)* 3 T.C.T. 5303, 114 N.R. 81, 74 D.L.R. (4th) 449, [1990] 2 S.C.R. 1324, 1990 CarswellNat 611, 1990 CarswellNat 741 (S.C.C.) — considered

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

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Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

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

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92 (2004), (sub nom. *Construction & General Workers' Union, Local 92 v. Voice Construction Ltd.)* 2004 C.L.L.C. 220-026, [2004] 7 W.W.R. 411, 2004 SCC 23, [2004] 1 S.C.R. 609, 14 Admin. L.R. (4th) 165, 29 Alta. L.R. (4th) 1, 2004 CarswellAlta 422, 2004 CarswellAlta 423 (S.C.C.) — considered

Cases considered by *M. Rowe J.A.*:

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans) (1992), 11 C.C.L.T. (2d) 241, 54 F.T.R. 20, [1992] 3 F.C. 54, 1992 CarswellNat 169, 1992 CarswellNat 597 (Fed. T.D.) — considered

Decision 86.01 (June 18, 1986), Doc. 86.01 (Can.-N.L. O.P.B.) — referred to

Decision 97.02 (December 1, 1997), Doc. 97.02 (Can.-N.L. O.P.B.) — considered

Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board) (1994), 1994 CarswellNfld 277, 163 N.R. 27, 21 Admin. L.R. (2d) 248, 115 Nfld. & P.E.I.R. 334, 360 A.P.R. 334, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1, 1994 CarswellNfld 211 (S.C.C.) — considered

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

Statutes considered by *B.G. Welsh J.A.*:

Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3

Generally — referred to

Pt. I — referred to

Pt. III — referred to

s. 17 — considered

s. 30 — considered

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s. 38 — considered

s. 42(1)(d) — considered

s. 45 — considered

s. 45(2) — considered

s. 45(3) — considered

s. 45(3)(c) — considered

s. 45(5) — considered

s. 45(6) — considered

s. 80 — referred to

s. 124(10) — considered

s. 135.1 [en. 1992, c. 35, s. 53] — considered

s. 137(a) — considered

s. 137(b) — considered

s. 138 — referred to

s. 138(1) — considered

s. 138(1)(b) — considered

s. 138(2) — considered

s. 138(3) — considered

s. 138(4) — considered

s. 138(5) — considered

s. 138(5)(a) — considered

s. 139 — referred to

s. 145(3) — considered

s. 149 — referred to

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s. 151.1 [en. 1992, c. 35, s. 65] — considered

s. 151.1(1) [en. 1992, c. 35, s. 65] — considered

s. 151.1(2) [en. 1992, c. 35, s. 65] — considered

s. 184(1) — considered

Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act, R.S.N. 1990, c. C-2

Generally — referred to

Statutes considered by *L.D. Barry J.A.*:

Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3

s. 30 — considered

s. 45(3) — considered

s. 151.1(1) [en. 1992, c. 35, s. 65] — considered

s. 151.1(2) [en. 1992, c. 35, s. 65] — considered

Statutory Instruments Act, R.S.C. 1985, c. S-22

Generally — referred to

Statutes considered by *M. Rowe J.A.*:

Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3

Generally — referred to

s. 45 — considered

s. 45(1) "Canada-Newfoundland benefits plan" — considered

s. 45(2) — considered

s. 45(3) — considered

s. 45(3)(c) — considered

APPEAL by offshore project operators from judgment reported at *Hibernia Management & Development Co. v. Canada-Newfoundland Offshore Petroleum Board* (2007), 2007 CarswellNfld 31, 2007 NLTD 14, 798 A.P.R. 40, 263

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2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

Nfld. & P.E.I.R. 40 (N.L. T.D.), dismissing operators' application for judicial review of decision of Canada-Newfoundland and Labrador Offshore Petroleum Board.

***B.G. Welsh J.A.*:**

1 A company seeking authority to operate in the offshore petroleum industry adjacent to this Province is legislatively required to submit a benefits plan for the approval of the Canada-Newfoundland and Labrador Offshore Petroleum Board. The plan must include provision for expenditures to be made by the company for research and development to be carried out in the Province. This appeal by two companies that are in the production phase of their operations in the offshore raises questions as to the scope of authority of the Board to interpret and apply the research and development component of the companies' benefits plans.

Background

2 The petroleum industry operating in the offshore adjacent to Newfoundland and Labrador is governed jointly by the federal and provincial governments by means of parallel legislation ("the Atlantic Accord legislation"). (See: *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3; and *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2.) The legislation is designed to implement the 1985 Atlantic Accord Memorandum of Agreement between the governments (the "Atlantic Accord"). Consistent with the decision of the applications judge, for convenience, I will refer to the relevant sections of the federal legislation. While there are some differences in language and drafting style between the federal and provincial statutes, these differences do not affect the interpretation of the provisions relevant to this appeal.

3 The Canada-Newfoundland and Labrador Offshore Petroleum Board (the "Board") was established under the Atlantic Accord legislation. The Board has authority, among other things, to issue licences and work authorizations (sections 80 and 138 of the Act). Hibernia Management and Development Company Limited ("Hibernia Management") was licenced to produce petroleum from the Hibernia Offshore Development Project (the "Hibernia Project"). Likewise, Petro-Canada was licenced for the Terra Nova Offshore Development Project (the "Terra Nova Project").

4 Each project requires a development plan. Before a development plan is approved, a benefits plan, including a research and development component, must be submitted to and approved by the Board. The development plans for the Hibernia and Terra Nova Projects were approved by decisions of the Board in 1986 and 1997, respectively.

5 The applications judge commented on circumstances that led the Board, in 2004, to issue Guidelines regarding expenditures by companies for research and development in the Province ((2007), 263 Nfld. & P.E.I.R. 40 (N.L. T.D.)):

> [78] In this case, at the time of approving the benefits plans, the Board opted, at the suggestion of the operators and with their concurrence, for a scheme which called for a Statement of General Principles without specific expenditure commitments for research and development, subject to ongoing reporting by the operators and monitoring by the Board to determine sufficiency.
>
> [79] Ultimately, the Board determined that it needed to review the level of expenditures on research and development by the operators of the Hibernia and Terra Nova oilfields. As noted by Frederick Way, the then acting chair and chief executive officer of the Board, in his affidavit dated 20 April, 2005, filed in this matter, at paragraph 101:
>
> > The reports and information filed with the Board indicated declining research and development expenditures for the Hibernia and Terra Nova projects during the production phase. Hibernia's reported research and development expenditures had declined by over 50% from 1998 to 2001. The Terra Nova Annual Benefits

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> Report for the year 2001, filed with the Board in March 2002, projected only $300,000.00 to $400,000.00 as the average annual expenditures for research and development, including education and training, for the years 2002-2004.

6 As a result, in 2004, the Board issued Guidelines regarding expenditures for research and development to be made in the Province pursuant to the companies' benefits plans. This led to an application by Hibernia Management and Petro-Canada in the Trial Division challenging the Board's authority to apply the Guidelines to the Hibernia and Terra Nova Projects. The applications judge summarized:

> [3] Following consultation with the industry, on 5 November, 2004, the Board established a set of "Guidelines for Research and Development Expenditures" (the "R & D Guidelines"). These Guidelines apply to all existing and future offshore petroleum projects in the area subject to the **Accord Acts** and came into effect on 1 April, 2004.
>
> [4] The R & D Guidelines establish expenditure obligations for project operators during the three recognized phases of an offshore petroleum project: the exploration phase, the development phase and the production phase. Both the Hibernia Project and Terra Nova Project are currently in the production phase. The Board undertook research to determine, based on Statistics Canada statistics, the "upstream" research and development expenditures norms by oil and gas extracting companies in Canada. Based on this research, using a five-year moving average, the Board established a percentage of total annual revenue to be spent on research and development in the Province. The actual amount of expenditure in a year will depend on the five-year benchmark and the price of oil.
>
> [5] While the applicants and the Board differ on the actual amounts [of] these projected expenditures for research and development over the life of each of the projects, it is clear that the costs will be significant, depending on the long-term price of oil and the total amount of oil extracted from each project. ...

7 The applications judge considered three issues: (1) whether the Board has authority to apply the 2004 Guidelines (the "Guidelines") to the Hibernia and Terra Nova Projects; (2) whether the Board exceeded its authority by establishing a fund from monies required to be, but not, expended during the term of a production operations authorization ("production authorization" or "POA"); and (3) whether the Board has authority to refuse to issue a production authorization if an operator fails to comply with the research and development component of its benefits plan.

8 I note here that, as discussed below, after the applications judge gave his decision, the Supreme Court of Canada released its decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.). That decision alters the analytical approach to be used in determining the appropriate standard of review to be applied to a decision of an administrative tribunal. Accordingly, the applications judge's conclusions are based on the previously authorized pragmatic and functional analysis.

9 Regarding the appropriate standard of review in respect of the Board's authority to impose the 2004 Guidelines on the Hibernia and Terra Nova Projects, the applications judge concluded:

> [27] On the whole, applying the functional and pragmatic approach, I find that the appropriate standard of review for questions involving the interpretation by the Board of its constitutive statute and its own decisions is that of reasonableness.

10 Applying this standard, the applications judge concluded that the Board "has the authority to establish reasonable levels of expenditure required to be made for research and development and education and training as part of its ongoing monitoring and enforcement role under the Accord and the *Act*" (paragraph 74). And further, he wrote:

> [83] I conclude that the Board's decision to tie research and development expenditures to industry norms in fulfillment of its obligation to determine what would be a reasonable and sufficient level of expenditure on research and development is a reasonable approach. It can be supported on the facts and it is not for this Court to substitute its decision for that of the Board. The Board's decision in this regard is not patently unreasonable. It also passes

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muster on the standard of reasonableness *simpliciter*.

. . . . .

[85] In my respectful view, on either standard, reasonableness *simpliciter* or patently unreasonable, the Board's decision to impose the R & D Guidelines and the factual basis for the guidelines is unassailable. It is neither unreasonable nor patently unreasonable.

11 With respect to establishing a fund from monies required to be, but not, expended during the term of a production authorization, the applications judge concluded that patent unreasonableness was the appropriate standard of review. However, while applying that standard, he indicated the issue also met the reasonableness criterion:

[89] ... The Board possesses considerable expertise in the management of the offshore and the fulfillment of its statutory mandate. In the absence of a contrary intention in the **Acts**, it is not unreasonable or patently unreasonable for the Board to establish an R & D Fund to be spent in conjunction with the operators to ensure that adequate expenditures as determined by the Board are actually made in the province on research and development.

12 Finally, regarding the Board's determination that an operator's failure to comply with the research and development component of a benefits plan is sufficient to warrant withholding a production authorization, the applications judge wrote:

[90] Likewise, as noted earlier, the affixing of a requirement to comply with the R & D Guidelines as a condition to a POA is a regulatory and enforcement matter within the authority of the Board pursuant to Section 138(4) of the **Act**. This section gives the Board a wide discretion. POA's have a limited life. Benefits are clearly linked to POA's by virtue of their relationship between Section 45(2) and Section 138(1)(b) of the **Act**. There is nothing clearly irrational about making compliance with a lawful requirement of the Board a condition of the right to continue to prosecute a public resource for profit.

13 In the result, the application by Hibernia Management and Petro-Canada was denied.

Issues

14 Two preliminary issues were raised in this Court in an application by Hibernia Management. These are:

(1) Whether Hibernia Management could make submissions regarding the timing of the enactment of section 151.1 of the Act given that such submissions had not been made in the Trial Division; and

(2) Whether Statistics Canada documents published in 2000, 2002 and 2006 could be filed and referred to during Hibernia Management's submissions given that the documents had not been filed in the Trial Division.

15 Given the change in approach to determining the appropriate standard of review as a result of the *Dunsmuir* decision, it is necessary to reconsider the applications judge's conclusions on this point.

16 The issues may then be conveniently considered as follows. Did the applications judge err in concluding that:

(1) The Board has authority to apply the 2004 Guidelines regarding expenditures for research and development in the Province to the Hibernia and Terra Nova Projects;

(2) The Guidelines are reasonable;

(3) The Board has authority to establish a research and development fund from monies required to be, but not,

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expended during the term of a production authorization; and

(4) The Board has authority to make compliance with the benefits plans, including the Guidelines, a condition of production authorizations for the Hibernia and Terra Nova Projects?

Analysis

The Preliminary Issues

17 At the hearing, based on the written and oral submissions of counsel, this Court gave its decision regarding the two preliminary issues raised by Hibernia Management.

18 Regarding the first issue, the Board did not object to Hibernia Management making submissions regarding the timing of the enactment of section 151.1 of the Act although such submissions had not been made in the Trial Division. Generally speaking, to facilitate comprehensive adjudication, all relevant arguments should be made in the court of first instance. However, in the circumstances, this Court accepted that there was an adequate record to support the new submissions, that the issue was fully argued in the facta, and that there was no reason to conclude that the Board would be prejudiced by allowing the submissions. Accordingly, Hibernia Management was given leave to make the requested submissions.

19 With respect to the second issue, this Court concluded that the Statistics Canada documents published in 2000 and 2002, although not provided in the Trial Division, could be filed and referred to during submissions in this Court. It is clear from the affidavit filed by Frederick Way in the Trial Division that, in establishing the Guidelines, the Board referred to Statistics Canada data from the years 1995 to 2002. Hibernia Management, represented in this Court by different counsel than in the Trial Division, did not challenge the accuracy of that data, but wished to supplement the information to assist in demonstrating that the parameters set out in the Guidelines are not reasonable.

20 The Board, while not suggesting that it would be prejudiced by inclusion of the additional data, responded that the data would not further the issues on appeal because such detail and minutiae would provide neither helpful nor appropriate considerations in this Court's assessment of the reasonableness of the Guidelines. However, counsel acknowledged that Statistics Canada data was before the Court and was relevant in establishing the Guidelines. The data is in the nature of a public document and was not under challenge as to its accuracy.

21 In these circumstances, to ensure full opportunity to Hibernia Management to make its submissions on the appeal, leave was granted to file the additional Statistics Canada data for the years 2000 and 2002.

22 However, the documents published in 2006 were not admissible. This data would not have been available for the Board's consideration in establishing the Guidelines, had not been raised in the Trial Division, and could not properly be considered by this Court.

The Legislation and the Atlantic Accord

23 The functions of the Board are set out, in broad terms, in section 17 of the Act:

(1) The Board shall perform such duties and functions as are conferred or imposed on the Board by or pursuant to the Atlantic Accord or this Act.

(2) The Board may make recommendations to both governments with respect to proposed amendments to this Act, the Provincial Act and any regulations made under those Acts.

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24 In Part I of the Act, under the title "Decisions in Relation to Offshore Management", section 30 speaks to finality of the Board's decisions:

> Subject to this Act, the exercise of a power or the performance of a duty by the Board pursuant to this Act is final and not subject to the review or approval of either government or either Minister.

25 Section 42 of the Act deals with binding ministerial directives to the Board:

> (1) The Federal Minister and the Provincial Minister may jointly issue to the Board written directives in relation to
>
> . . . . .
>
> (d) Canada-Newfoundland benefits plans and any of the provisions thereof; ...

26 Benefits plans are dealt with under section 45 of the Act, which states, in relevant parts:

> . . . . .
>
> (2) Before the Board may approve any development plan pursuant to subsection 139(4) or authorize any work or activity under paragraph 138(1)(b), a Canada-Newfoundland benefits plan shall be submitted to and approved by the Board, unless the Board directs that that requirement need not be complied with.
>
> (3) A Canada-Newfoundland benefits plan shall contain provisions intended to ensure that
>
> . . . . .
>
> (c) expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province;
>
> . . . . .
>
> (5) In reviewing any Canada-Newfoundland benefits plan, the Board shall consult with both Ministers on the extent to which the plan meets the requirements set out in subsections (1), (3) and (4).
>
> (6) Subject to any directives issued under subsection 42(1), the Board may approve any Canada-Newfoundland benefits plan.

27 Part III of the Act addresses "Petroleum Operations". Section 137 sets out the requirement for licences and work authorizations:

> No person shall carry on any work or activity related to the exploration or drilling for or the production, conservation, processing or transportation of petroleum in the offshore area unless
>
> (a) that person is the holder of an operating licence issued under paragraph 138(1)(a);
>
> (b) that person is the holder of an authorization issued, before the commencement of operations, under paragraph 138(1)(b) for each such work or activity; and ...

28 Section 138 deals with issuing licences and authorizations, and provides, in relevant parts:

> (1) The Board may, on application made in the form and containing the information fixed by it, and made in the prescribed manner, issue

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(a) an operating licence; and

(b) subject to section 45, an authorization with respect to each work or activity proposed to be carried on.

(2) An operating licence expires on the thirty-first day of March immediately after the day on which it is issued and may be renewed for successive periods not exceeding one year each.

(3) An operating licence is subject to such requirements as the Board determines or as may be prescribed and to such fees and deposits as are prescribed.

(4) An authorization is subject to such approvals as the Board determines or as may be granted in accordance with the regulations and such requirements and deposits as the Board determines or as may be prescribed, including

(a) requirements relating to liability for loss, damage, costs or expenses;

(b) requirements for the carrying out of environmental programs or studies; and

(c) requirements for the payment of expenses incurred by the Board in approving the design, construction and operation of production facilities and production platforms, as those terms are defined in the regulations.

(5) The Board may suspend or revoke an operating licence or an authorization for failure to comply with, contravention of or default in respect of

. . . . .

(a) a requirement, approval, fee or deposit subject to which the licence or authorization was issued;

. . . . .

29 Section 151.1 authorizes the Board to issue guidelines and interpretation notes:

(1) The Board may issue and publish, in such manner as the Board deems appropriate, guidelines and interpretation notes with respect to the application and administration of sections 45, 138 and 139 or any regulations made under section 149.

(2) Guidelines and interpretation notes issued pursuant to subsection (1) shall be deemed not to be statutory instruments for the purposes of the Statutory Instruments Act.

30 In addition to the legislation, the Atlantic Accord is relevant. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202 (S.C.C.), Iacobucci J., for the Court, wrote, at page 219:

Finally, attention must be given to the object and scheme of the legislation at issue. The federal and provincial *Implementation Acts* gave effect to the provisions of the Atlantic Accord, and the Board must conduct itself with the Accord in mind: s.17(1). Two purposes of the Accord were "to provide for a stable and fair offshore management regime for industry" and "to provide for a stable and permanent arrangement for the management of the offshore": see clauses 2(f) and (g).

31 Other relevant provisions of the Accord provide:

24. The Board shall make all other decisions relating to the regulation and management of petroleum-related activities in the offshore area. Except for fundamental decisions, as set out in clause 25, all decisions of the Board

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shall be final.

50. It is the objective of both governments to ensure that the offshore area is managed in a manner which will promote economic growth and development in order to optimize benefits accruing to Newfoundland in particular and to Canada as a whole.

55. Benefits plans submitted pursuant to clause 51 shall provide for expenditures to be made on research and development, and education and training, to be conducted within the province. Expenditures made by companies active in the offshore pursuant to this requirement shall be approved by the Board.

Standard of Review

32 Given the recent decision of the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, *supra*, it is necessary to consider the appropriate standard of review to be applied to each issue. I begin with a review of general principles as set out in the majority decision in *Dunsmuir*. The context for the analysis is determined by reference to the function of judicial review which is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes" (paragraph 28).

The Standards of Review

33 Patent unreasonableness has been eliminated as an applicable standard. There are two standards of review: correctness and reasonableness. Regarding what reasonableness means under the revised "standard of review analysis", Bastarache and LeBel JJ., for the majority, wrote:

[47] 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.

34 The majority then proceeded with a discussion of judicial deference. Bastarache and LeBel JJ. wrote:

[48] ... Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. ...

35 The majority referred to "respectful attention to the reasons offered or which could be offered in support of a decision" (paragraph 48), and to a recognition that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (paragraph 49).

36 Finally, Bastarache and LeBel JJ. discussed the standard of correctness:

[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized appli-

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cation of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Choosing the Appropriate Standard of Review

37 As to choosing the appropriate standard of review, the majority wrote:

[51] ... As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

38 Regarding questions of law, Bastarache and LeBel JJ. wrote:

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity [authority cited]. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: [authority cited]. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

39 However, in the context of questions of law the majority cautioned:

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE* [[1979] 2 S.C.R. 227]. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: [authority cited]. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal Acts to enact bylaws limiting the number of taxi plate licences (para.5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" [authority cited]. Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.* [[2003], 3 S.C.R. 77], which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

40 Finally, in determining whether deference should be accorded and a reasonableness test applied, Bastarache and LeBel JJ. identified some factors to be considered. First, while not determinative, a privative clause is a "strong indication" that the reasonableness standard will apply. However, a privative clause must be read in context and so as

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to ensure that the tribunal does not exceed its jurisdiction (paragraph 52). Second, a reasonableness standard will generally apply to a "discrete and special administrative regime in which the decision maker has special expertise", such as a labour relations board (paragraph 55). Third, where a question of law is at issue, the correctness standard will always apply where the question is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative tribunal (paragraph 55). However, a question of law that does not fall within this description may attract a reasonableness standard.

41 In conclusion, Bastarache and LeBel JJ. wrote:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

42 With these general principles in mind, I turn now to a consideration of the issues on appeal.

The Board's Authority to Apply the Guidelines to the Projects

43 The crux of the submissions by Hibernia Management and Petro-Canada regarding the Board's application of the 2004 Guidelines to their Projects is that application of the Guidelines constitutes a unilateral amendment of the prior approved benefits plans, an action which the Board is not authorized to take. In response, the Board submitted that the Guidelines do not impose new obligations, but are merely an exercise of the Board's continuing obligation to monitor the expenditures for research and development set out in the benefits plans for the Hibernia and Terra Nova Projects.

Standard of Review

44 Hibernia Management and Petro-Canada submitted that whether the Board has authority to apply the 2004 Guidelines to the Hibernia and Terra Nova Projects is a true question of jurisdiction or *vires* as discussed in *Dunsmuir*, at paragraph 59, and that, therefore, the standard of review on this issue is correctness. I do not accept this proposition.

45 I begin with the legislation. The Board has broad authority with respect to the approval of benefits plans (section 45(2) of the Act). This authority is subject to three requirements: (1) the benefits plan shall include provisions designed to ensure that expenditures are made for research and development in the Province (section 45(3)); (2) the Board must consult with the relevant federal and provincial ministers regarding compliance with the requirements of section 45 (section 45(5)); and (3) the Board must comply with any ministerial directives (section 45(6)).

46 The authority of the Board regarding benefits plans is properly considered in the context of the Board's mandate generally. A review of the legislation supports the conclusion that the Board is a specialized tribunal designed to operate in a defined area of expertise, the offshore petroleum industry. The Board has been assigned extensive decision making authority throughout the legislation. The members of the Board are appointed for terms of six years, with eligibility to be appointed for further terms, a factor which supports the conclusion that the Board is intended to be a specialized tribunal with expertise in the area of offshore petroleum development. The grant of extensive authority to the Board arises at least partially from the unique nature of the Atlantic Accord which requires the cooperation of the federal and provincial governments in order to accomplish the purpose of providing a stable and permanent arrangement for the management of the offshore petroleum industry. These considerations support application of the reasonableness standard of review to decisions of the Board regarding benefits plans.

47 In submitting that correctness is the appropriate standard of review, Hibernia Management and Petro-Canada

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argued that there is no privative clause in the legislation protecting the Board's decisions from review by the courts. In response, the Board submitted that section 30 constitutes a privative clause because it provides that "the exercise of a power or the performance of a duty by the Board pursuant to this Act is final and not subject to the review or approval of either government or either Minister".

48 The language of section 30, particularly compared with other provisions in the Act, is ambiguous. There are at least three other provisions in the legislation that use language consistent with a privative clause. Two of these are confined in their application to decisions, and the particular operations, of the Oil and Gas Committee, and are, therefore, not directly relevant to this appeal. However, it is useful to review the language used:

> 145(3) The finding or determination of the [Oil and Gas] Committee on any question of fact within its jurisdiction is binding and conclusive.
>
> 184(1) Except as provided in this Division, every decision or order of the [Oil and Gas] Committee is final and conclusive.

49 By contrast, again in the context of the Oil and Gas Committee, section 124(10) specifically provides for review by the courts:

> Any order, decision or action in respect of which a hearing is held under this section is subject to review and to be set aside by the Trial Division of the Supreme Court of Newfoundland.

50 The third provision of the legislation containing language that may be characterized as a form of privative clause is found in the same Part as section 30. Section 38 states:

> Where a determination referred to in section 36 or 37 [regarding self-sufficiency and unreasonable delay] is made by a panel pursuant to that section, that determination is not subject to be reviewed or set aside by any government, court or other body.

51 Of particular interest is the specific reference to "court". Section 30, by contrast, omits that reference. It may be argued, therefore, that, in light of the reference to governments and ministers in section 30, if the intention had been to restrict review by the courts, then the courts would have been specifically mentioned. Applying this interpretation, section 30 would not be characterized as a privative clause.

52 On the other hand, the argument can be made that the essence of section 30 is that the exercise of a power by the Board, including the making of a decision, is final, and that the remaining language simply emphasizes that governments and ministers may not interfere. This interpretation flows from the language of section 30 which specifies that the exercise of a power by the Board under the Act "is final" and "not subject to the review or approval of either government or either Minister". (See also, clause 24 of the Atlantic Accord, paragraph 31, above.) This interpretation would result in characterization of section 30 as at least a partial privative clause.

53 Ambiguity in the language of section 30 must be considered in the context of the legislation as a whole. As noted above, under the statute, the Board has an extensive mandate. The Board falls within the description of a "discrete and special administrative regime in which the decision maker has special expertise", and, therefore, a regime where the reasonableness standard would generally apply (*Dunsmuir*, at paragraph 55).

54 In the circumstances, on balance, I would characterize section 30 as a partial privative clause which would support review by the courts on a standard of reasonableness.

55 Even if this section did not constitute a partial privative clause, the absence of such a clause is not determinative. In the circumstances of this case, other factors, particularly the mandate and expertise of the Board, lead to the conclusion that the courts should show deference to the Board's decisions by applying the reasonableness standard.

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56 Finally, it is important to note that the question of whether the Board has authority to apply the 2004 Guidelines to the Hibernia and Terra Nova projects does not involve any questions of law of central importance to the legal system (*Dunsmuir*, at paragraph 55). Accordingly, the standard of correctness is not, for that reason, necessarily engaged.

57 Further, the question of whether the Board has authority to issue the 2004 Guidelines and to apply them to the Hibernia and Terra Nova Projects is not a true question of *vires* as discussed in *Dunsmuir*. As noted above, the Board has broad authority with respect to approving benefits plans, including the research and development component. Section 151.1 of the Act specifically authorizes the Board to issue "guidelines and interpretation notes with respect to the application and administration" of the sections of the Act dealing with benefits plans, operating licences and production authorizations. As discussed below, the question of whether the 2004 Guidelines can properly be applied to companies already in the production phase depends primarily on the interpretation of the language of the benefits plans as approved in the Board's decisions. In the circumstances, it cannot be said that, in issuing and applying the Guidelines, the Board acted beyond its authority in the sense of a true question of *vires*.

58 In the result, I conclude that reasonableness is the appropriate standard of review in assessing whether the Board has authority to apply the 2004 Guidelines to the Hibernia and Terra Nova projects.

Was the Board's Decision to Apply the Guidelines Reasonable?

59 In 1986, the Board issued *Decision 86.01* [(June 18, 1986), Doc. 86.01 (Can.-N.L. O.P.B.)] approving, among other things, a benefits plan for the Hibernia Project. The plan included a commitment to "continue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment" (clause 2.6). Regarding the benefits plan, the Board also wrote, at clause 2.1:

> ... It was the decision of the Board that the most effective approach would be to encourage the commitment of the Proponent to a series of basic principles. The implementation of these basic principles would, in the Board's opinion, be more effective than attempting to negotiate specific requirements for the multitude of elements of which the project will consist. The Board will monitor the project, as it proceeds, to ensure that the Proponent complies with the commitments.
>
> The development and implementation of a benefits plan is, because of the nature of the subject matter, an evolutionary process. The Board has found the Proponent willing to amend its positions to comply with regulatory requirements and to respond positively to issues of concern. It is the Board's expectation that the Proponent's demonstrated responsiveness in the area of benefits will continue through the duration of the project.

The Board's Decisions 90.01 and 97.01 updated the Hibernia Project benefits plan with particular details not relevant to this case, and continued the plan as set out in Decision 86.01.

60 With respect to the Terra Nova Project benefits plan, in 1997, in *Decision 97.02* [(December 1, 1997), Doc. 97.02 (Can.-N.L. O.P.B.)], the Board wrote:

> 3.5.3 ... The Board appreciates the difficulty in providing, in advance, detailed research and development and education and training plans for the entire duration of the Development and, therefore, to provide a framework for monitoring the Proponent's activities in this regard, establishes as a condition to its approval of the Benefits Plan that:
>
> **Condition 7**
>
> The Proponent report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct

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> of research and development and education and training in the Province, including its expenditure estimates, for a three-year period and on its actual expenditures for the preceding year.

61 At the hearing before this Court, Petro-Canada submitted that research and development was not an important component of the Development Plan for the Terra Nova Project because, unlike the Hibernia Project which involved new technology related to the use of a gravity based structure, the floating platform system employed for the Terra Nova Project was not new technology. However, it is clear from a review of the Board's decision that there was concern regarding Petro-Canada's commitment to research and development in the Province. The Board wrote:

> 3.5.3 ... It is the Board's overall assessment, however, that the Plan does not fully satisfy the statutory requirement that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development and education and training in the Province. ...

And also:

> 3.5.1 ... The Board acknowledges the Proponent's support for R & D activities in Newfoundland in the past. It is the Board's assessment, however, that the Proponent's commitments vis-à-vis its future support of such activities are at best qualified, particularly inasmuch as there is no measure of the level of effort the Proponent intends to make in this regard (e.g., there are no expenditure estimates provided in the Benefits Plan). While the relevant provisions of the Accord Acts do not prescribe levels of expenditure, the Acts require that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development in the Province. ...

62 The 2004 Guidelines are a departure from the approach adopted in the initial stages of development of the offshore petroleum industry. Rather than reliance on general principles with annual monitoring, the 2004 Guidelines, issued under section 151.1, set out "guidance parameters" for expenditures for research and development to be carried out in the Province. These Guidelines apply to companies already in the production phase, and, to that extent, alter the earlier basic principles approach set out in the originally approved benefits plans.

63 Hibernia Management and Petro-Canada challenged the application of the Guidelines to the Hibernia and Terra Nova Projects on several grounds. I begin with the reasonableness of the Board's interpretation of the Act and the Hibernia and Terra Nova benefits plans.

Interpretation of the Act and Benefits Plans

64 Section 151.1 of the Act provides the starting point. The Board's authority to issue guidelines is restricted to four provisions: section 45 which deals with benefits plans, section 138 which deals with licences and authorizations, section 139 regarding development plans, and section 149 relating to certain regulations not relevant for purposes of this appeal. Clearly, then, in enacting the provision as an amendment to the statute in 1992, the legislators had in mind the application of section 151.1 to benefits plans and production authorizations.

65 There is no indication section 151.1 or the Guidelines were intended to operate retrospectively. However, under section 138(2), an operating licence expires on March 31 of each year, and is renewable only for one year periods. A production authorization is required for each work or activity, and an authorization can be suspended or revoked for failure to comply with a requirement in the authorization (subsections 138(4) and (5)). Section 45(3) requires that the benefits plan "contain provisions intended to ensure" that expenditures will be made for research and development in the Province. When Hibernia Management and Petro-Canada entered into their agreements and their benefits plans were approved, they were aware of these provisions, and could, at the initial stage, have sought more specific language and particulars regarding expenditures on research and development.

66 Further, there is nothing in the Act or the benefits plans supporting the conclusion that the company may unilaterally determine the level of expenditure on research and development. Indeed, the expenditures are subject to being monitored by the Board. In *The Compact Oxford English Dictionary*, new edition, "monitor" is defined to mean,

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among other things:

> to observe, supervise, or keep under review; to measure or test at intervals, esp. for the purpose of regulation or control.

67 A reasonable inference flowing from the monitoring function is that the Board may determine that the expenditures of a company do not meet the requirements of the benefits plan. Further to this point, the effect of the Guidelines is to advise companies regarding what to expect when the Board undertakes its monitoring function. (Whether the parameters set out in the Guidelines are reasonable is a different question, dealt with below.)

68 This interpretation is consistent with the Board's Decision 86.01, clause 2.5, regarding "Monitoring and Reporting" with respect to the Hibernia Project:

> ... An effective monitoring and reporting system, in the Board's view, should concentrate on key procurement decisions and provide for early disclosure of the Proponent's plans so that potential problems can be detected at an early date and corrective measures taken.
>
> . . . . .
>
> The Proponent responded with a commitment to:
>
> > Carry out a program of timely reporting to the Canada/Newfoundland Board to enable the Board to monitor the level of efforts and benefits achieved and to assist in promoting maximum benefits, ...

Similarly, regarding the Terra Nova Project, clause 3.5.3 of Decision 97.02 refers to providing "a framework for monitoring the Proponent's activities" with respect to research and development expenditures (paragraph 61, above).

69 The Board adopted this interpretation in expressing the rationale underlying the 2004 Guidelines as referenced in clause 1.0:

> . . . . .
>
> This document is intended to provide an operator engaged in petroleum exploration development and production activities in the Newfoundland Offshore Area with guidance parameters and criteria for R&D expenditures in the Province, which are required under Section 45 of the Legislation. Throughout this guideline the term "Research & Development" (R&D) includes "Education and Training".
>
> Research & Development represent one avenue whereby the exploration for, and the development and production of the petroleum resources in the Newfoundland Offshore area can make a contribution to the sustainable development of the Province. This was the vision or intent of the legislators at the time when they inserted the requirement for Research & Development and Education & Training "in the Province" into the Atlantic Accord legislation. The petroleum resource is finite and exhaustible, and it is the intent of this provision of the legislation that its exploitation create a lasting economic legacy for the people of the Province. This is best achieved by building on the intellectual capital and human resources of the Province. Achievement of this legislative intent is a key reason why some parameters or guidance are required in respect of the requirement in the Act that there be expenditures in the Province for R&D. These guidelines seek to establish such parameters.
>
> (emphasis added)

The Guidelines also permit a company to propose an alternative research and development program to apply in lieu of the parameters set out in the Guidelines.

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70 The above considerations support the conclusion that the Board's interpretation of the Act and benefits plans is reasonable. The interpretation "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", and, accordingly, satisfies the standard of reasonableness as discussed in *Dunsmuir*, at paragraph 47.

Vested Rights

71 Hibernia Management submitted that, when its benefits plan was approved, the provision authorizing the Board to issue Guidelines did not apply to the benefits plan provision, section 45 of the Act. The extension of section 151.1 to include section 45 occurred in 1992. Hibernia Management submitted that, to apply the Guidelines to the Hibernia Project, where the plan for that Project had been approved before the legislative amendment, would amount to altering a vested right. The company relied upon the decision in *Dikranian c. Québec (Procureur général)*, [2005] 3 S.C.R. 530 (S.C.C.), for this proposition.

72 The issue in *Dikranian* was whether an amendment to the legislation dealing with interest to be paid on student loans could be applied to loans that had already been taken by students. The majority of the Court concluded that, when the loan contract was signed, the rights as between the parties crystallized, resulting in vested rights. There was no indication of an intention by the legislature to interfere with rights that had previously vested. A similar situation does not exist in the case before this Court. The Guidelines do not interfere with vested rights.

73 I note, first, that the Guidelines are not law and do not amount to an alteration in the legislative regime applicable to the Hibernia Project. Subsection 151.1(2) specifically provides that guidelines issued under subsection (1) "shall be deemed not to be statutory instruments for the purposes of the *Statutory Instruments Act*".

74 Further, given the interpretation of the benefits plans discussed above, it cannot be said that the elements of the Hibernia plan constituted vested rights that precluded the application of the 2004 Guidelines. The 1986 approval of the Hibernia benefits plan provided for the Board's continuous monitoring of the company's expenditures on research and development. Subject to the question of reasonableness as to the parameters set out in the Guidelines, an issue that is discussed below, the Board reasonably concluded that it has authority to determine on a continuing basis whether the company is making adequate expenditures. In the circumstances, it cannot be said that application of the Guidelines to the Hibernia Project interferes with vested rights.

75 The same analysis applies to the submissions by Petro-Canada based on decisions such as *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 (S.C.C.). These decisions, which discuss the presumption against interference with vested rights, apply only if a vested right is at issue, which, in the circumstances before this Court, is not the case.

The Principle of Functus Officio

76 For the same reasons, I would reject the companies' submissions that, once the benefits plans were approved, the Board is *functus officio* in respect of those plans. The Board reasonably concluded that it has a continuing responsibility and authority to monitor expenditures for research and development. The principles set out in decisions such as *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.); and *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.), have no application on the facts of this case.

Nature of the Obligation to Make Expenditures on Research and Development

77 Petro-Canada also submitted that the amounts to be expended on research and development pursuant to the 2004 Guidelines constitute an invalid tax, and cannot be described as a valid fee. Counsel noted that the criteria in-

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dicative of a tax are that the levy is: (1) enforceable by law, (2) imposed by a public body under the authorization of legislation, and (3) intended for a public purpose (*Eurig Estate, Re*, [1998] 2 S.C.R. 565 (S.C.C.)). A fee, submitted counsel, requires a nexus between the quantum charged and the cost of the service.

78 The difficulty with this submission is that the expenditures required to be made on research and development are neither a fee nor a tax. The amounts are simply a component of the agreements between the governments and the companies. Expenditures for research and development are distinguishable from, for example, royalties involving simply the payment over of money to government. Appropriate research and development projects would be chosen, and undertaken, by the company. The projects, and consequently expended funds, would, therefore, be under the supervision and control of, and having direct or indirect benefit to, the company. Accordingly, I reject the submission that expenditures required for research and development constitute an invalid tax or fee.

79 In the result, the applications judge did not err when he concluded that the Board's interpretation of the legislation and the Hibernia and Terra Nova benefits plans, permitting application of the 2004 Guidelines, was reasonable, and that the Board has authority to establish reasonable levels of expenditures to be made by the companies for research and development.

Are the Guideline Parameters Reasonable?

80 The companies submitted that the applications judge erred when he concluded that the parameters for expenditures on research and development in the 2004 Guidelines are reasonable. In assessing this submission, I begin with the Board's explanatory statement in clause 1.0 of the Guidelines:

> The level of R&D expenditure by operators is expected to be consistent with the norms for such expenditures by the upstream petroleum industry in Canada. While the expenditures must be "in the Province", Canadian tax criteria will be used as a general guide to determine other eligibility criteria.
>
> R&D expenditures are viewed by the Board to be strategically important contributions to growth and sustainable development associated with the offshore petroleum sector in the Province.

81 In particular, the Guidelines set out formulae for establishing parameters for expenditures on research and development during the exploration, development and production phases of a project. With respect to the production phase, clause 2.2 provides a formula, explaining:

> ... Establishing a benchmark (B) based on industry practice in Canada seems to be a reasonable approach and the Board will apply the most recent five-year data reported by Statistics Canada.

82 In addition to providing guideline parameters by means of formulae, provision is made for alternative options that may be proposed by a company. Clause 2.0 provides, in part:

> ... Both [research and development, and education and training] will be legitimate expenditures in either [the development or production] phase of a project. Further an operator, or group of operators, may propose an R&D program in lieu of the requirement of the guidelines. The acceptability of such a proposal will be assessed by the Board.
>
> (emphasis added)

83 The applications judge concluded that to use Canadian industry norms to assess the companies' expenditures on research and development was a reasonable approach, supportable on the facts, and that, accordingly, there was no basis on which to interfere with the Board's decision on the point. In reaching this conclusion, he noted that: the Board undertook a study to determine the level of expenditures on research and development by petroleum companies in Canada; after consultation with the industry players, there was no consensus, other than opposition to the Guidelines; the Guidelines permit an operator to propose an alternative program that may be approved by the Board; the expend-

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itures depend on the phase of operation; in the production phase, the parameters are established using the average of expenditures by petroleum companies in Canada for the most recent five year period; and, "in essence a credit [is given] in the production phase for development phase expenditures at the established levels" (decision of the applications judge, at paragraph 82).

84 Hibernia Management and Petro-Canada submitted that it was not reasonable for the Board to develop the formulae using statistics based on industry practice in Canada generally. They pointed to the unique nature of petroleum development in the offshore, the requirement that the expenditures be made in the Province, and the small sample size in the Statistics Canada data.

85 Applying the standard of review of reasonableness, the question is whether the approach used in the Guidelines satisfies the considerations of "justification, transparency and intelligibility within the decision-making process", and whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". In making this assessment, both process and outcomes are relevant. (*New Brunswick (Board of Management) v. Dunsmuir*, *supra*, at paragraph 47.)

86 As part of the consultation process, the Board considered, and rejected, the companies' proposal that the expenditure parameters should be based on the needs of the particular Project. There is nothing in the language of the benefits plan for either Project to support such a restriction. The Board provided the companies with the opportunity to discuss alternatives to the draft Guidelines. However, before the Guidelines were issued, the Board was notified by a representative of the companies that they had failed to reach a consensus.

87 While the Statistics Canada data provide a basis for the formulae, other factors are incorporated which adjust the effect of the data as applied to the Projects. The affidavit of Frederick Way submitted at the hearing in the Trial Division on behalf of the Board provides an explanation:

> 164. The Statistics Canada data includes only "in house" expenditures by operators. It does not include expenditures by operators' contractors. In addition, the Statistics Canada data does not include education and training as part of the research and development expenditures. The R&D Guidelines permit the inclusion of contractors' R&D expenditures and permit inclusion of education and training expenditures in fulfillment of the R&D Guideline requirements. In the Board's view, the expenditure requirements under the R&D Guidelines represent a reasonable requirement for research and development expenditures within the Province.
>
> 165. The R&D Guidelines do not necessarily require the operators to spend additional new money on research and development. Operators already spend money on research and development, both internationally and in Canada. In Canada, operators spent approximately 0.6% of revenue on research and development during the period 1995-2000. Put simply, approximately 0.6% of the value of every barrel of oil produced in Canada, including the Newfoundland offshore, went to research and development. The R&D Guidelines simply provide that a similar percentage of the revenue derived from oil produced in the Newfoundland offshore must be spent on research and development within this Province. This is consistent with the recognition that Newfoundland and Labrador is to be the principal beneficiary of oil and gas resources off its shores.

88 Using the average of the most recent five years has the effect of maintaining the Guideline parameters at current levels, while providing a balance that minimizes the effect of any extremes that may occur during a particular period.

89 The company may choose the projects on which to expend research and development funds. The Guidelines provide flexibility and scope in this choice. Under clause 3.3, "expenditures may extend beyond science and technology to include research in such areas as fiscal regimes, business models and socio-economic and environmental matters". Clause 3.0 provides:

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> The Board seeks a definition of R&D that is reasonable and consistent with that contemplated by the Legislation. The definitions suggested below are not considered exhaustive, and the Board will consider other reasonable areas of expenditure proposed by an operator as appropriate, on a case-by-case basis.

90 An additional factor that supports the reasonableness of the Guidelines is the manner of their administration. Clause 4.2 provides a system for adjusting expenditures as necessary:

> A successful R&D program should not fluctuate widely. Therefore, for any POA period in which there are not sufficient projects to absorb the required level of expenditure, the balance may be placed in a[n] R&D fund. The fund will be managed by the board in conjunction with the operator consistent with these guidelines. In a POA period where an operator overspends its R&D requirement, the excess may be applied against its requirement in the subsequent POA period.

91 In light of these factors I conclude that the Guideline parameters satisfy the threshold of reasonableness. The parameters established and administered under the Guidelines fall within a range of possible, acceptable, defensible approaches to monitoring the research and development expenditures which companies are legislatively required to make in the Province. The Guidelines take account of the unique nature of the offshore petroleum industry and the limitations of the Statistics Canada data.

92 Accordingly, the appeal as to the Board's authority to apply the Guidelines to the Hibernia and Terra Nova Projects is dismissed. Similarly, the appeal on the basis that the parameters set out in the Guidelines are unreasonable is dismissed.

The Research and Development Fund

93 Given the nature of expenditures on research and development and the long term character of an offshore petroleum project, the establishment of a research and development fund is an important component of the Guidelines. Hibernia Management and Petro-Canada have challenged the Board's authority to establish such a fund.

Standard of Review

94 For the reasons enumerated in paragraphs 44 to 57, above, I am satisfied that reasonableness is the appropriate standard of review to be applied to the issue of whether the Board has authority to establish the fund.

Application of the Standard of Review

95 The applications judge, in concluding that it was not unreasonable for the Board to establish the research and development fund, commented on the nature and effect of the fund:

> [86] [Hibernia Management and Petro-Canada] also attack the establishment of the R&D fund. This is simply an enforcement mechanism in the event an operator fails to meet its expenditure target in any year. It is an administrative matter squarely within the power of the Board. The establishment of a fund is but one way to enforce the Board's requirements for mandated expenditures on research and development. It could also, for example, revoke the operator's licence or POA, thereby shutting down the project altogether. This would seem a Draconian result.

96 Petro-Canada submitted that establishing the fund amounts to creation of a compulsory payment to the Board. I do not accept this proposition. As noted by the applications judge, the fund is an administrative vehicle available to a company to accommodate situations where, due to the nature and timing of projects undertaken by the company, expenditures on research and development in a particular period fall below the parameters set out in the Guidelines. Monies expended from the fund are subject to the same conditions as if they had been expended without reference to the fund. That is, subject to the parameters set out in the Guidelines, the choice of projects and the manner in which they are carried out are decisions made by the company.

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97 Further, the fact that the Act does not specifically authorize the Board to establish a research and development fund is not determinative. Rather, the question is whether establishing and administering the fund is an appropriate and necessary component of the Board's functions. The principle is set out in *Newfoundland (Board of Commissioners of Public Utilities), Re* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.). Green J.A. (as he then was), for the majority, wrote:

> [36] Having conducted this brief survey, I will now attempt to state some general principles to be used in the interpretation and application of the local legislation:
>
> . . . . .
>
> 3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power.
>
> . . . . .

98 Given the nature and purpose of the research and development fund, I am satisfied that, in establishing and administering the fund, the Board was exercising an implied or incidental power appropriate and necessary to carrying out its mandate under the legislation.

99 In the result, I conclude, it was reasonable for the Board to determine that it has authority to establish and administer the research and development fund. The appeal on this point is dismissed.

Relationship between Guidelines Compliance and Production Authorizations

Standard of Review

100 For the reasons enumerated in paragraphs 44 to 57, above, I am satisfied that reasonableness is the appropriate standard of review to be applied to the issue of the Board's authority to make compliance with the benefits plan a requirement of a production authorization.

Application of the Standard of Review

101 The Board relied on section 138 of the Act in applying the Guidelines to the Hibernia and Terra Nova projects as a condition of their production authorizations. Pursuant to section 138(1), the Board has authority, subject to the benefits plans provision, section 45, to issue "an authorization with respect to each work or activity proposed to be carried on". Section 138(4) provides that a production authorization is subject to such approvals and requirements as the Board determines.

102 Hibernia Management submitted that the authority to determine and impose requirements must be interpreted in context. Part of that context, it was argued, is the placement of section 138 in Part III of the Act, "Petroleum Operations". Section 135.1, which was added to the 1987 statute by amendment in 1992, sets out the purpose of Part III, and provides:

> The purpose of this Part is to promote, in respect of the exploration for and exploitation of petroleum,

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(a) safety, particularly by encouraging persons exploring for and exploiting petroleum to maintain a prudent regime for achieving safety;

(b) the protection of the environment;

(c) the conservation of petroleum resources; and

(d) joint production arrangements.

103 On this basis, Hibernia Management submitted that the Board had authority to impose only requirements related to the promotion of safety, protection of the environment, conservation of petroleum resources and joint production arrangements. Further, it was submitted that the items listed in paragraphs (a) to (c) of section 138(4) circumscribe the kinds of requirements that may be applied by the Board when issuing a production authorization (see paragraph 28, above). Finally, counsel submitted that the sole purpose of the reference to section 45 was to ensure that a benefits plan is in place.

104 Petro-Canada submitted that the factors in paragraphs (a) to (c) of section 138(4) "are directly tied to the operational actions of the Operator, and in no way suggest a power to impose new conditions relating to a Canada-Newfoundland Benefits Plan". Similarly, counsel submitted that the regulatory power does not support a power to impose new research and development requirements. The focus of the submissions was that a production authorization cannot be used to change, reopen or permit reconsideration of the research and development component of a benefits plan.

105 These submissions by Hibernia Management and Petro-Canada fail to recognize that, as set out above, application of the Guidelines to the Hibernia and Terra Nova Projects does not involve an amendment to the benefits plans. Rather, the Guidelines set parameters consistent with the Board's responsibility to monitor expenditures for research and development required under the benefits plans. The question, then, is whether the Board has authority to refuse a production authorization where the company fails to comply with a component of the benefits plan, in this case, expenditures on research and development.

106 Section 138(1)(b) provides that the Board may issue a production authorization. The Board's authority to issue a production authorization is specifically subject to section 45 which not only establishes the requirement for a benefits plan, but also specifies in paragraph 45(3)(c) that "expenditures shall be made for research and development to be carried out in the Province". The benefits plans provide the manner in which this requirement is to be satisfied. Accordingly, I do not accept the proposition that the sole purpose of the reference to section 45 in section 138 is to ensure that a benefits plan is in place. If that had been the intention, the reference would have been to section 45(2) which sets out the requirement for a benefits plan to be approved by the Board. The general reference to section 45 encompasses all the subsections.

107 The reasonable inference follows that the authority to issue a production authorization is subject to a determination by the Board that the company is in compliance with its benefits plan. In the case of the Hibernia and Terra Nova Projects, this would include compliance with the 2004 Guidelines. Further, section 138(5) authorizes the Board to suspend or revoke a production authorization for failure to comply with a requirement subject to which the authorization was issued. This could include a failure to comply with the research and development component of the benefits plan.

108 Even assuming it is necessary to rely on section 138(4), my conclusion would be the same. Generally for the reasons expressed by the applications judge at paragraphs 67 to 73 of his decision, the scope of permissible requirements to be attached to a production authorization is not circumscribed by the three items listed in paragraphs (a) to (c). It follows from this, together with the reference to section 45 in section 138(1), that there is no principled basis on

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which to determine that compliance with the benefits plan is not a permissible requirement to which a production authorization may be subject.

109 I conclude, therefore, that the Board's interpretation of section 138 is reasonable, and that the Board has authority to make compliance with the benefits plan, which includes the Guidelines, a requirement of a production authorization. Accordingly, the appeal on this point is dismissed.

Summary and Disposition

110 In summary, the applications judge did not err in concluding that:

(1) The Board has authority to apply the Guidelines to the Hibernia and Terra Nova Projects;

(2) The parameters set out in the Guidelines are reasonable;

(3) The Board has authority to establish and administer the research and development fund; and

(4) The Board has authority to make compliance with the benefits plan, which includes the Guidelines, a requirement of a production authorization.

111 Accordingly the appeal by Hibernia Management and Petro-Canada is dismissed with costs on a party and party basis.

***L.D. Barry J.A.*:**

112 I concur with the decision of Welsh J.A. but would add the following comments.

The Appropriate Standard of Review

113 Welsh J.A. has concluded clause 24 of the Accord and section 30 of the federal *Act* should be characterized as partial privative clauses. Clause 24 reads:

> 24. The Board shall make all other decisions relating to the regulation and management of petroleum-related activities in the offshore area. Except for fundamental decisions, as set out in clause 25, all decisions of the Board shall be final. ...

Section 30 provides:

> 30. Subject to this Act, the exercise of a power or the performance of a duty by the Board pursuant to this Act is final and not subject to the review or approval of either government or either Minister.

The inclusion of the word "the" before "review" in section 30 establishes that the review expressly restricted by this section is that of either government or Minister and not the court. However, the reference to "final" in each provision satisfies me that these may properly be treated as partial privative clauses requiring this court to show some deference to Board decisions, as was the case with similar wording in *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.).

114 I agree with Welsh J.A. that, even if clause 24 and section 30 do not operate as partial privative clauses, other significant factors, namely, the purpose of the enabling statutes, the tribunal's special expertise, and the nature of the question of law involved in the particular problem before the board, weigh heavily in the present case in favour of that degree of deference flowing from adoption of a standard of reasonableness.

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115 First, on the purpose of the legislative scheme, the Atlantic Accord and the parallel federal and provincial legislation implementing the Accord make clear that the Parliament of Canada and the Legislative Assembly of Newfoundland and Labrador sought to establish a legislative framework, where issues relating to economic benefits, including research and development, were to be left to the Board, subject only to joint direction from the two governments. The management scheme contemplates Board decision makers exercising discretion on matters relating to a complex international oil industry. This indicates a legislative purpose to place a high level of responsibility for benefits with the Board and weighs in favour of a high level of judicial deference to Board decisions regarding benefits.

116 Second, regarding the expertise of the tribunal, the Board is a highly specialized body with seven members and a staff of 52 people. It must draw upon its understanding of the international and local oil industry while performing complex economic and financial analysis to arrive at guidelines for producing appropriate benefit levels. This mandates in favour of a very high level of judicial deference regarding Board decisions on guidelines.

117 Third, the nature of the question of law involved in this case is not one of "central importance to the legal system ... and outside the ... specialized area of expertise" of the tribunal (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.), at para. 62). Rather, the question involves interpretation of the Accord, the implementing legislation, and prior Board decisions, to determine the scope of the Board's authority to issue research and development Guidelines and to make compliance with the Guidelines a condition of a Production Operations Authorization. The majority in *New Brunswick (Board of Management) v. Dunsmuir*, at paras. 54 & 68, reaffirmed that interpretation by a specialized tribunal of its constitutive or enabling legislation has generally been reviewed on a reasonableness standard.

118 Rowe J.A. accepts the submission of the appellants that this is a true question of jurisdiction or *vires*, requiring a standard of correctness, since no judicial deference need be shown a tribunal determining the extent of its own authority. With respect, I disagree. To adopt the approach requested by the appellants would be to return to the discredited approach of the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. "By simply branding an issue as 'jurisdictional', courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal." (*Dunsmuir*, at para. 35.) The proper approach is to "ascertain the extent of judicial review that the legislature intended for a particular decision of the administrative tribunal". (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 (S.C.C.), at para. 15.)

119 Bastarache and Lebel JJ., in *Dunsmuir*, at para. 59, emphasized that courts should be cautious in branding an issue as jurisdictional:

> Administrative bodies must also be correct in their determination of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction /preliminary question doctrine that plagued the jurisprudence in this area for many years. 'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction ... .

Unfortunately, as becomes evident in the present case, after *Dunsmuir* we still do not have incontrovertible indicia of a "true" jurisdictional question. (See David Mullan, "Brunswick v. Dunsmuir, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 2 Can. J. Admin. L. & Prac. 117, at p. 150, where the author refers to "insufficient guidance" regarding these indicia.)

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2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

120 In the present case, clause 55 of the Accord expressly and clearly provides that expenditures made by companies on research and development shall be approved by the Board. This is not a situation where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to issue guidelines. Section 151.1(1) of the federal *Act* provides:

> The Board may issue and publish, in such manner as the Board deems appropriate, guidelines and interpretation notes with respect to the application and administration of sections 45 [benefits plan], 138 and 139 or any regulations made under section 149.

The authority of the Board to issue guidelines regarding research and development expenditures flows directly from these provisions.

121 In characterizing the issue as a challenge to the authority of the Board to issue mandatory guidelines and to require oil companies to spend on research and development allegedly unrelated to their specific projects, the appellants seek to frame the issues in terms of whether *authority* to decide exists. But in essence they are questioning the result of the Board's exercise of its authority — they object to the content of the Guidelines rather than to the Board's making of them. As decided in *Voice Construction*, the proper approach is to ask: did the legislatures intend the Board or the courts to decide whether particular guidelines might be adopted by the Board? Every issue in every judicial review application could be characterized as an inquiry into whether the legislature *authorized* the particular result arrived at by the tribunal. To require every tribunal to be correct in answering these issues would be to cease showing deference to tribunal decisions. Bastarache and Lebel JJ. made clear in *Dunsmuir* that this was not their intention. Except for the relatively rare cases described by them, the proper approach is to analyze the result of a tribunal's exercise of discretion in terms of whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". (*Dunsmuir*, para. 47.)

122 Although s. 151.1(2) of the federal legislation says that the Board's guidelines shall be deemed not to be subordinate legislation for the purposes of the *Statutory Instruments Act*, the Board's function issuing guidelines might be regarded as a legislative rather than adjudicative one, analogous to enactment by a tribunal of subordinate legislation. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 (S.C.C.), the Court held no pragmatic and functional analysis was needed before adoption of a correctness standard in reviewing the validity of a taxi by-law. Bastarache J. in delivering the judgment stated (at para. 5):

> ... There is no need to engage in the pragmatic and functional approach in a review for vires; such an inquiry is only required where a municipality's adjudicative or policy making function is being exercised.

In other words, "legislative functions attract a correctness standard automatically". See Mullan, supra, at p. 129.

123 This provides some support for the conclusion of Rowe J.A. that the correctness standard should be applied here. However, clause 21 of the Accord, dividing decisions on offshore resources between the federal Parliament, government or ministers, the Newfoundland and Labrador legislature, government or ministers and the Board, adds a novel feature to the normal grant of authority to enact subordinate legislation. Clause 21(d) provides for Board policy-making regarding benefits under clause 33(a), subject to joint directions from ministers of both governments. This convinces me that the Accord and legislative scheme contemplates the Board should decide whether adoption of a particular guideline regarding benefits is within the authority granted by the legislation to the Board. Ministers may intervene to jointly direct otherwise, if they conclude the Board has gone too far in the exercise of its authority. This legislative framework indicates courts should show some deference to the policy-making discretion conferred on the Board to make guidelines regarding benefits, including research and development.

124 In summary on the appropriate standard of review, the purpose of the enabling statutes and the tribunal's special expertise weigh heavily in favour of a considerable degree of deference being shown the Board's decisions. The presence of a partial privative clause and the nature of the question also support showing deference. The overall

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accumulation of factors mandates adoption of the standard of reasonableness.

The Reasonableness of the Decision

125 As noted by Welsh J.A., the majority in *Dunsmuir*, at para. 47, explained reasonableness as follows:

> 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 appellants' main challenges to the reasonableness of the Board's decision in the present case relate to what they see as "changing the rules after the game has started" by requiring expenditures on research and development allegedly unrelated to specific projects. I agree with Welsh J.A. that the Board in its *Decision 86.01* and its *Decision 97.02* reserved for itself authority to determine on a continuing basis by its monitoring process whether the companies were making adequate expenditures on research and development. The companies did not seek judicial review of those decisions.

126 I also agree with Rowe J.A. that the Board, by requiring reporting of research and development expenditures, in its Decisions 86.01 and 97.02, also implicitly reserved for itself on-going authority to put in place further research and development requirements, should monitoring indicate this was warranted. Otherwise, what was the purpose of the monitoring? But the reservation of authority to require more expenditures was more than implicit. In its Decision 86.01, at p. 8, the Board expressly stated: "The Board will monitor the project [relating to Hibernia] as it proceeds, to ensure that the Proponent complies with the commitments". One commitment, at p. 7 of the Mobil Supplementary Benefits Plan, was: "Continue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment". Similarly, in Decision 97.02, relating to Terra Nova, the Board stated (at p. 2):

> The Board believes the Proponent's commitments in the Benefits Plan will be fulfilled. However, the Board also has an obligation as the regulator to ensure that the Proponent's commitments are met. Accordingly, it will develop, in consultation with the Proponent, ... appropriate reporting formats for tracking employment and expenditures.

127 Where I differ with Rowe J.A. is in his conclusion that the Board was restricted to imposing only additional research and development requirements that "relate to the needs of the Terra Nova and Hibernia projects".

128 Rowe J.A. finds support for this in the wording of clause 51, of the Atlantic Accord, which refers to benefit plans providing persons in this Province and other parts of Canada "with a full and fair opportunity to participate in the supply of goods and services used *in that work or activity*". (His emphasis.) He then finds a restriction in the first words of clause 55 ("Benefits plans submitted pursuant to clause 51") on the requirement for expenditures and research and development set out in clause 55. Considered in the context of the Accord, I do not interpret these clauses as restricting the authority of the Board to impose only research and development requirements which "have application" to specific projects.

129 First, clauses 51 and 55 must be interpreted in the light of clause 2(d), which says one purpose of the Accord is:

> [T]o recognize the equality of both governments in the management of the resource, and ensure that the pace and manner of development optimize the social and economic benefits to Canada as a whole and to Newfoundland and Labrador in particular ... .

Requiring expenditures on research and development relating generally to the offshore petroleum environment is a legitimate mechanism for such optimization, along with taxes, royalties, job creation, education and training, and, with appropriate agreement, profit-sharing.

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130 Second, section 45(3) of the federal Act provides that a Canada-Newfoundland benefits plan *shall* contain provisions intended to ensure that expenditures shall be made for research and development to be carried out in the Province. These mandatory provisions contain no qualification entitling oil companies to refuse to expend on research and development because they are of the opinion the needs of their projects can be met with existing knowledge and technology.

131 Third, in Decision 86.01, the Board expressed its intention to enforce the commitment for Hibernia made by Mobil to "promote further research and development in Canada to solve problems unique to the Canadian offshore environment". This did not restrict research and development to the specific needs of the Hibernia project.

132 Fourth, in Decision 97.02, Section 3.5.1, the Board stated:

> In the Board's opinion, the [Terra Nova Project Environmental Assessment] Panel's recommendation [51] related to funding basic research is consistent with the thrust of this legislative requirement [for Benefits Plans to contain provisions intended to ensure that expenditures are made on research and development].

Recommendation 51 reads in part:

> The panel recommends that the Board require operators of offshore oil projects to fund basic research. ...

Here again the reference to basic research indicates there was no intention in Decision 97.02 to restrict research requirements to those needed by a specific project.

133 The trial judge correctly noted, at para. 47 of his decision, that the appellants, "by accepting the Board's approval of their respective benefit plans, have accepted that the Board has an ongoing obligation and authority to assess and monitor the appropriateness of the levels of expenditure on research and development ..." and it should not now be open to them to deny the Board's authority. If the appellants considered Decisions 86.01 and 97.02 to be wrong, they should have challenged these when made, not after enjoying the opportunity to profit from their developments.

134 Rowe J.A. characterizes the Board's reference to a legislative intent of creating "a lasting economic legacy" from the exploitation of petroleum resources as the Board taking off "on a flight of its own fancy, rising on wings of rhetoric far beyond the bounds of its authority". I see the Board as legitimately and reasonably performing its role of administering offshore petroleum resources so as to meet the Accord's objective of optimizing social and economic benefits for this Province and Canada. Rather than accepting development plans which would see the residents of this Province and this Country simply as "hewers of wood and drawers of water", performing only the lesser skilled tasks in the offshore petroleum industry, the Board reasonably interprets the Accord as requiring expenditures on research and development in this Province and Country as a mechanism to ensure residents become involved in highly skilled aspects of the industry. In the words of the Board, this builds "on the intellectual capital and human resources of the Province". The knowledge and skills obtained will remain to benefit this Province and Country economically and socially after the finite petroleum reserves have been exhausted. The use of Canadian industry norms to limit the extent of the expenditures provides a reasonable assurance to oil companies that the Board's demands will remain moderate in this respect.

135 Rowe J.A. accepts the appellants' submissions that important rules, upon which reliance was placed, have been changed. I respectfully disagree. The decisions granting the appellants approval for their projects have not been fundamentally changed. The Board reasonably interpreted its decisions. They approved the Hibernia and Terra Nova projects on condition that the Board have the authority to continuously monitor research and development expenditures and intervene by issuing guidelines requiring higher expenditures should the appellants' level of expenditures fall below that which the Board considered appropriate. These were the rules of the game when development approvals

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2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

issued. The same rules apply today.

136 For the reasons set out above and as elaborated by Welsh J.A., the Board's interpretation of the Accord, the legislation and its prior decisions is justifiable, transparent and intelligible. Its decision to implement the Guidelines falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and applicable law.

***M. Rowe J.A.* (dissenting):**

Introduction

137 It is axiomatic that authority is necessary for an action to be valid and that an action taken without authority is invalid. The principal issue here is whether the CNLOPB had authority (vis-à-vis the Terra Nova and Hibernia developments) to establish the R&D Guidelines. If it had such authority, the Guidelines are valid; if not, then the Guidelines are invalid.

138 The Board's position is that the Atlantic Accord legislation confers authority on it to regulate, *inter alia*, with respect to research and development by offshore petroleum producers; as the Guidelines address such matters, their establishment is therefore within the Board's authority. The counter is that the legislation establishes a scheme through which the Board exercises its authority and for the Board to act validly it must do so in accordance with that scheme and not contrary to or outside that scheme.

Facts

139 Necessary to the proper determination of this case is an understanding of the sequence of events that gave rise to it. I will focus on Terra Nova.

140 The outline of the facts by counsel for Terra Nova in his Factum is undisputed. I reproduce it in part:

> **Terra Nova Project History**
>
> 3. On August 5th, 1996, the owners of the Terra Nova Project, being at the time Petro-Canada, Mobil Oil Canada Properties, Husky Oil Operations Ltd., Murphy Oil Company Ltd. and Mosbacher Operating Ltd., received a letter (the "Letter") from the Government of Newfoundland and Labrador. The Letter set forth the parties' agreement in principle with respect to fiscal and benefits matters.
>
> > **Newfoundland Benefits**
> >
> > The Government acknowledges that compliance by the Owners with the Newfoundland Benefits principles set out in Attachment 2 to this letter (the "Newfoundland Benefits") and any additional requirements stipulated by the CNOPB shall be sufficient and acceptable to the Government for the purposes of the Accord Acts and the Government shall not require any Newfoundland benefits greater than or in addition to those described in Attachment 2 as a condition to the approval of the Project or any portion thereof or otherwise in respect of any aspect of the Project including, without limitation, its design, engineering, construction, procurement, operation or management.
>
> It is Petro-Canada's submission that the reference to the CNOPB must be read as a reference to requirements imposed under the Accord Act at the time of approval of the Benefits Plan, and not thereafter.
>
> 4. Attachment 1 to the Letter indicated the willingness of the Government of Newfoundland and Labrador to provide a commitment, in conjunction with Canada, similar to the following:

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> Canada and Newfoundland acknowledge that each of the project owners relies upon the good faith of each of Canada and Newfoundland, respectively, to maintain substantially the legislative and regulatory framework applicable to the project as of the effective date of the Definitive Agreements, to the extent that doing so is in the public interest and, without limiting the generality of the foregoing, is consistent with governmental responsibilities, including responsibility for ensuring proper management of its resources, the protection and maintenance of public health and safety and the protection of the environment.

5. Attachment 2 to the Letter set forth the principles to be followed by the Terra Nova Project with respect to Newfoundland and Labrador Benefits. It did not refer to research and development.

6. On August 5th, 1996, Petro-Canada submitted a Terra Nova Canada-Newfoundland Benefits Plan and a Terra Nova Development Plan to the Board. Section 2.4 outlined the agreed Newfoundland Benefits commitments, stating:

> Recognizing the importance to Newfoundland of the Terra Nova development, the Proponents entered into discussions with the Government of Newfoundland and Labrador during 1995. The purpose of these discussions was to identify areas where the province wished the Proponents to address benefits concerns. As a result of these discussions, the province and the Proponents have reached agreement on benefits commitments relative to the Terra Nova development. The Proponents' commitments are set out in the remainder of this chapter. Supplemental discussions are contained throughout this Benefits Plan.

The Benefits Commitments were with respect to a Newfoundland Office, Procurement Policies and Procedures, Newfoundland Construction Facilities, Mode of Development, Engineering and Canadian Flag vessels.

7. The Benefits Plan made the following commitment in section 7.2 with respect to Research and Development:

> The Proponents will continue to support technically worthy research and development activities and programs in the province where t he results of such activities and programs have application to the Terra Nova Development.
>
> The needs of the Terra Nova Development can be met with existing products and services. As a consequence, the Proponents expect the expenditures for R & D studies relative to the development and operation of Terra Nova will be relatively small. In some cases, however, the Proponents may wish to extend existing knowledge and technology. If so, they will develop and carry out appropriate R & D programs in a way that supports the needs of Terra Nova.
>
> These programs will focus on applied research directed at improving the effectiveness and acceptability of the existing technology rather than high risk concept or prototype studies. Some of the areas in which the project may find it appropriate to continue R & D activity include:
>
> - Iceberg detection, tracking and management
> - Ice-vessel interactions
> - Ice-seafloor interaction
>
> As research needs are identified, Newfoundland and Canadian institutions will be made aware of the specific needs and requested to submit research proposals.

8. In Decision 97.02 the Board approved the Terra Nova Development Plan and Terra Nova Benefits Plan, subject to conditions. With respect to Research and Development the Board stated:

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> The Board acknowledges the Proponent's support for R & D activities in Newfoundland in the past. It is the Board's assessment, however, that the Proponent's commitments vis-à-vis its future support of such activities are at best qualified, particularly inasmuch as there is no measure of the level of effort the Proponent intends to make in this regard (e.g., there are no expenditure estimates provided in the Benefits Plan). While the relevant provisions of the Accord Acts do not prescribe levels of expenditure, the Acts require that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development in the Province. In the Board's opinion, the Panel's recommendation [51] related to funding basic research is consistent with the thrust of this legislative requirement

9. In summary, the Board stated:

> The Board acknowledges that the Proponent's Benefits Plan indicates that opportunities exist for the conduct of research and development in the Province to continue in the future and that safety-related training will primarily take place in the Province. It is the Board's overall assessment, however, that the Plan does not fully satisfy the statutory requirement that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development and education and training in the Province. The Board appreciates the difficulty in providing, in advance, detailed research and development and education and training plans for the entire duration of the Development and, therefore, to provide a framework for monitoring the Proponent's activities in this regard, establishes as a condition to its approval of the Benefits Plan that:
>
> **Condition 7:**
>
> **The Proponent report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct of research and development and education and training in the Province, including its expenditure estimates, for a three-year period and on its actual expenditures for the preceding year.**

. . . . .

The Guidelines

12. In July 2003, the Board released a Consultation Draft entitled "Guidelines for Research and Development Expenditures". These Guidelines were revised slightly in October 2004, and on November 5th, 2004 both Appellants were notified that they were effective retroactive to April 1st, 2004. In the Guidelines, the Board outlined a three phase incremental requirement for Research and Development ("R&D") expenditures to be made in Newfoundland and Labrador, to be applied to all existing, and future, offshore programs in the area subject to the Accord Acts.

The expenditures required in each of the three phases are:

> (1) With respect to exploration activity, the expenditure required would be "up to a maximum of 5% of the expenditure bid".
>
> (2) With respect to development, the required amount would be 0.5 percent (one-half of one percent) of the total project capital cost.
>
> (3) With respect to production, the requirement for R&D expenditure would be tied to a statistical average for companies in the oil and gas extraction industry. In the Guidelines this is stated to be 0.6%, while in recent correspondence from the Board to each of the Appellants this is stated to be 0.46% of revenue, less, in each case, the amount credited for development phase R & D expenditures. This is the only requirement applicable

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to the Appellants, given their completion of project development, prior to the intended effective date.

13. The Guidelines require that any R&D expenditures not made during a Production Operations Authorization period would be placed in an R&D fund to be administered by the Board in conjunction with the Operator.

14. Applied to the Terra Nova Project and using the 0.6% rate, the required future expenditure is approximately sixty-eight million dollars ($68,000,000.00) based on assuming a long term price of thirty four dollars and twenty five cents CAN ($34.25 CAN) per barrel. Higher or lower prices would increase or decrease this impact proportionately. While the Board has questioned the precise calculation, there is no issue between the parties that, as Mr. Justice Adams noted in the trial decision, the amounts in question are substantial.

15. In the October 2004 R & D Expenditure Guidelines, the Board wrote:

> **1.0 The Legislation**
>
> The legislative requirement for expenditures related to R&D in the Province is contained in Section 45 of the Act, and reads as follows:
>
> > 45(3)(c) ... expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province;
> >
> > Section 151.1(1) of the Act authorizes the Board to issue and publish in such manner as it deems appropriate guidelines and interpretation notes with respect to the application and administration of Section 45.
>
> . . . . .
>
> Research & Development represent one avenue whereby the exploration for, and the development and production of the petroleum resources in the Newfoundland Offshore area can make a contribution to the sustainable development of the Province.
>
> This is the vision or intent of the legislators at the time when they inserted the requirement for Research & Development and Education & Training "in the Province" into the Atlantic Accord legislation. The petroleum resource is finite and exhaustible, and it is the intent of this provision of the legislation that its exploitation create a lasting economic legacy for the people of the Province. This is best achieved by building on the intellectual capital and human resources of the Province. Achievement of this legislative intent is a key reason why some parameters or guidance are required in respect of the requirement in the Act that there be expenditures in the Province for R&D. These guidelines seek to establish such parameters.

16. On January 27th, 2005 the Board issued a new Production Operations Authorization to Petro-Canada, condition 15 of which requires compliance with the Guidelines. The Second Appellant takes the position that the Board does not have the legal authority to impose the obligations in these Guidelines as a condition under the powers granted to the Board by statute or otherwise, and brought an Application seeking to have the imposition of the Guidelines *vis á vis* the Terra Nova Project, quashed.

17. On January 22, 2007, Mr. Justice Adams of the Supreme Court Trial Division denied the Application. This appeal is taken from that decision.

Analysis

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141 The essential position of the parties can be summarized simply:

The Board

• In its 97.02 decision the Board left open the possibility of adding further R&D requirements to those set out in 97.02. That is what the Board did in 2004 in the R&D Guidelines.

• In any case, whatever the wording of 97.02, it was open to the Board to establish the Guidelines under its ongoing authority under s. 45(3)(c) of the Act.

The Operators

• The 97.02 decision sanctioned a deal on benefits (as part of an overall arrangement) struck by the proponents (later operators) with governments; read properly, the 97.02 decision imposed quite limited obligations as regards R&D on the Terra Nova operators. That being so, the Board cannot go outside 97.02 and add further R&D obligations.

• In any case, whatever the wording of 97.02, the power granted the Board under s. 45(3)(c) does not authorize it to impose obligations for R&D that do not relate to the operation of the Terra Nova project.

142 The Trial Division judge in his decision essentially agreed with the Board's position. I do not. To the contrary, I am persuaded that the position set out by the operators, as summarized above, is correct in law.

Are the Guidelines Consistent with Decision 97.02?

143 As noted above, the key passage in *Decision 97.02* is as follows:

> 3.5.3 The Board acknowledges that the Proponent's Benefits Plan indicates that opportunities exist for the conduct of research and development in the Province to continue in the future and that safety-related training will primarily take place in the Province. It is the Board's overall assessment, however, that the Plan does not fully satisfy the statutory requirement that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development and education and training in the Province. The Board appreciates the difficulty in providing, in advance, detailed research and development and education and training plans for the entire duration of the Development and, therefore, to provide a framework for monitoring the Proponent's activities in this regard, establishes as a condition to its approval of the Benefits Plan that:
>
> **Condition 7**
>
> **The Proponent report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct of research and development and education and training in the Province, including its expenditure estimates, for a three-year period and on its actual expenditures for the preceding year.**

144 Two quite different interpretations of the foregoing were urged on this Court by the parties. In the Board's submission, in 97.02 it required reporting by the operators for the purpose of seeing whether additional substantive requirements would be needed later. The Board implicitly reserved to itself on-going authority to put in place further R&D requirements in addition to those in 97.02, should monitoring indicate this was warranted.

145 In the operators' submission, the Board approved the Benefits Plan and imposed an on-going reporting requirement. Nothing more was required of the operators. Therefore, any additional requirement for R&D, including the

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Guidelines, is inconsistent with 97.02. The Board having approved the Benefits Plan in 97.02, cannot "un-approve" it later, nor can the Board impose requirements inconsistent with the approval in 97.02.

146 I do not accept the interpretation put forward by the Board because it says, in effect, that as regards R&D 97.02 means nothing, that the Board retained carte blanche to impose any R&D requirements that it saw fit at any time, that the operators can take no comfort from nor place any reliance on 97.02, that their risk is unlimited.

147 I do not accept the interpretation put forward by the operators. While I agree with them that a literal reading of 97.02 imposes a reporting requirement on them and nothing more, it would be strange for a regulator to impose no substantive requirements in this area and then simply vacate the field, restricting its role only to monitoring whatever the operators do.

148 In my view, the proper interpretation of 97.02 is that the Board required the operators to report on R&D, that the Board would monitor what R&D was being done and might act further if the operators were failing to carry out R&D in the province that could be carried out in the province *and that related to the needs of the Terra Nova project.*

149 This final point is critical to the interpretation not only of decision 97.02, but more fundamentally to the interpretation of the Board's authority to impose R&D requirements.

150 As noted, the Board says the Guidelines are consistent with decision 97.02, while the operators say they are not. Much of the argument presented by the parties treats the answer to this question as determinative of whether or not the Guidelines are valid. I do not base my decision on this. (If I were to do so, I would agree with the position taken by the operators; it is beyond question that the Guidelines impose additional R&D requirements inconsistent with 97.02 and, as such, cannot be valid as regards the Terra Nova project. The same is true regarding *Decision 86.01* and the Hibernia Project.)

151 Rather, I base my decision on a more fundamental question: does the Board have authority under s. 45(3)(c) to establish Guidelines of this nature, whatever is set out in 97.02?

Does the Board Have Authority to Make Guidelines of This Nature?

152 As noted above, the Benefits Plan submitted by Terra Nova included the following wording in section 7.2:

> ... The Proponents will continue to support technically worthy research and development activities and programs in the province where the results of such activities and programs have application to the Terra Nova Development.

153 Thus, the Terra Nova proponents linked the conduct of R&D in the province to the operation of the project. Could it be otherwise? That's what Benefits Plans are intended to do by the Atlantic Accord. I see nothing in the legislation to suggest that the Benefits Plan should require an operator to carry out R&D that does not relate to the operation of the project.

154 Section 45 of the implemented legislation should be read along with corresponding provisions, clauses 51 and 55, of the Atlantic Accord:

> 51. The legislation implementing the Accord shall provide that before the start of any work program for exploration or field development, a plan must be submitted satisfactory to the Board for the employment of Canadians and, in particular, members of the provincial labour force and for providing manufacturers, consultants, contractors and service companies in Newfoundland and other parts of Canada with a full and fair opportunity to participate in the supply of goods and services used in that work or activity.

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> In its review of Canada and Newfoundland benefits plans, the Board shall seek to ensure that first consideration is given to services provided from within Newfoundland, and to goods manufactured in Newfoundland, where such goods and services are competitive in terms of fair market price, quality, and delivery.
>
> The Board shall also require that any such plans include particular provisions, consistent with the Canadian Charter of Rights and Freedoms, to ensure that individuals resident in Newfoundland are given first consideration for training and employment opportunities in the work program for which the plan was submitted.
>
> . . . . .
>
> 55. Benefits plans submitted pursuant to clause 51 shall provide for expenditures to be made on research and development, and education and training, to be conducted within the province. Expenditures made by companies active in the offshore pursuant to this requirement shall be approved by the Board.
>
> [emphasis added]

155 Clause 51 refers to approval "before the start of any work program for ... field development" of a plan "satisfactory to the Board" for employment and for the "supply of goods and services used in *that work or activity*". Thus, there is, as one would expect, a link drawn between the "work program for ... field development" and a plan for labour, goods and services "used in that work".

156 This linkage is carried forward into clause 55 ("Research and Development and Education and Training") by the opening words, "Benefits plans submitted pursuant to clause 51 shall provide for expenditures to be made on research and development, and education and training ...".

157 Section 45 of the implemented legislation reads (in part):

> 45.(1) In this section, "Canada-Newfoundland benefits plan" means a plan for the employment of Canadians and, in particular, members of the labour force of the Province and, subject to paragraph (3)(d), for providing manufacturers, consultants, contractors and service companies in the Province and other parts of Canada with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan.
>
> (2) Before the Board may approve any development plan pursuant to subsection 139(4) or authorize any work or activity under paragraph 138(1)(b), a Canadian-Newfoundland benefits plan shall be submitted to and approved by the Board, unless the Board directs that that requirement need not be complied with.
>
> (3) A Canada-Newfoundland benefits plan shall contain provisions intended to ensure that
>
> (a) before carrying out any work or activity in the offshore area, the corporation or other body submitting the plan shall establish in the Province an office where appropriate levels of decision-making are to take place;
>
> (b) consistent with the Canadian Charter of Rights and Freedoms, individuals resident in the Province shall be given first consideration for training and employment in the work program for which the plan was submitted and any collective agreement entered into by the corporation or other body submitting the plan and an organization of employees respecting terms and conditions of employment in the offshore area shall contain provisions consistent with this paragraph;
>
> (c) expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province; and

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(d) first consideration shall be given to services provided from within the Province and to goods manufactured in the Province, where those services and goods are competitive in terms of fair market price, quality and delivery.

158 I read s. 45 of the implemented legislation in the context of clauses 51 and 55 of the Accord. Those clauses in the Accord make a link between research and development under a benefits plan and the work to be carried out to develop a project. That linkage carries forward into s. 45 of the implementing legislation, because as stated by the Supreme Court of Canada in *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, *infra*, the implemented legislation is to be interpreted in light of the provisions of the Accord.

159 The foregoing is a textual rationale. Beyond that, there is the logical point that it is irrational to read the authority to impose requirements for R&D as part of a benefits plan approval to include the power to cause an operator to spend money on things that have nothing to do with the project. It's no more complicated than that.

160 To return to the particulars of Terra Nova, the Benefits Plan in section 7.2 went on to state:

> The needs of the Terra Nova Development can be met with existing products and services. As a consequence, the Proponents expect the expenditures for R&D studies relative to the development and operation of Terra Nova will be relatively small. In some cases, however, the Proponents may wish to extend existing knowledge and technology. If so, they will develop and carry out appropriate R & D programs in a way that supports the needs of Terra Nova.
>
> These programs will focus on applied research directed at improving the effectiveness and acceptability of the existing technology rather than high risk concept or prototype studies. Some of the areas in which the project may find it appropriate to continue R & D activity include:
>
> - Ice detection, tracking and management
> - Ice-vessel interactions
> - Ice-seafloor interaction
>
> As research needs are identified, Newfoundland and Canadian institutions will be made aware of the specific needs and requested to submit research proposals.

161 The Terra Nova proponents were clear: the R&D to be undertaken will relate to the operation of the Terra Nova Project; and, this project needs little R&D because it will use existing technology. The Board in 97.02 never took issue with these points, but the Guidelines completely ignore and run counter to both.

162 The Guidelines require an expenditure on R&D (during production) of 0.6% of the value of production. This is not linked in any way to the R&D needs of the Terra Nova project. There is no effort by the Board to make a connection between what R&D could be done in the province to meet the needs of the project and what the Terra Nova operators are required to do under the R&D Guidelines. In the view of the Board, no such connection is needed. This point is fundamental.

163 The sums involved are colossal. Terra Nova has recoverable reserves estimated at 440 million barrels. At the date of writing, oil is priced at well over $100 a barrel. The arithmetic is simple: (440 million barrels × $100 per barrel) × 0.6% equals $264 million. Whatever the price of oil, it is clear that the R&D expenditures required by the Guidelines have no logical or factual connection with the R&D needs of the Terra Nova project and will vastly exceed those needs. The effect is to create a giant piñata, filled with money, the operators having one stick, the Board another.

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2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

164 While the Board drew the 0.6% figure from a Statistics Canada report, that was not the *basis* for the Guidelines. Instead, the Board set out its basis for the Guidelines in its decision putting them in place:

> **45(3)(c) [of the Act] ... expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province;**
>
> Section 151.1(1) of the Act authorizes the Board to issue and publish in such manner as it deems appropriate guidelines and interpretation notes with respect to the application and administration of section 45.
>
> . . . . .
>
> The petroleum resource is finite and exhaustible, and it is the intent of this provision of the legislation that its exploitation create a lasting economic legacy for the people of this Province ... Achievement of this legislative intent is a key reason why some parameters or guidance are required in respect of the requirement in the Act that there be expenditures in the Province for R&D.
>
> [underline added]

In this passage, the Board takes off on a flight of its own fancy, rising on wings of rhetoric far beyond the bounds of its authority.

165 When I read s. 45(3)(c) in light of the Atlantic Accord, I see a requirement that R&D which relates to projects in the Newfoundland offshore and that can be done in this province should be done in this province, and that education and training needed by workers in this province to participate in the offshore petroleum industry should be provided.

166 Such local benefits are important. Of great concern to governments has been the prospect that work relating to petroleum development off this province, including R&D, that could be done in this province would be done elsewhere. The Atlantic Accord is clear that such work should be done in this province; the regulatory framework supports this. But, the R&D Guidelines do not address this. They do not even try. Instead, they impose a "one size fits all" approach unrelated to the operation of the Terra Nova project and which will require expenditures vastly beyond its needs.

167 I do not see in s. 45(3)(c) any authority for the Board to create a gigantic reservoir of cash, a Legacy Fund (my term) that the Board will control jointly with the operators, to endow research chairs at the university, build new facilities at the Marine Institute, fund port infrastructure, or whatever the Board conceives from time to time as "creat[ing] a lasting economic legacy for the people of this province".

168 Further, if the Board has the authority to create such a Fund to be jointly administered by it and the operators, would it not have authority to go one step further and itself administer the Fund? Once the connection is broken between the R&D needs of a project and the level of R&D expenditure required of the operators, things become infinitely elastic. The sky's the limit if the Board's authority includes "legacy" creation.

169 If a "legacy" is to be created, that is the business of governments and not regulatory authorities. In establishing the Guidelines, the Board got out of the business of being a regulator and got into the business of government. It used its regulatory power in a way that exceeded its grant of authority.

"A Stable and Fair Offshore Management Regime"

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170 In *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202 (S.C.C.), Iacobucci J., for the Court, wrote at 219:

> Finally, attention must be given to the object and scheme of the legislation at issue. The federal and provincial *Implementation Acts* gave effect to the provisions of the Atlantic Accord, and the Board must conduct itself with the Accord in mind: s. 17(1). Two purposes of the Accord were "to provide for a stable and fair offshore management regime for industry" and "to provide for a stable and permanent arrangement for the management of the offshore": see clauses 2(f) and (g).
>
> [emphasis added]

171 Providing "a stable and fair offshore management regime for industry" has been undermined not only by the Guidelines, but more fundamentally by the authority asserted by the Board for its establishment of the Guidelines. Essentially, the Board has said, notwithstanding approval of a Benefits Plan, it can at any time in future take decisions that go far beyond anything set out in its decision approving the Benefits Plan.

172 Changing important rules, upon which reliance was placed to make multi-billion dollar investments, to use the words of Strayer, J. in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1992] 3 F.C. 54 (Fed. T.D.), constitutes an example of "erratic public administration which was productive of serious mischief to private entrepreneurs" (at para. 25).

173 A "stable and fair offshore management regime for industry" *must* mean that when proponents receive an approval they can have confidence that the decision won't be reversed or (as here) fundamentally altered. Unless proponents have that confidence, then the offshore management regime is not "stable", rather it is "unstable" and the proponents' risk is unlimited. (The Board chose 0.6% as its figure; why not far, far more if the Board's authority is as broad as it says it is?)

174 As the Supreme Court of Canada stated in the foregoing quote, the legislation implementing the Atlantic Accord is to be read in light of the Accord that it was intended to implement. Doing so, I would interpret s. 45(3)(c) as not granting authority to the Board to put in place guidelines for R&D of the nature established by the Board in 2004.

Hibernia

175 I have addressed the issues in the context of the Terra Nova project. Particulars differ as regards Hibernia, but my general conclusions remain the same. For essentially the same reasons as in the case of the Terra Nova project, s. 45(3)(c) does not authorize the Board to establish the Guidelines as regards the Hibernia project.

New Brunswick (Board of Management) v. Dunsmuir

176 I have reached the foregoing conclusion regarding the Board's lack of authority being mindful of the Supreme Court of Canada's recent decision in *New Brunswick (Board of Management) v. Dunsmuir*, *supra*. The key passage is para. 59 (per Bastarache and LeBel, J.J., for the majority):

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE* [Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227]. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power

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> gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline in jurisdiction: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
>
> [emphasis added]

177 The matters at issue in this appeal are such that, "the tribunal must interpret the grant of its authority [under s. 45(3)(c)] correctly or its action will be found to be *ultra vires*... ."

178 For the reasons set out above, the Board has incorrectly interpreted its grant of authority under s. 45(3)(c) and, as such, its action in imposing the Guidelines is without authority and, therefore, invalid.

Other Matters

179 Given my conclusion that the Guidelines are invalid, I need not address other issues raised by the Appellants, notably "Vested Rights", "Functus Officio", "Taxation", the submission by the Hibernia operators that the Guidelines are not "reasonable", and "Production Authorizations".

180 I would note briefly the reasons for decision of my brother Barry, who sets out a rebuttal, step by step, of my analysis. It is not my practice to engage in debate with my colleagues through my judgments. Thus, I offer no sur-rebuttal. I would, however, make one point.

181 It seems to me entirely legitimate to consider whether a legislature intended to confer on a regulatory body the type of authority that the regulatory body purports to exercise in a given decision. When I do this it is to me inconceivable that the Parliament of Canada intended to confer on the Board authority of a nature that would allow the Board to approve a project for development and, then, when billions of dollars had been invested to put the project into production, to say to the operators that they will no longer be permitted to operate the project unless they spend phenomenally large sums on matters un-related to the project because the Board has decided that *it* (and not a government) wishes to create for the province a "legacy", as the Board conceives this from time to time.

Conclusion

182 I would have reversed the decision of the Trial Division judge and set aside the R&D Guidelines established by the Board in 2004 on the basis they were made without authority and are, thus, invalid. I would have awarded both Appellants their costs in this Court and in the Trial Division.

Appeal dismissed.

FN* Leave to appeal denied at *Hibernia Management & Development Co. v. Canada-Newfoundland Offshore Petroleum Board* (2009), 2009 CarswellNfld 45, 2009 CarswellNfld 46 (S.C.C.).

FN** A corrigendum issued by the Court on October 28, 2008 has been incorporated herein.

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2008 CarswellNfld 225, 2008 NLCA 46, 850 A.P.R. 248, 277 Nfld. & P.E.I.R. 248, 297 D.L.R. (4th) 65, 84 Admin. L.R. (4th) 241

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Newfoundland
& Labrador
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF AN APPLICATION BY

NEWFOUNDLAND & LABRADOR HYDRO

FOR A

GENERAL RATE REVIEW

DECISION AND ORDER
OF THE BOARD

ORDER No. P.U. 7 (2002-2003)

JUNE 7, 2002

BEFORE:

Mr. Robert Noseworthy
Chair and Chief Executive Officer

Ms. Darlene Whalen, P.Eng.
Vice-Chair

Mr. Don Powell, C.A.
Commissioner

Mr. G. Fred Saunders
Commissioner

NEWFOUNDLAND AND LABRADOR

AN ORDER OF THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

NO **P.U. 7 (2002-2003)**

IN THE MATTER OF the Electrical Power Control Act, SN 1994, c. E-5.1 ("*EPCA*") and the Public Utilities Act RSN, 1990, c. P-47 ("the *Act*") and their subordinate regulations,

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro (NLH) for approval of: (1) Under Section 70 of the *Act*, changes in the rates to be charged for the supply of power and energy to its Retail Customer, Newfoundland Power, its Rural Customers and its Industrial Customers; (2) Under Section 71 of the *Act*, its Rules and Regulations applicable to the supply of electricity to its Rural Customers; (3) Under Section 71 of the *Act*, the contracts setting out the terms and conditions applicable to the supply of electricity to its Industrial Customers; and (4) Under Section 41 of the *Act*, its 2002 Capital Budget.

BEFORE: **Robert Noseworthy**
Chair and Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Don Powell, C.A.
Commissioner

G. Fred Saunders
Commissioner

IV. RATE STABILIZATION PLAN

1. Introduction

Prior to 1986 NLH maintained two separate accounts to adjust for annual variations in hydraulic and thermal production as compared to test year forecasts allowed in NLH's rates.

A water equalization provision recorded the fluctuations in water availability and the resulting changes in thermal generation costs needed to meet load requirements. NLH charged or credited fuel expense in its annual income statements with a corresponding adjustment in the water equalization account equivalent to actual increased or decreased generation costs relative to hydraulic production based on an average yearly water condition. For example, a drier year than average would generally result in less hydraulic production, more thermal generation and hence higher fuel costs; whereas a wetter than average year would have the opposite impact. The water equalization account had a maximum provision of $36,000,000 which was considered sufficient to absorb the adverse affects of a reoccurrence of the three consecutive driest years on record.

NLH's second account involved an adjustment formula to recover generation costs attributable to fuel prices in excess of those allowed in test year rates. These fuel adjustment charges were recovered in the month following which the costs were incurred. This method of recovery resulted in significant volatility in rates to customers, particularly during winter months when consumption was highest.

In the early 1980s rising fuel prices and higher fuel consumption from increased thermal generation at Holyrood raised consumer concerns regarding monthly rate fluctuations and high electricity rates. In 1985, as a means of providing greater rate stability to customers, NLH proposed the Rate Stabilization Plan (RSP). The RSP contemplated consolidating both the hydraulic and the fuel adjustment charge (FAC) accounts into a single plan. The positive balance at the time in the water equalization provision would be refunded to NP and the Island IC over three years. The proposed RSP was accepted by the Board subject to various conditions. NLH later clarified the operating characteristics and mechanics in a letter to the Board. [IC-284(e)]

The existing RSP provides for adjustments to smooth variations between forecasted test year costs used to set rates and actual costs attributable to differences in the price of No 6. fuel, hydraulic production and load forecast. The plan also includes an adjustment to account for any variation in NLH's rural revenues which may arise as NLH's rural rates are changed, in accordance with Government policy, to reflect NP's rates. This provision was incorporated into the RSP as part of the 1993 generic COS hearing.

The variables used in the RSP are based on the cost of service study filed with the Board in November 1991 which is based on forecast test year costs and operating conditions for the 1992 test year. These include a normal annual hydraulic production of 4,205.32 GWh, a cost of service oil price of $12.50 Cdn/bbl and a fuel efficiency factor for Holyrood of 605 kWh per barrel.

NLH tracks the various components of the plan monthly, comparing actual results with the cost of service and crediting or charging the plan with the difference. The annual balances in the plan are recovered from NP using a declining balance over a three-year period and from IC through an automatic adjustment in rates. In the case of NP, one-third of the amount as of December 31 is either recovered or paid over the 12 month period commencing the following July 1 through an adjustment in the energy rate charged to NP. NP passes this adjustment on to its retail and general service customers. In the case of the IC one third of the plan balance as of September 30 is either recovered or paid over the 12 month period commencing the following January 1 through an adjustment in their firm energy rate.

2. Current Status of the RSP

The actual balances in the RSP for the period 1992-2000 and the forecast balances for 2001 and 2002, are shown below:

Rate Stabilization Plan ($ millions)			
Year	**Total Balance**	**Retail (NP)**	**Industrial**
1992	4.1	0.6	3.5
1993	9.4	3.8	5.6
1994	(4.0)	(5.6)	1.6
1995	12.9	6.9	6.0
1996	30.2	21.0	9.2
1997	41.3	27.6	13.7
1998	48.8	33.0	15.8
1999	34.5	21.5	13.0
2000	35.6	22.7	12.9
2001 forecast – as filed	87.4	61.3	26.1
2001 forecast – revised (PUB-81)	83.6	60.4	23.2
2002 forecast – as filed	97.8	72.0	25.8
2002 forecast – revised (PUB-81)	86.3	65.0	21.3

(Supplementary Evidence, J. C. Roberts, Schedule XIV)

In final argument (pg. 53) NLH states that the increases in the balances in the RSP from 1992 to 2001 were caused by the dramatic increase in the price of No. 6 fuel from the time that base rates were set in 1992 using $12.50 Cdn/bbl for No. 6 fuel. The increase forecast RSP balance for 2002 relates primarily to the difference in the forecast average price for No. 6 fuel and the price NLH is proposing to use for the RSP of $20 Cdn/bbl.

PUB-81 indicates the mill rate adjustments required for NP and the IC to recover the outstanding balances. The IC RSP mill rate for 2001 was set in January 2002, based on the September 30, 2001 balance, at 5.14 mills/kWh. An RSP mill rate of 4.84 mills/kWh is forecast for January 2003 based on the forecast September 2002 balance. For NP, the RSP mill rate based on the December 2001 balance is forecast to be 4.52 mills/kWh in July 2002, with a

forecast mill rate of 4.83 mills/kWh in July 2003 based on the projected December 2002 balance in the retail plan. These mill rate adjustments are in addition to base rate increases requested in this Application.

3. NLH's Proposals

NLH outlined proposed changes to the RSP in IC-120. These changes include:

1. Hydraulic Production Variation
   - An addition of mini-hydro plants to the calculation of hydraulic production variation.
   - A change in the Holyrood conversion factor from 605 to 610 kWH/bbl
2. Load Variation
   - No longer include interruptible energy in the plan. Barrels relating to this energy will also be excluded from the fuel price variation calculation (along with the existing exclusion for barrels relating to emergency sales).
3. Customer Splits
   - No longer base the RSP split on test year Cost of Service Study (COS); instead use 12 month-to-date invoiced/bulk transmission energy, as well as test year Rural deficit allocation.
4. Rate Calculation
   - Establish energy rates on the same basis as split, ie. 12 month-to-date invoiced/bulk transmission energy.
5. Other
   - Change finance charge from NLH's embedded cost of debt to NLH's WACC.
   - Increase the RSP cap for NP of $50,000,000 to $100,000,000.

The current *"cost of service"* price of fuel in the RSP is $12.50 Cdn/bbl set by the Board in 1992. NLH is projecting that the weighted average annual purchase price for No. 6 fuel in 2002 will be approximately $25.91 Cdn/bbl. (2nd Supplementary Evidence, R. Henderson, pg. 1) In this Application, NLH is proposing a test year fuel price of $20 Cdn/bbl in calculating the revenue requirement for base rates. The difference resulting from the $20 Cdn/bbl and the actual price will be included in the RSP.

4. Issues Raised at the Hearing

There was considerable discussion surrounding the RSP. Some of the issues raised by the intervenors included the complexity of the plan, the amount of the outstanding balance, the recovery of this balance and the future of the plan.

Mr. Bowman expressed his concerns about the existing RSP: (Pre-filed Evidence, C. D. Bowman, pg. 6):

i. "It causes cross-subsidization in that past consumers are being subsidized by current consumers, and it appears that current consumers will be subsidized by future consumers;
ii. It removes any incentive that Hydro might have to better manage its fuel supply costs and improve its forecasting techniques; and
iii. It is difficult for consumers to understand."

Mr. Bowman also submitted that the RSP in its present form distorts price signals and should be eliminated, or, at the very least, the Board should direct NLH to file a revised RSP that addresses the above concerns. (Pre-filed Evidence, C. D. Bowman, pg. 5-6/21-12)

Mr. Brockman agrees with the continuation of the RSP but not with the proposed increase of the cap to $100,000,000. The "*increase cap is excessive and gives Hydro little or no incentive to operate efficiently"*. (Pre-filed Evidence, L.B. Brockman, pg. 9) Mr. Brockman suggests that the Board allow NLH to book amounts in excess of the present cap of $100,000,000. NLH can decide to either absorb the difference or apply to the Board for a hearing to justify the difference. (Pre-filed Evidence, L. B. Brockman, pg. 9) Mr. Brockman disagreed with the CA's position on eliminating the RSP and stated:

> *"I do not advocate the elimination of the RSP. The RSP helps reduce the volatility associated with dramatic changes in both fuel costs and hydraulic conditions. It was implemented because customers did not want to be exposed to excessive price volatility. In that respect, it has served its purpose well"*. (Supplementary Evidence, L. B. Brockman, pg. 5)

The IC do not object to the concept of a RSP as a mechanism to protect both ratepayers and NLH from variations in uncontrollable variables such as hydrology and fuel prices. Mr. Osler, in his pre-filed and supplementary testimony, had a number of observations, in particular, with respect to the load variation component and the allocations of the plan balances between NP and the IC. When commenting on the load variation component Mr. Osler stated (2nd Supplementary Evidence, C. F. Osler, pg. 4/81):

> *".,.the load variation component provides substantial protection to Hydro from errors in its load forecasting and changes in all factors influencing energy sales, including weather, economy, changing consumer fuel mix requirements, etc. The load variation component has provided Hydro with substantial additional income in 8 of the past 9 years, as much as $5,300,000 in 1999 which has clearly played a marked role in Hydro being able to avoid regulatory review by the Board over this period."*

Mr. Osler also comments that, based on the evidence filed by NLH on the RSP *"it is concluded that Hydro's process results in substantial balances in the fund being improperly allocated to NP, IC and Rural Interconnected customers based on reallocation of cost-of-service*

amounts that are not properly part of the RSP." (2nd Supplementary Evidence, C. F. Osler, pg. 3/17-19)

Mr. Osler states that, in relation to the intended operation of the RSP, there are two areas where the operation of the current RSP differs from the 1985 Board Order (2nd Supplementary Evidence, C. F. Osler, pg. 7/21/28):

> *"1. The RSP was intended only to adjust for load variation to the extend that it caused an earnings variation for Hydro.*
> *2. The RSP was intended to be simple for the utility to administer and for customers to understand.*
>
> *Neither of these principles have been applied in the current RSP: the operation of the plan is clearly complex to a degree that is unnecessary, and the plan adjusts and reallocates substantial costs between customers that are in no way related to variations in Hydro's earnings."*

In final argument (pg. 64) the IC submitted that:

> *"It should not be forgotten that, while the RSP is clearly a 'rate', it serves a different purpose than the base rate. It is intended to fluctuate, to accommodate variations both positive and negative over time arising from particular causes. It is not intended to represent an amount which forms a part of the charge for electricity to consumers over the long term. Long run changes in price levels of inputs, such as fuel, should be incorporated in base rates; it is the failure to do so in this case, i.e. that continued attachment to the unrealistic $12.50/bbl fuel, that has created something of a crisis."*

The IC propose that the Board should direct NLH to establish separate rate elements to track fuel price changes and water inflow changes. They also suggested that the fuel price adjustment should be shorter term (1 year) while the water inflow provision is more suited to a longer term adjustment since forecasts are based on long term averages. (IC, Final Argument, pg. 64)

Dr. Wilson questioned whether the social gain of deferring recovery of NLH's fuel cost, by setting a base below market, justifies the pricing inefficiency and equity issues inherent in shifting costs between generations. He stated *"The apparent philosophy behind Hydro's RSP is somewhat different than the reasons offered by most utilities for fuel cost adjustment clauses in their rates."* (Pre-filed Evidence, Dr. J. W. Wilson, pg. 34)

The Board's decisions on the issues raised by the intervenors are dealt with below.

5. Continuation of RSP

The Board agrees with NP and NLH that the RSP provides rate stability to customers and also provides a mechanism to eliminate volatility in NLH's revenue requirement due to events beyond NLH's control. This was the original intent of the RSP and remains so today. Ratepayers benefit from the smoothing of the impact of changing fuel prices on rates and thus

eliminating the rate spikes experienced by customers under the previous fuel adjustment charge. The Board believes that the regulatory principle of rate stability and predictability is still important to customers.

The Board is not convinced that the interests of the consumers or NLH would be served through the elimination of the RSP and, other than the specific adjustments and changes described in this decision, will not make any other change in the RSP or its operation at this time.

The Board does however note the concerns and issues surrounding the RSP raised by the intervenors, especially the CA and the IC, in particular concerns about the complexity of the plan and the interactions of the various components of the plan, especially the inclusion of the load variation provision. The Board also agrees that the existing RSP and its operation is difficult to understand.

The Board is convinced, based on the evidence and issues raised at the hearing, that the design and elements of the existing plan should be reviewed. To that end the Board will commission a study of the RSP, which will include a review of the plan since its implementation, together with the operational issues raised by the intervenors at the hearing. The Board will decide based on the results of that study what action should be taken.

6. Price of Fuel in RSP

The primary concern of the Board at this time is not the intent or principle of the RSP but rather its operation over the last five years which has seen the plan balances increase significantly. The Board acknowledges that the primary reason for this is the price of No. 6 fuel in the RSP of $12.50 Cdn/bbl, when actual fuel prices in recent times have exceeded $40 Cdn/bbl.

The Board agrees with NLH that the issue of *rate shock* to consumers is an important one. The Board is convinced, however, that incorporating the forecast price of fuel into base rates is the fairest and most prudent course of action which will avoid ever increasing balances in the RSP and also protect future consumers from having to pay even higher rates because of the deferral of a portion of fuel costs. As indicated when considering revenue requirement, the Board believes it is important to maintain the relationship between the price of fuel and electricity rates and that the correct price signals are reflected in rates to consumers. The Board will monitor the actual price of fuel, the RSP operation and the plan balances through NLH's quarterly reporting to the Board.

The COS price for No. 6 fuel to be used in the RSP for calculating the fuel price adjustment will be based on the monthly 2002 forecast fuel prices as filed in Table 1 of R. J. Henderson's, 2nd Supplementary Evidence. This table indicates that the weighted average fuel price for the test year will be $25.91 Cdn/bbl. In addition, NLH will be required to file updated 12-month fuel forecasts as part of its quarterly report to the Board.

7. Increase in Retail Cap

The existing retail portion of the plan has a cap of $50,000,000 (positive or negative) and was established in the Board's 1985 report recommending approval of the RSP. The cap was set to trigger a review by the Board as outlined in the 1985 report (pg 42):

> *"…if the net balance of provisions created by the Rate Stabilization Plan, to the extent that they are applicable to retailers, reaches $50 million (either positive or negative). At that appearance, Hydro would either propose alternative rates or present facts relevant to examining the need for an alteration of rates in light of the circumstances at that time."*

NLH has requested in this Application that the current cap on the retail portion of the plan be increased from its current level of $50,000,000 to $100,000,000. The reasons for the proposed increase in the cap relate to the increasing plan balance and the fact that NLH is proposing that the price of fuel to be used in base rates for 2002 be $20 Cdn/bbl, which is significantly less than the forecast price. NLH also acknowledges that the original request for a $100,000,000 cap was based on a forecast RSP total balance of $97.8 million. (NLH, Final Argument, pg. 54/4-5)

In supplementary evidence GT recommended that the Board approve a temporary or interim increase in the retail cap and that the cap should be set in relation to the forecast retail plan balance over the 2002 and 2003 time period. (Supplementary Evidence, GT, pg. 8) NLH did not oppose GT's recommendation but suggested that the cap be set at $85,000,000 to allow for forecasting uncertainties and the fact that the RSP balance will also be increased by the date of implementation of new rates for 2002. (NLH, Final Argument, pg. 54/19-29)

In final argument NP did not object to an increase in the RSP cap stating that *"An increase of the Retail RSP cap to $60-65 million, the forecast year end 2001 balance, is in Newfoundland Power's view, practically inevitable given that the year end 2001 balance represents fuel costs already incurred by Hydro."* (NP, Final Argument, pg. D-4)

The reason for implementing a cap on the retail plan was to ensure that the plan balance did not become excessively large. It is clear to the Board that the mere existence of a cap has not prevented this from happening. However, the Board is now faced with the dilemma of a large plan balance, which needs to be recovered from customers, coupled with a significant increase in base rates to these same customers due to higher fuel costs.

Any mechanism that is put in place to trigger a review of the RSP must be considered with a view to the original intent of the plan. On pg. 87 of the Board's 1985 report the Board states:

> *"The elimination of FAC will mean that fuel costs will be reflected in higher base rates and will not vary from month to month between adjustments made for the Rate Stabilization Plan and will protect the consumer from the large increase in the FAC that occurred during the winter of 1984-1985."*

This indicates that the Board at the time was concerned about rate stability and felt that this goal was best achieved by recovering fuel costs in base rates. The Board believes that this is still the best method to deal with fuel costs and that the goal should be to minimize deviations between current fuel costs and current electricity rates. The RSP should be used only to capture the uncertainties in forecasting. The Board maintains this principle in its decision to order NLH to use the forecast average fuel price in calculating its 2002 test year costs for No. 6 fuel.

In light of the other decisions taken at this time, including the commissioning of a review of the RSP, it is the Board's opinion that a cap on the retail plan balance is no longer necessary. The Board believes that setting the price of No. 6 fuel at forecast prices and recovering those costs in base rates instead of deferring a portion of the costs in the RSP will address the significant issues with respect to the cap. As well, the Board will undertake increased monitoring of the plan and will track the spread between the price of No. 6 fuel used in the plan, the actual price NLH is paying and the forecast long term price. The Board will exercise its authority to investigate or make changes to the RSP when it determines, based on the information before it, that action is necessary.

The Board does not accept NLH's proposal to increase the cap on the retail portion of the RSP to $100,000,000. The Board will remove the existing cap of $50,000,000 on the retail portion of the RSP.

8. Recovery of Balance in the RSP

The balance in the plan is currently recovered from customers over a three-year period using a declining balance method. As indicated previously, this recovery method has been in place since 1985 and means that residential customers are assessed as of July 1 each year for one third of the balance in the plan as of December 31 of the previous year. Similarly, the RSP adjustment for the IC occurs on January 1 each year based on a plan balance for the IC as of September 30 of the previous year.

While this recovery method has been working well according to NLH, there were questions raised during the hearing as to whether a shorter time frame for recovery should be considered in light of the increasing balances in the plan. GT proposed two alternatives for the Board to consider (Supplementary Evidence, GT, pg. 9):

1. Freeze the balance as of December 31, 2001 and continue to recover this balance using the current three year declining balance method, and recover any accumulation in the plan in subsequent years using a straight line basis over a two year period.
2. Freeze the balance as of December 31, 2001 and recover over a three year period using a straight line balance, and recover any accumulation in the plan in subsequent years using a straight-line basis over a two year period.

Either of these options will be faster than the existing method in recovering plan balances over the long term. Both will, however, result in higher mill rate adjustments in 2003 than would

occur under the current recovery mechanism because of the two year recovery period. (Supplementary Evidence, GT, Exhibit IV)

In final argument (pg. 56) NLH submitted that it is not opposed to a shorter period for the recovery of the RSP balance as proposed by GT but requested that the Board recognize the impact on consumers of using an accelerated recovery method. NLH stated that either of the alternatives suggested by GT is acceptable.

In considering this issue, the Board has to take into account the effect on rates of recovering some of the existing plan balance in the test year combined with its decision to rebase fuel at forecast prices. While lower RSP balances should accumulate as a result of recovering more of the fuel price in the actual base rate, the increase in base rates will be higher than that originally proposed by NLH. Recovering the RSP balance as proposed by NLH will mean even higher rates for both retail and industrial customers.

In addition to considering the impact of all costs on electricity rates to consumers, the Board has to balance the issue of trying to match recovery of costs with the period in which these costs were incurred, sometimes referred to as an inter-generational equity issue. This issue was raised by several of the expert witnesses, in particular Mr. Bowman and Dr. Wilson. Although costs should normally be recovered over the period in which they are incurred, the Board also has to balance this goal with the impact on ratepayers of this kind of matching recovery.

Because of the magnitude of the anticipated rate increases which will result from the Board's decision to use the forecast average fuel price in base rates, the Board will not allow any additional recovery of the existing RSP balance until 2003. The Board believes that deferral of the RSP mill rate adjustments together with an extended recovery period mitigates the impact of moving to true "*cost based*" rates incorporating the forecast price of No. 6 fuel.

With respect to the recovery of the balance in the RSP the Board will order the following:

- **The existing balances in the RSP are to be fixed as of the end of the month prior to the effective date of rate implementation based on the current methodology.**
- **The RSP mill rate for the IC will be reset as of the effective date of rate implementation for the remainder of 2002 to 2.80 mills/kWh, which was the rate effective January 1, 2001.**
- **The RSP mill rate for 2002 for NP will remain at 1.77 mills/kWh, which was the rate effective as of July 1, 2001.**
- **Recovery of the fixed balance outstanding will be spread over a five year period commencing in 2003 using a straight line recovery method. The method for calculating the mill rate adjustments and the date of the adjustments for both the IC and NP will remain the same. The amounts recovered will be credited against the outstanding balance of the plan. Interest will be accumulated and maintained on the balance using the WACC.**

- **Recovery or credits of balances that accumulate in the plan after the effective date of rate implementation will be calculated using a straight-line method over a two year period, to be effective January 1, 2004 for the IC and July 1, 2004 for NP.**

9. Allocation of Rate Stabilization Plan Balances

The IC raised the issue of the allocation of balances in the RSP between the retail customers and the IC. Mr. Osler submits that there were "*significant inconsistencies and improper operation of the RSP since the Board last reviewed Hydro in 1992"*. (2nd Supplementary Evidence, C. F. Osler, pg. 8/19-29) Their concern is summarized in the IC's final argument (pg. 73):

> *"One point on which the 1985 report is clear and consistent is that the RSP generally and the load elements in particular were intended to be applied to circumstances which gave rise to an actual change in NLH's revenues or costs. At page 90 of the Report, the Board states, repeating in part its words on p. 88 in item (vi) where it enumerated the changes from Hydro's proposed RSP:*
>
> > *The Board recommends that any earnings variation because of a difference between the estimated load and the actual load be included in the Rate Stabilization Plan so that Hydro's earnings will not vary. (Emphasis added)*
>
> *The concern was clearly to ensure that Hydro was made whole in respect of additional costs and refunded amounts which represented income not expected to be received on the basis of its forecasts. There was never a suggestion that the RSP was intended to re-distribute cost responsibility among Hydro's customers. If Hydro's income was not affected, there was no need for the RSP to effect a rate change in response to any experienced result, whether or not that result varied from the forecast."*

The main issue is with the monthly re-calculation of Average and Excess Demand factors which were used under the former cost of service methodology to assign costs to customer classes. The IC submit that the demand elements they should pay in the RSP were set by the Board in 1992 and that this recalculation is actually an alteration in the Board approved cost allocations. The fact that NLH has recalculated the demand elements each month since the Board implemented the 1992 report means that neither NP nor the IC have paid the "approved" allocated amounts. Mr. Osler, on behalf of the IC, submitted that in 2000 alone an amount in the order of $1,500,000 in cost were transferred from NP to the IC as a result of the RSP calculations. (2nd Supplementary Evidence, C. F. Osler, pg. 9/1-2) The IC recommend that the Board recalculate and restate the RSP to calculate the proper balance in the industrial RSP since 1995. (IC, Final Argument, pg. 78)

The IC also objected to the continued use of Albright and Wilson and Royal Oak Mines load in determining the load variation for the IC after both these customers ceased operation. The IC submit that the RSP charges to the industrial portion of the plan arising from this load variation calculation be reversed from the dates on which those operations ceased in Newfoundland (IC, Final Argument, pg. 78).

NLH submits that the way in which NLH split the RSP balance between the Island IC and NP was understood and communicated to the IC and has been reviewed by the Board and its financial consultants a number of times since 1986. NLH argues it is difficult to accept the IC position that the RSP has not been implemented properly or that these customers were unaware of the implications or the manner in which the balance was split between retail and industrial customers. NP agrees with NLH's position on this issue.

The Board agrees with NP and NLH that there is no basis upon which to reallocate past RSP balances between the retail customers and the IC. It is the Board's view that both NP and the IC, as the two major stakeholders in the operation of the RSP, have had sufficient opportunity to question any aspect of the RSP directly, either with NLH or through a query to the Board since 1992. The IC were present at the December 1999 hearing dealing with the phase out of their portion of the rural subsidy and at the subsequent pre-hearing conference, which set the date and scope of the present hearing. No such questions were rasied on either occasion concerning the NP/IC split in the RSP plan.

It is also apparent that there was communication between NLH and the IC regarding aspects of the RSP, as evident from correspondence filed in IC-284 and IC-286. The Board is not in a position to comment on whether the IC understood the correspondence and its implications or the manner in which the balance was split between NP and the IC. The Board can only assume that if there was a concern it would have been raised at the time. It is the view of the Board that NLH has consistently applied the rules as they were intended by the Board in 1986, and as communicated to the Board by NLH at that time. The Board does not agree with the IC that NLH has implemented the RSP improperly.

NLH has proposed that in future the allocation of the RSP balance be based on the customers' 12 months-to-date inventory/bulk transmission energy for the year in question. This change to the operation of the RSP will address the concern of the IC regarding the allocation of balances in the plan.

The Board will not make any adjustments to the RSP prior period balances as requested by the IC.

10. Other Changes to RSP Proposed by NLH

In addition to the issues addressed above NLH has proposed a number of other changes to the RSP as previously outlined. These other changes are restated below:

1. Hydraulic Production Variation
   - An addition of mini-hydro plants to the calculation of hydraulic production variation.
2. Load Variation
   - No longer include interruptible energy in the plan. Barrels relating to this energy will also be excluded from the fuel price variation calculation (along with the existing exclusion for barrels relating to emergency sales).

3. Customer Splits
   - No longer base the RSP split on test year Cost of Service Study (COS); instead use 12 month-to-date invoiced/bulk transmission energy, as well as test year Rural deficit allocation.
4. Rate Calculation
   - Establish energy rates on the same basis as split, i.e. 12 month-to-date invoiced/bulk transmission energy.
5. Other
   - Change finance charge from NLH's embedded cost of debt to NLH's WACC.

None of the intervenors took issue with these proposals and the Board finds them reasonable.

The Board accepts the changes in the RSP as proposed by NLH with the exception of the price of No. 6 fuel, the Holyrood efficiency factor, the test year hydraulic production and the increase in RSP cap, which are dealt with elsewhere in this decision.

PART FOUR. THE ORDER

IT IS THEREFORE ORDERED THAT:

CAPITAL STRUCTURE

1. NLH's debt/equity ratio in the 2002 test year of 83/17 and a short term debt/equity target rate of 80/20 is approved for use in calculating the rate of return on rate base.

FORECASTING: PRODUCTION/FUEL COSTS

2. The 2002 test year forecast of hydraulic production shall be 4,425 GWh.

3. The 2002 test year forecast of thermal generation shall be reduced to reflect the revised hydraulic forecast.

4. A fuel efficiency factor of 615 kWh/bbl shall be used to calculate 2002 test year fuel costs for No. 6 fuel.

5. NLH shall file with the Board:

- **i. As part of its next general rate application, an independent study of its hydraulic production forecasting methodology and the terms of reference shall be filed with the Board for approval in advance.**
- **ii. On or before December 31, 2002, a statement of policies and procedures outlining a coordinated, integrated and strategic approach to fuel purchasing; as outlined in the decision of the Board.**

REVENUE REQUIREMENT – TEST YEAR 2002

6. NLH shall calculate and file a revised total revenue requirement for the 2002 test year based on its proposals in this Application, incorporating the changes set out in this Order, which include:

- **i. Depreciation expense, adjusted to reflect NLH's 2002 Capital Budget as revised by this Order, including the elimination of the VHF Mobile Radio system project and the reduction of 7½%.**
- **ii. The monthly forecast price of No. 6 fuel, as set out in Schedule 1 attached to this Order.**
- **iii. Salaries and Fringe Benefits, reduced by an additional $500,000 to reflect a higher vacancy credit.**

iv. "*Other costs*", reduced by $2,000,000 to incorporate a productivity allowance.

v. An appropriate credit for interest collected on overdue accounts.

vi. The interest expense component of the 2002 test year return on rate base, incorporating:

(a) a reduction (calculated using the embedded cost of debt) to reflect the cost of financing the dividend in excess of NLH's existing dividend policy; and

(b) an adjustment to reflect the reduction of 7½% to NLH's approved 2002 capital budget for revenue requirement purposes.

vii. The return on equity component of the 2002 test year return on rate base, incorporating an adjustment to reflect the 3% return on the notional increase in equity resulting from payment of a dividend which is consistent with NLH's existing dividend policy.

7. Regulated expenses for the 2002 test year and subsequent years shall exclude:

i. Spousal travel;

ii. "Communication Plan" advertising; and

iii. Bay D'Espoir street lighting.

8. NLH shall file with the Board:

i. On or before December 31, 2002, a detailed plan of projected maintenance expenditures for the Holyrood Generating Station for the period 2003-2013.

ii. On or before December 31, 2002, a statement of policies and procedures governing employee travel.

iii. On or before June 30, 2003, details of the methodology used for calculation of notional interest.

iv. On or before December 31, 2005, an updated depreciation study.

RATE STABILIZATION PLAN

9. NLH shall continue to utilize the RSP, incorporating the changes proposed by NLH and those set out in this Order including:

i. A Cost of Service price of No. 6 fuel, as set out in Schedule 1 attached to this Order.

ii. A fuel efficiency factor of 615 kWh/bbl.

iii. A forecast hydraulic production of 4,425 GWh.

iv. The elimination of the cap on the retail portion of the RSP.

10. The existing balances in the RSP shall be fixed as of the end of the month prior to the effective date of rate implementation based on the current methodology, and additional recovery of this balance is not allowed in the 2002 test year.

11. The balance in the RSP shall be recovered in the following manner:

- **i. The RSP mill rate for the IC shall be reset as of the effective date of rate implementation for the remainder of 2002 to 2.80 mills/kWh, which was the rate effective January 1, 2001.**
- **ii. The RSP mill rate for 2002 for NP shall remain at 1.77 mills/kWh, which was the rate effective as of July 1, 2001.**
- **iii. Recovery of the fixed balance outstanding shall be spread over a five year period commencing in 2003 using a straight-line recovery method.**
- **iv. The method for calculating the mill rate adjustments and the date of the adjustments for both the IC and NP shall remain the same.**
- **v. The amounts recovered shall be credited against the fixed balance of the plan.**
- **vi. Interest shall be accumulated and maintained on the balance using the WACC.**
- **vii. Recovery or credits of balances that accumulate in the plan after the effective date of rate implementation (the new balance) shall be calculated using a straight-line method over a two year period, to be effective January 1, 2004 for the IC and July 1, 2004 for NP.**

12. NLH shall file with the Board updated 12-month fuel forecasts as part of its quarterly reports.

2002 CAPITAL BUDGET

13. The capital budget projects, excluding the VHF Mobile Radio system, as listed in Schedule 2 attached to this Order, are approved, pursuant to subsection 41(3) of the *Act.*

14. The 2002 capital budget in the amount of $36,765,000, adjusted to reflect the removal of the $3,081,000 associated with the VHF Mobile Radio system is approved, pursuant to subsection 41(1) of the *Act.*

15. Order No. P.U. 30 (2001-2002) is hereby amended to reflect the removal of B-47 (Replace 75 kW Diesel Unit No. 252, Petites).

16. An *"Allowance for Unforeseen Events"* fund of $1,000,000 shall replace the Contingency Fund and shall be used by NLH pursuant to the guidelines of the Board as set out in the decision which may be amended by the Board from time to time.

17. NLH shall file with the Board:

i. Upon further application for approval of the VHF Mobile Radio system project, a full cost benefit analysis of the project.

ii. As part of its 2003 capital budget application, an updated Telecommunications Plan.

iii. In all applications for approval of capital projects where generation is being replaced or upgraded, a cost benefit analysis of alternatives that may result in reduced load or a deferral of capacity expansion, including appropriate conservation or DSM programs.

iv. In all applications for approval of capital budget projects under subsection 41(3) of the *Act*, documentation showing the use of a net present value methodology to evaluate projects, pursuant to the guidelines of the Board as set out in Schedule 3 attached to this Order, which may be amended by the Board from time to time.

RATE BASE

18. NLH shall calculate and file a revised rate base, using the approach and methodology proposed in this Application incorporating the changes set out in this Order.

19. NLH shall file with the Board, prior to its next general rate application, a study of the implications upon Cash Working Capital Allowance of the timing difference between the payment of semi-annual long term bond interest and the receipt of the funds for their payment.

COST OF SERVICE

20. NLH shall complete and file a revised COS study for the 2002 test year, using the COS methodology as proposed by NLH, incorporating the changes set out in this Order, which include:

i. The allocation of generation demand costs for both the Island and Labrador Interconnected systems based upon a 1 CP allocator.

ii. The COS assignment of GNP assets, proposed to be assigned to common in this Application, to rural.

iii. The COS assignment of the Doyle's-Port aux Basques assets, proposed to be assigned to common in this Application, to NP specifically assigned.

21. NLH shall file with the Board, as part of its next general rate application, a detailed study as outlined in the decision of the Board, as to the proper COS assignment of the GNP assets, the Doyles-Port aux Basques assets and the Burin Peninsula assets.

RURAL SYSTEMS

22. Pursuant to section 70, the existing rate structures in respect of the rural systems are approved, except that NLH shall increase the rates it charges to the Federal and Provincial Governments effective with the implementation of rates arising from this Application, to recover the full costs of providing this service in rural areas.

23. Preferential rates shall continue to apply to hospitals, fish plants, churches, schools, community halls and municipal buildings and like facilities currently benefiting from preferential rates.

24. Pursuant to Section 70, the existing *"lifeline block"* of 700 kWh is approved for both domestic and general service customers.

25. Pursuant to Section 70, the existing policy of allowing NLH, as NP changes its rates, to automatically adjust the rates it charges its Island Rural Interconnected customers, its customers serviced from the L'Anse au Loup System and its Isolated Rural customers for the first 700 kWh per month of consumption, other than Government departments and agencies, so that the rates are the same as the rates charged by NP to its customers and to automatically change the rates charged for consumption over 700 kWh per month of electricity sold to Isolated Rural customers, other than Government departments and agencies, by the average rate of change granted to NP, is approved.

26. NLH shall file with the Board:

- **i. On or before December 31, 2002, a report in respect of the existing *"lifeline block"* for domestic isolated rural customers to assess its adequacy.**
- **ii. As part of its next general rate application, a multi-year plan to phase out preferential rural rates and move to a full cost recovery rate structure.**
- **iii. As part of its next general rate application, a proposal for the implementation of a demand energy rate structure for general service customers on isolated systems.**
- **iv. As part of its next general rate application, a plan to eliminate the *"lifeline block"* for general service customers on isolated systems, co-ordinated with the implementation of a demand energy rate structure for these customers.**
- **v. As part of its next general rate application, an evidentiary record in respect of the rural deficit which addresses the relevant issues, including those outlined by the Board in its decision.**

RATE ISSUES/RATE DESIGN

27. NLH shall apply to the Board for approval of a revised 2002 test year rate base, return on rate base, and Schedule of Rates incorporating the changes set out in this Order.

28. The revised Schedule of Rates shall be based on the proposals of NLH in this Application incorporating the changes set out in this Order.

29. NLH shall refund the Wabush surplus in the amount of $2,922,755, in the manner proposed.

30. NLH shall calculate the wheeling rate based upon transmission losses of 3.47%.

31. The Rules and Regulations as set out in the contracts with the industrial customers, except North Atlantic Refinery Limited, are approved.

32. The Rules and Regulations as set out in the contract with North Atlantic Refinery Limited, excluding Clause 9.04, which describes the liability of NLH, are approved.

33. NLH shall submit revised Rules and Regulations for its rural customers, incorporating the changes to Clause 4 and Clause 10 (c) set out in the decision of the Board.

34. NLH shall file with the Board, as part of its next general rate application, a five year plan outlining further alterations in rates on the Labrador Interconnected system, with the cost recovery targets as identified in this Application, including a phase in of the impact of applying the credit for secondary energy sales to CFB Goose Bay (5 Wing) to the rural deficit.

OTHER/GENERAL

35. NLH shall file its next general rate application, pursuant to Section 70 of the *Act,* no later than December 31, 2003.

36. Pursuant to Section 58 of the *Act,* the code of accounts submitted by NLH, is approved.

37. Pursuant to Section 68 of the *Act,* the changes in depreciation policies as proposed by NLH, including the extension of the service lives for the transmission lines affected by the Avalon upgrade program, are approved.

38. NLH shall file with the Board:

- **i. On or before September 30, 2002, a report with recommendations on how NLH may reasonably improve the reliability and quality of service for customers served in coastal Labrador communities.**
- **ii. On or before December 31, 2002, a final report on the results of joint efforts to date to reduce duplication between NLH and NP.**

iii. On or before December 31, 2002, the written policies and procedures to account for all intra and inter-corporate transactions, identifying what is to be included in regulated and non-regulated activities as a normal reporting function.

iv. On or before December 31, 2002, a multi-year plan directed towards its community-based conservation initiatives.

v. On or before June 30, 2003, a summary and index of all policies related to regulated activities.

vi. In all regulatory reporting, separate financial statements for regulated and non-regulated activities, including reconciliation with annual consolidated statements.

HEARING COSTS

39. The IC be awarded costs in an amount to be determined by the Board, following receipt of a detailed statement of their costs.

40. The application by the Towns of Labrador City and Wabush for costs is denied.

41. NLH shall pay the expenses of the Board arising from this Application, including the expenses of the Consumer Advocate as ordered by the Lieutenant-Governor in Council pursuant to Section 117 of the *Act*.

Dated at St. John's, Newfoundland and Labrador this 7th day of June 2002.

Robert Noseworthy,
Chair & Chief Executive Officer.

Darlene Whalen, P.Eng.,
Vice-Chairperson.

G. Fred Saunders,
Commissioner.

Don Powell, C.A.,
Commissioner.

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G. Cheryl Blundon,
Board Secretary.

P.U. 40 (2003)

IN THE MATTER OF the *Electrical Power Control Act*, 1994 (the "*EPCA*") and the *Public Utilities Act* R.S.N. 1990, Chapter P-47 (the "*Act*");

AND IN THE MATTER OF an application by Newfoundland and Labrador Hydro ("Hydro") for approval of, *inter alia*, rates to be charged its customers (the "Application");

AND IN THE MATTER OF proposed amendments to the Rate Stabilization Plan.

Before:

Robert Noseworthy
Chair and Chief Executive Officer

Darlene Whalen, P. Eng.
Vice-Chair

G. Fred Saunders
Commissioner

WHEREAS Hydro filed the Application with the Board of Commissioners of Public Utilities (the "Board") on May 21, 2003, which Application was amended on August 12, 2003, for an Order of the Board approving, among other things, the proposed rates for the various customers of Hydro to be effective January 1, 2004; and

WHEREAS the registered intervenors for the proceeding are the Consumer Advocate, Mr. Dennis Browne, Q.C.; Newfoundland Power Inc.; Hydro's Industrial Customers, namely Corner Brook Pulp and Paper Limited, Abitibi Consolidated Company of Canada-Stephenville and Grand Falls Divisions, North Atlantic Refining Limited and Voisey's Bay Nickel Company Limited; and the Towns of Labrador City and Wabush; and

WHEREAS as part of the proceeding the "Participating Parties", which for the purposes of this Order include Hydro and the registered intervenors, excepting the Towns of Labrador City and Wabush, held settlement discussions with respect to amendments to the Rate Stabilization Plan (the "RSP"); and

WHEREAS the RSP is established for two of Hydro's customers - Newfoundland Power and the Island Industrial customers - to smooth rate impacts for certain variations between actual results and Test Year Cost of Service estimates for (i) hydraulic production; (ii) No. 6 fuel cost used at Hydro's Holyrood generating station; (iii) customer load (Newfoundland Power and Island Industrial); and (iv) rural rates; and

WHEREAS Hydro advised during the hearing that the Participating Parties proposed that the RSP be amended as set out in Sections A, B, C and D of Schedule A to this Order (filed as Consent #2 in the proceeding) and further that, with the exception of the Industrial Customers who took no position, amendments as set out in Section E of Schedule A to this Order (filed as Consent #3 in the proceeding) should be made; and

WHEREAS Hydro has requested that the Board issue an Order on the proposed amendments prior to January 1, 2004 since the proposed changes to the RSP would, if accepted by the Board, result in changes to the January 1, 2004 annual RSP adjustment for the Industrial Customers; and

WHEREAS the Board has received no objection to the proposed amendments to the RSP set out in Schedule "A" to this Order or to the proposed timing of this Order; and

WHEREAS the Board is satisfied that the proposed amendments will not affect the rates charged to the Labrador Interconnected customers of Hydro or otherwise impact the issues to be determined in this Application in respect of the Labrador Interconnected System; and

WHEREAS the Board has considered the proposed amendments to the RSP and the relevant evidence and concurs with the amendments as presented; and

WHEREAS the Board will address any other specific issues surrounding the RSP, such as the monitoring issues raised during the hearing, as part of the ongoing regulatory supervision of the Board or in the final order flowing from the Application.

IT IS THEREFORE ORDERED THAT:

Unless otherwise ordered by the Board, the Rate Stabilization Plan is hereby amended as set out in Schedule "A" effective January 1, 2004.

DATED at St. John's, Newfoundland and Labrador, this 16th day of December 2003.

Robert Noseworthy,
Chair & Chief Executive Officer.

Darlene Whalen, P.Eng.,
Vice-Chair.

G. Fred Saunders,
Commissioner.

G. Cheryl Blundon,
Board Secretary.

SCHEDULE "A"

ORDER NO. P.U. 40 (2003)

NEWFOUNDLAND AND LABRADOR HYDRO

RATE STABILIZATION PLAN

The Rate Stabilization Plan of Newfoundland and Labrador Hydro (Hydro) is established for Hydro's Utility customer, Newfoundland Power, and Island Industrial customers to smooth rate impacts for variations between actual results and Test Year Cost of Service estimates for:

- hydraulic production;
- No. 6 fuel cost used at Hydro's Holyrood generating station;
- customer load (Utility and Island Industrial); and
- rural rates.

The formulae used to calculate the Plan's activity are outlined below. Positive values denote amounts owing from customers to Hydro whereas negative values denote amounts owing from Hydro to customers.

Section A: Hydraulic Production Variation

1. **Activity:**
   Actual monthly production is compared with the Test Year Cost of Service Study in accordance with the following formula:

   $$\{(A - B) \div C\} \times D$$

   Where:

   A = Test Year Cost of Service Net Hydraulic Production (kWh)
   B = Actual Net Hydraulic Production (kWh)
   C = Test Year Cost of Service Holyrood Net Conversion Factor (kWh /bbl.)
   D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)

2. **Financing:**
   Each month, financing charges, using Hydro's approved Test Year weighted average cost of capital, will be calculated on the balance.

3. **Hydraulic Variation Customer Assignment:**
   Customer assignment of hydraulic variations will be performed annually as follows:

   $$(E \times 25\%) + F$$

   Where:

   E = Hydraulic Variation Account Balance as of December 31, excluding financing charges
   F = Financing charges accumulated to December 31

   The total amount of the Hydraulic Customer Assignment shall be removed from the Hydraulic Variation Account.

4. **Customer Allocation:**
   The annual customer assignment will be allocated among the Island Interconnected customer groups of (1) Newfoundland Power; (2) Island Industrial Firm; and (3) Rural Island

Interconnected. The allocation will be based on percentages derived from 12 months-to-date kWh for: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The portion of the hydraulic customer assignment which is initially allocated to Rural Island Interconnected will be re-allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study.

The Newfoundland Power and Island Industrial customer allocations shall be included with the Newfoundland Power and Island Industrial RSP balances respectively as of December 31 each year. The Labrador Interconnected Hydraulic customer allocation shall be written off to Hydro's net income (loss).

Section B: Fuel Cost Variation, Load Variation and Rural Rate Alteration

1. **Activity**

1.1. **Fuel Cost Variations**

This is based on the consumption of No. 6 Fuel at the Holyrood Generating Station:

$$(G - D) \times H$$

Where:

D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)
G = Monthly Actual Average No. 6 Fuel Cost ($Can /bbl.)
H = Monthly Actual Quantity of No. 6 Fuel consumed less No. 6 fuel consumed for non-firm sales (bbl.)

1.2. Load Variations

Firm: Firm load variation is comprised of fuel and revenue components. The load variation is determined by calculating the difference between actual monthly sales and the Test Year Cost of service Study sales, and the resulting variance in No. 6 fuel costs and sales revenues. It is calculated separately for Newfoundland Power firm sales and Industrial firm sales, in accordance with the following formula:

$$(I - J) \times \{(D \div C) - K\}$$

Where:

C = Test Year Cost of Service Holyrood Net Conversion Factor (kWh /bbl.)
D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)
I = Actual Sales, by customer class (kWh)
J = Test Year Cost of Service Sales, by customer class (kWh)
K = Firm energy rate, by customer class

Secondary: Secondary load variation is based on the revenue variation for Utility Firmed-Up Secondary energy sales compared with the Test Year Cost of Service Study, in accordance with the following formula:

$$(J - I) \times L$$

Where:
I = Actual Sales (kWh)
J = Test Year Cost of Service Sales (kWh)
L = Secondary Energy Firming Up Charge

1.3. Rural Rate Alteration

(a) Newfoundland Power Rate Change Impacts:
This component is calculated for Hydro's rural customers whose rates are directly or indirectly impacted by Newfoundland Power's rate changes, with the following formula:

$$(M - N) \times O$$

Where:

M = Cost of Service rate [1]
N = Existing rate
O = Actual Units (kWh, bills, billing demand)

(b) Rural Labrador Interconnected Automatic Rate Adjustments:
This component reflects the impact of the automatic rate adjustments for Hydro's rural customers on the Labrador Interconnected system, which arise from the five-year phase-in of the application of the credit from secondary energy sales to CFB Goose Bay to the rural deficit.

Monthly adjustments commence January, 2005, and will be subject to revision when a new Test Year Cost of Service is approved by the Public Utilities Board for Hydro. The amount of the automatic rate adjustment is calculated as follows:

$$P = (Q - R) \div 12$$

Where:

P = the monthly amount of the automatic rate adjustment
Q = the CFB Revenue Credit applied to the rural deficit in Hydro's Final 2004 Test Year Cost of Service
R = the CFB Revenue Credit applied to the rural deficit in 2005 to 2008, included in existing rates and outlined in the table below:

[1] Hydro's schedule of rates for its rural customers impacted by Newfoundland Power's rate changes as a result of the pass-through of Hydro's rate changes associated with the Test Year Cost of Service Study.

	Q	R	Q – R	P
2005	$ 0	$445,722	($445,722)	($37,143)
2006	$ 0	$593,461	($593,461)	($49,455)
2007	$ 0	$1,477,393	($1,477,393)	($123,116)
2008 [2]	$ 0	$2,504,056	($2,504,056)	($208,671)

2. **Monthly Customer Allocation: Load and Fuel Activity**
Each month, the load variation will be assigned to the customer class for which the load variation occurred.

Each month, the year-to-date total for fuel price variation will be allocated among the Island Interconnected customer groups of (1) Newfoundland Power; (2) Island Industrial Firm; and (3) Rural Island Interconnected. The allocation will be based on percentages derived from 12 months-to-date kWh for: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The year-to-date portion of the fuel price variation which is initially allocated to Rural Island Interconnected will be re-allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study.

The current month's activity for Newfoundland Power, Island Industrials and regulated Labrador Interconnected customers will be calculated by subtracting year-to-date activity for the prior month from year-to-date activity for the current month. The current month's activity allocated to regulated Labrador Interconnected customers will be removed from the Plan and written off to Hydro's net income (loss).

3. **Monthly Customer Allocation: Rural Rate Alteration Activity**
Each month, the rural rate alteration will be allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study. The portion allocated to regulated Labrador Interconnected will be removed from the Plan and written off to Hydro's net income (loss).

4. **Plan Balances**
Separate plan balances for Newfoundland Power and for the Island Industrial customer class will be maintained. Financing charges on the plan balances will be calculated monthly using Hydro's approved Test Year weighted average cost of capital.

Section C: Fuel Price Projection

A fuel price projection will be calculated to anticipate forecast fuel price changes and to determine fuel riders for the rate adjustments. For industrial customers, this will occur in October each year,

[2] Monthly adjustments will continue after 2008 until a new Test Year Cost of Service is approved by the Public Utilities Board.

for inclusion with the RSP adjustment effective January 1. For Newfoundland Power, this will occur in April each year, for inclusion with the RSP adjustment effective July 1.

1. **Industrial Fuel Price Projection:**
In October each year, a fuel price projection for the following January to December shall be made to estimate a change from Test Year No. 6 Fuel Cost. Hydro's projection shall be based on the change from the average Test Year No. 6 fuel purchase price, in Canadian dollars per barrel, determined from the forecast oil prices provided by the PIRA Energy Group, and the current US exchange rate. The calculation for the projection is:

$$[\{(S - T) \times U\} - V] \times W$$

Where:

S = the September month-end PIRA Energy Group average monthly forecast for No. 6 fuel prices at New York Harbour for the following January to December

T = Hydro's average Test Year contract discount (US $/bbl)

U = the monthly average of the $Cdn / $US Bank of Canada Noon Exchange Rate for the month of September

V = average Test Year Cost of Service purchase price for No. 6 Fuel ($Can /bbl.)

W = the number of barrels of No. 6 fuel forecast to be consumed at the Holyrood Generating Station for the Test Year.

The industrial customer allocation of the forecast fuel price change will be based on 12 months-to-date kWh as of the end of September and is the ratio of Industrial Firm invoiced energy to the total of: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The amount of the forecast fuel price change, in Canadian dollars, and the details of an estimate of the fuel rider based on 12 months-to-date kWh sales to the end of September will be reported to industrial customers, Newfoundland Power, and the Public Utilities Board, by the 10th working day of October.

2. **Newfoundland Power Fuel Price Projection:**
In April each year, a fuel price projection for the following July to June shall be made to estimate a change from Test Year No. 6 Fuel Cost. Hydro's projection shall be based on the change from the average Test Year No. 6 fuel purchase price, in Canadian dollars per barrel, determined from the forecast oil prices provided by the PIRA Energy Group, and the current US exchange rate. The calculation for the projection is:

$$[\{(X - T) \times Y\} - V] \times W$$

Where:

T = Hydro's average Test Year contract discount (US $/bbl)

V = average Test Year Cost of Service purchase price for No. 6 Fuel ($Can /bbl.)

W = the number of barrels of No. 6 fuel forecast to be consumed at the Holyrood Generating Station for the Test Year.

X = the average of the March month-end PIRA Energy Group average monthly forecast for No. 6 fuel prices at New York Harbour for the following July to December, and the most recent long-term PIRA Energy Group average annual forecast for No. 6 fuel prices at New York Harbour for the following January to June.

Y = the monthly average of the $Cdn / $US Bank of Canada Noon Exchange Rate for the month of March.

The Newfoundland Power customer allocation of the forecast fuel price change will be based on 12 months-to-date kWh as of the end of March and is the ratio of Newfoundland Power Firm and Firmed-Up Secondary invoiced energy to the total of: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The amount of the forecast fuel price change, in Canadian dollars, and the details of the resulting fuel rider applied to the adjustment rate will be reported to Newfoundland Power, industrial customers, and the Public Utilities Board, by the 10th working day of April.

Section D: Adjustment

1. Newfoundland Power

As of March 31 each year, Newfoundland Power's adjustment rate for the 12-month period commencing the following July 1 is determined as the rate per kWh which is projected to collect:

Newfoundland Power March 31 Balance

less projected recovery / repayment of the balance for the following three months (if any), estimated using the energy sales (kWh) for April, May and June from the previous year

plus forecast financing charges to the end of the 12-month recovery period (i.e., June in the following calendar year),

divided by the 12-months-to-date firm plus firmed-up secondary kWh sales to the end of March.

A fuel rider shall be added to the above adjustment rate, based on the Newfoundland Power Fuel Price Projection amount (as per Section C.2 above) divided by 12-months-to-date kWh sales to the end of March.

Where a new Test Year comes into effect while there is an existing fuel rider in place, the fuel rider portion of the RSP Adjustment will be set to zero upon implementation of the new Test Year Cost of Service rates, until the time for the next fuel price projection.

2. Island Industrial Customers

As of December 31 each year, the adjustment rate for industrial customers for the 12-month period commencing January 1 is determined as the rate per kWh which is projected to collect:

Industrial December 31 Balance

plus forecast financing charges to the end of the following calendar year,

divided by 12-months-to-date kWh sales to the end of December.

A fuel rider shall be added to the above adjustment rate, based on the Industrial Fuel Price Projection (as per Section C.1 above) amount divided by 12-months-to-date kWh sales to the end of December.

Where a new Test Year comes into effect while there is an existing fuel rider in place, the fuel rider portion of the RSP Adjustment will be set to zero upon implementation of the new Test Year Cost of Service rates, until the time for the next fuel price projection.

Section E: Historical Plan Balances:

1. **August 2002 Balance:**
Newfoundland Power and Island Industrial customer balances accumulated in the Plan as at August 2002 will be recovered over a 5-year collection period, with adjustment rates established each December 31, commencing December 31, 2002. Financing charges on the plan balances will be calculated monthly using Hydro's approved Test Year annual weighted average cost of capital.

Newfoundland Power
The adjustment rate for each year of the five-year adjustment period will be determined as follows:

$$A = (B - C + D) \div E \div F$$

where
A = adjustment rate ($ per kWh) for the 12-month period commencing the following July 1.
B = Balance December 31
C = projected recovery to the following June 30 (if any), estimated using the most recent energy sales (kWh) for the period January to June.
D = projected financing charges to the following June 30
E = number of years remaining in the adjustment period
F = energy sales (kWh) (firm and firmed-up secondary) to Newfoundland Power for the most recent 12 months ended December 31

Recovery and financing will be applied to the balance each month. At the end of the five-year recovery period, any remaining balance will be added to the plan then in effect.

Island Industrial Customers
The adjustment rate for each year of the five-year adjustment period will be determined as follows:

$$G = H \div I \div J$$

where

G = adjustment rate ($ per kWh) for the 12-month period commencing the following January 1.
H = Balance December 31
I = number of years remaining in the adjustment period
J = firm energy sales (kWh) to Industrial Customers for the most recent 12 months ended December 31

Recovery and financing will be applied to the balance each month. At the end of the five-year recovery period, any remaining balance will be added to the plan then in effect.

2. RSP Balance, December 31, 2003:

Newfoundland Power and Island Industrial customer balances accumulated in the Plan as at December 31, 2003 will be consolidated with the outstanding August 2002 customer balances as of December 31, 2003, and will be included with the Newfoundland Power and Island Industrial customer balances respectively for rate-setting purposes as of December 31, 2003.

Newfoundland & Labrador

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF THE

2003 GENERAL RATE APPLICATION

FILED BY

NEWFOUNDLAND AND LABRADOR HYDRO

DECISION AND ORDER

OF THE BOARD

ORDER No. P.U. 14 (2004)

BEFORE:

Mr. Robert Noseworthy
Chair and Chief Executive Officer

Ms. Darlene Whalen, P.Eng.
Vice-Chair

Mr. G. Fred Saunders
Commissioner

P.U. 14 (2004)

IN THE MATTER OF the *Electrical Power Control Act* R.S.N. 1994, Chapter E-5.1 (the "*EPCA*") and the matter of the *Public Utilities Act* R.S.N. 1990, Chapter P-47 (the *"Act"*)*;*

AND IN THE MATTER OF an application by Newfoundland and Labrador Hydro for approval of, *inter alia*, rates to be charged its customers (the "*Application*").

BEFORE:

Robert Noseworthy
Chair and Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

G. Fred Saunders
Commissioner

IV. RATE STABILIZATION PLAN

1. Introduction

The Rate Stabilization Plan (RSP) is established for two of NLH's customers – NP and the Island Industrials – to smooth rate impacts for certain variations between actual results and test year COS estimates for (i) hydraulic production, (ii) No. 6 fuel cost used at NLH's Holyrood generating station, (iii) customer load (NP and Island Industrials), and (iv) rural rates. Issues surrounding the RSP were canvassed extensively during NLH's 2001 general rate hearing and the Board made a number of findings and orders regarding the RSP in Order No. P. U. 7(2002-2003).

2. Order No. P. U. 40(2003)

On December 16, 2003 the Board issued Order No. P. U. 40(2003) (Appendix J) approving amendments as of January 1, 2004 to the RSP with respect to the current rules in the existing rates schedules as well as recovery of historic plan balances. The only outstanding issue that was not addressed in the Order is ongoing monitoring of the RSP.

3. Ongoing Monitoring

Since the changes to the RSP increase the level of complexity of the plan and may cause increased volatility in rates, Grant Thornton suggested that the Board consider the appropriate reporting requirements to permit effective monitoring, including the impact on customers. (Supplementary Evidence, Grant Thornton, Dec. 5, 2003, pgs. 4-5) NLH acknowledged that the modified RSP may result in more volatility in customer rates. (Supplementary Evidence, S. D. Banfield, Nov. 21, 2003, pgs. 6/26-31; 7/1-3) Grant Thornton recommended that NLH be directed to undertake a review of the new plan after a 24-month period. This review should assess the effectiveness of the new plan along with customer impact and reaction, and determine whether any modifications are appropriate. (Supplementary Evidence, Grant Thornton, Dec. 5, 2003, pgs. 4-5)

The Board agrees that ongoing monitoring of the RSP is necessary to ensure that the plan is operating as intended in light of the changes approved in Order No. P. U. 40(2003). The Board also agrees with the recommendation of Grant Thornton that the RSP should be comprehensively reviewed after a 24-month period. As part of its ongoing regulatory supervision the Board may address additional reporting and review requirements for NLH's quarterly regulatory and annual reports. NLH will also be required to undertake a review of the operation of the RSP for the period January 1, 2004 to December 31, 2005. This review should assess the effectiveness of the revised RSP, including an assessment of the impact on customers in terms of rates based on the outstanding plan balance as of December 31, 2005.

The Board will direct NLH to complete a review of the operation of the RSP for the period January 1, 2004 to December 31, 2005. A report on this review setting out an assessment of the impact on customers should be filed with the Board no later than June 30, 2006.

PART FOUR. THE ORDER

IT IS THEREFORE ORDERED THAT:

REVISED REVENUE REQUIREMENT AND COST OF SERVICE

1. **NLH shall file a revised total revenue requirement and cost of service study for the 2004 test year based on its October 31, 2003 filing, incorporating the determinations of the Board in this Decision and Order, including:**
   - i. **The forecast dividend payout shall be reduced for rate setting purposes to 25% of net income;**
   - ii. **The allowed rate of return on equity for the purposes of determining the weighted average cost of capital shall be 5.83%;**
   - iii. **The fuel conversion factor for No. 6 fuel at Holyrood shall be 630 kWh/bbl;**
   - iv. **The approved 2004 Capital Budget shall be adjusted for rate setting purposes to reflect a reduction of 5.0%;**
   - v. **The forecast 2004 capital retirements shall be increased to 0.39% of total capital assets;**
   - vi. **Salary expenses shall be reduced by $500,000;**
   - vii. **Transportation expense shall be reduced by $185,000;**
   - viii. **Professional services expense shall be increased by $200,000;**
   - ix. **Capitalized expenses shall be increased by $2,000,000; and**
   - x. **Costs associated with TL219 shall be specifically assigned to NP and costs associated with TL212 shall be assigned common.**

RATE BASE AND RETURN ON RATE BASE

2. **NLH shall file for the approval of the Board a revised calculation of rate base and rate of return on rate base for the 2004 test year based on the approach and methodology proposed in its Application, incorporating the determinations of the Board in this Decision and Order.**

3. **As part of its revised filing of rate base and rate of return on rate base NLH shall file for the approval of the Board:**
   - i. **a proposal for a range of return on rate base including an analysis of several alternate ranges with impacts; and**
   - ii. **a definition of an "excess earnings" account to be included in the company's system of accounts to which earnings above the maximum of the allowed range of rate of return on rate base will be credited.**

4. **The rate base for the year ending December 31, 2002 is hereby fixed and determined at $1,356,207,000.**

RATES, RULES AND REGULATIONS

5. NLH shall file for the approval of the Board a revised Schedule of Rates, Rules and Regulations to be effective as of July 1, 2004, addressing the consumption on which the rates will be effective, and incorporating the determinations of the Board in this Decision and Order, including:

- **i. Rates charged to NP shall be on an energy-only basis.**
- **ii. Rates charged to Rural Isolated Domestic customers for consumption of electricity:**
  - **(a) within the Seasonal Lifeline Block, as accepted by the Board in this Decision and Order, shall be the same rates charged to NP's domestic customers; and**
  - **(b) above the Seasonal Lifeline Block shall continue as historically structured and determined.**
- **iii. The Rules shall include a statement of the policies for automatic changes in rates for all of NLH's rural customers whose rates and rate changes are tied to NP's rates and rate changes as and when approved by the Board.**

6. NLH shall file for the approval of the Board a revised Schedule of Rates no later than November 30 for each subsequent year for rate changes proposed in accordance with:

- **i. The five-year implementation of uniform rates on the Labrador Interconnected System; and**
- **ii. The three-year phase-in of a demand-energy rate structure for Rural Isolated General Service customers.**

7. The Complaint of the Towns of Labrador City and Wabush is dismissed.

8. The adjustment of the rural rate alteration component of the RSP based on the phase-in of Labrador rates and the revenue credit from secondary energy sales to CFB Goose Bay shall be applied only to the portion of the revenue credit applicable to NP and shall not negatively affect the rates of the Labrador Interconnected customers.

9. NLH shall file no later than July 31, 2004, based on the revised cost of service study for the 2004 test year, an application with supporting documentation as set out in this Decision and Order for a demand-energy rate to be implemented for NP as of January 1, 2005.

REPORTING

10. NLH shall file as part of its next general rate application;

- **i. a report on the discontinuance of the use of regulated equity in favour of book equity;**
- **ii. a report with respect to the review of its property and assets;**
- **iii. a report setting out a proposal for an automatic adjustment mechanism with analysis as to impacts; and**

iv. an independent study of the treatment of NP's generation assessing the value of NP's generation to the system, with recommendations on how this generation should be accounted for in the cost of service study and rate design.

11. NLH shall file with the Board on or before June 30, 2006:
- **i. a report on the operation of the Rate Stabilization Plan for the period January 1, 2004 to December 31, 2005; and**
- **ii. a system-wide marginal cost study.**

12. NLH shall file a ten year plan of maintenance expenditures for the Holyrood generating station with its annual capital budget application, until otherwise directed by the Board.

13. NLH shall file with its annual financial report, commencing in 2004 until otherwise directed by the Board, an annual report on the rural deficit addressing the following:
- **i. the total rural deficit and a breakdown of its components by system (Island Interconnected Rural, Island and Labrador Isolated Rural, and L'Anse au Loup);**
- **ii. a five year forecast of the rural deficit by system;**
- **iii. the number of communities and customers served in each system;**
- **iv. the cost per kWh per system, showing a comparison with cost per kWh for the Island Interconnected System (less rural) and the Labrador Interconnected System;**
- **v. the deficit per customer and the cost recovery ratios for each system; and**
- **vi. a summary of any specific initiatives undertaken to reduce the capital or operating costs in each system.**

14. NLH shall file a report no later than December 31, 2004 proposing a *"peer group"* of utilities for the purposes of external benchmarking of its KPIs.

15. NLH shall file no later than December 31, 2004 a report outlining:
- **i. A comprehensive description of NLH's strategic and business planning processes;**
- **ii. A description of how corporate goals and strategies are communicated and operationalized including how specific operational targets are identified and linked to corporate goals and strategies; and**
- **iii. A description of how management performance and employee incentives are tied to achieving targeted goals, outcomes and efficiencies.**

16. NLH shall file with its annual financial report, commencing in 2004 until otherwise directed by the Board, an annual report outlining:
- **i. A strategic overview highlighting core strategies, corporate goals and achievements;**
- **ii. Appropriate historic, current and forecast comparisons of reliability, operating, financial and other key targeted outcomes/measures including the additional KPIs accepted in this Decision and Order; and**

iii. Initiatives targeting productivity or efficiency improvements, including status of ongoing projects and improved performance resulting from completed projects.

OTHER ISSUES

17. NLH shall file its next general rate application using the full historic hydraulic data flow record with evidence as to how the following issues have been addressed;
- **i. Correction of the internal inconsistencies in the data series; and**
- **ii. Selection of an appropriate computer model for simulation.**

18. NLH may accumulate the costs associated with the marginal cost study and the independent study of the treatment of NP generation in a deferral account to be addressed at NLH's next general rate application.

HEARING COSTS

19. NLH shall pay the expenses of the Board arising from this Application, including the expenses of the Consumer Advocate incurred by the Board, pursuant to Section 117 of the *Act*.

20. The Industrial Customers shall submit a detailed statement of costs no later than May 28, 2004 for the consideration of the Board in making an award of costs to the Industrial Customers.

21. The Towns of Labrador City and Wabush shall submit a detailed statement of costs no later than May 28, 2004 for the consideration of the Board in making an award of costs to the Towns.

Dated at St. John's, Newfoundland and Labrador this 4th day of May 2004.

Robert Noseworthy,
Chair & Chief Executive Officer.

Darlene Whalen, P.Eng.,
Vice-Chair.

G. Fred Saunders,
Commissioner.

.

G. Cheryl Blundon,
Board Secretary.

Newfoundland & Labrador
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
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Newfoundland & Labrador

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF THE

2006 GENERAL RATE APPLICATION

FILED BY

NEWFOUNDLAND AND LABRADOR HYDRO

DECISION AND ORDER

OF THE BOARD

ORDER No. P. U. 8(2007)

BEFORE: **Mr. Robert Noseworthy**
Chair and Chief Executive Officer

Ms. Darlene Whalen, P.Eng.
Vice-Chair

Newfoundland & Labrador

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

ORDER NO. P. U. 8 (2007)

IN THE MATTER OF
the *Electrical Power Control Act* RSNL 1994, Chapter E-5.1 (the *EPCA*") and the *Public Utilities Act* RSNL 1990, Chapter P-47 (the "*Act*") and their subordinate regulations;

AND IN THE MATTER OF
an application by Newfoundland and Labrador Hydro for approval of, *inter alia*, rates to be charged its customers (the "*Application*").

BEFORE:

Robert Noseworthy
Chair and Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

III. RATE STABILIZATION PLAN (RSP)

1. Application Proposals

In Order No. P.U. 14(2004) the Board directed that Hydro file a report on the operation of the RSP for the period January 1, 2004 to December 31, 2005. This report was filed with the Board on June 30, 2006. As part of the report Hydro proposed several changes to the RSP, including the addition of a provision regarding variations in diesel fuel costs and a change to allow the use of updated fuel rider forecasts when new test year base rates are implemented.

In its August 2006 Application Hydro requested that the Board approve the changes as set out in its June 30, 2006 report. Hydro also proposed to change the treatment of NP's allocated share of the CFB Goose Bay Revenue Credit whereby NP's portion of this credit would be removed from NP's base rates and refunded to NP through its RSP based on secondary revenue. The Application also proposed changes to the RSP to reflect the operation of the proposed annual automatic adjustment mechanism for Hydro's rate of return on rate base.

2. Settlement Agreements

The October 20, 2006 Agreement on Cost of Service, Rate Design and Rate Stabilization Plan proposed that the current provisions of the RSP continue as approved for all hydraulic, fuel and load related components and all recovery-related calculations. The parties also agreed with Hydro's proposal that *"when new test year base rates are implemented, if the fuel rider forecast is more current, a fuel rider which incorporates the new forecast should be implemented at the same time as the change in base rates."* Proposed changes to the RSP dealing with variations in diesel fuel costs and the CFB Goose Bay Revenue Credit, and the disposition of the forecast hydraulic production variation balance in the RSP were not agreed upon. This Agreement proposed that a review process be initiated by Hydro to examine the re-design of the RSP to better meet design objectives. This review is intended to include, but not be limited to:

i. *Definition of the design objectives against which the current RSP and all proposed modifications will be evaluated.*

ii. *A review of the necessity of a load variation component of the RSP, given potential changes to Industrial Customers rates to reflect marginal fuel costs.*

iii. *Modification of the RSP to enhance the price signal for marginal consumption by ICs and NP.*

iv. *Simplification of the RSP by separately tracking provisions not related to the hydraulic and fuel price components of the plan through an accounting mechanism discrete from the RSP.*

The parties agreed that *"As soon as practicable following the conduct of the review of the IC rate design and re-design of the RSP, and in no event later than October 31, 2007, Hydro shall host a Technical Conference, to be attended by the Parties and others as determined by the Parties, to further discuss the IC rate design and the re-design of the RSP."*

In the November 23, 2006 Agreement on COS, Rate Design and Other Issues the parties agreed that Hydro's proposals related to the treatment of NP's allocated share of the CFB Goose Bay Revenue Credit and the recovery of additional rural diesel fuel and power purchase costs would be withdrawn and added to the list of issues to be addressed as part of the proposed RSP review. The current treatment of the CFB Goose Bay Revenue Credit would continue for the purpose of this Application, except to the extent modified by the Agreement on the Labrador Interconnected Rates.

The November 23rd Agreement on Labrador Interconnected Rates proposed that a sufficient portion of the CFB Goose Bay Revenue Credit be used to maintain existing rates paid by Rural customers on the Labrador Interconnected system for 2007. The revenue shortfall to Hydro from maintaining existing rates will be recovered through the RSP. The RSP rules pertaining to the Rural Rate Alteration (Rural Labrador Interconnected Automatic Rate Adjustments) will be modified to reflect this proposal and to facilitate the phasing in of the CFB Goose Bay Revenue Credit for secondary energy sales to reduce the Rural Deficit. Hydro will submit the modified RSP rules to the Board for approval.

The November 23, 2006 Agreement on Revenue Requirement set out the parties' agreement on the disposition of the RSP Hydraulic Production Variation Balance. With respect to NP's portion of this balance the Agreement stated:

> *"i. Effective December 31, 2006, Hydro will transfer Newfoundland Power's portion of the actual RSP Hydraulic Production Variation Balance as of December 31, 2006 (in total, currently forecast at $20,700,000) to Newfoundland Power's Historic RSP Balance.*
>
> *ii. Effective January 1, 2007, Hydro will decrease the RSP rate charged to Newfoundland Power commensurate with a reduction in Newfoundland Power's Historic RSP Plan Balance. For the purposes of setting the new RSP rate, the reduction in Newfoundland Power's Historic RSP Balance will be calculated by deducting Newfoundland Power's portion of the forecast $20,700,000 RSP Hydraulic Production Variation Balance from Newfoundland Power's Historic RSP Balance. This will enable Hydro to amortize the collection of the reduced Historic RSP Balance over the eighteen (18) months (January 1, 2007 to July 1, 2008) and recognizes that RSP rates will again be reset on July 1, 2007 in accordance with the normal operation of the RSP.*
>
> *iii. Effective January 1, 2007, Newfoundland Power will reduce the RSA adjustment it charges its customers to reflect the change in the RSP rate charged to Newfoundland Power".*

With regard to the RSP Hydraulic Production Variation Balance for Industrial Customers the Agreement stated:

> *"i. The normal annual 25% allocation of the Industrial Customers' share of the actual RSP Hydraulic Balance as of December 31, 2006 (in total, currently forecast at $20,700,000) shall be incorporated into customer rates effective January 1, 2007 in accordance with the existing RSP rules, and*
>
> *ii. the portion of the Industrial Customers' share of the actual RSP Hydraulic credit balance, net of the allocation outlined in (i) above, shall be transferred, effective December 31, 2006, to the Industrial Customers' Historic RSP and used to reduce any*

charge, or increase any credit, which would otherwise be applied effective January 1, 2008 to the rates of Industrial Customers under the current RSP rules".

3. Revised Application

In the Revised Application Hydro seeks approval of changes to the RSP which reflect the Settlement Agreements. Hydro filed a further application with the Board on December 20, 2006 seeking approval of the revisions to the RSP rules to reflect the intent of the December 6, 2006 Government Directive related to rural rate alterations, the Settlement Agreements and the Revised Application.

In Order No. P. U. 46(2006) the Board did not approve all of the proposed changes but granted those which were appropriate in the context of the approval of interim rates effective January 1, 2007. Specifically, the Board approved on an interim basis:

i. Changes to the monthly amount of the 2007 automatic rate adjustment for the Rural Labrador Interconnected system resulting from the phase-in of the CFB Revenue Credit from secondary sales to CFB Goose Bay to the rural deficit, leaving the CFB Revenue Credit applied to the rural deficit in Hydro's final 2007 test year cost of service and future years to be determined later by final Order of the Board; and
ii. The use of a reserve account to maintain the December 31, 2006 RSP Hydraulic Variation balance, net of the normal 25% December 31, 2006 allocation, with normal RSP financing charges applied, until the balance is disposed of later by final Order of the Board.

4. Board Findings

Hydro proposed changes to the RSP rules pertaining to the Rural Rate Alteration for the Labrador Interconnected automatic rate adjustments. This proposal was accepted by the parties in the November 23, 2006 Agreement on Labrador Interconnected Rates. The language and specific amounts necessary to accommodate the revised amount of the CFB Goose Bay Revenue Credit for 2007 was approved on an interim basis in Order No. P. U. 46(2006). The Board is satisfied that it is reasonable and consistent with regulatory principles to allocate a portion of the CFB Goose Bay Revenue Credit during the extended phase-in of uniform Labrador Interconnected rates.

The Board accepts Hydro's proposed methodology for the allocation of the CFB Goose Bay Revenue Credit during the extended phase-in of uniform Labrador Interconnected rates. Hydro will be required to file supporting calculations with each annual application for approval of changes to Labrador Interconnected rates. The Board will accept on a final basis the monthly amount of the automatic rate adjustment in the Rural Rate Alteration.

The Board notes that the RSP rules as proposed include specific elements of the rates beyond 2007 for the Labrador Interconnected Customers. Future rates will be established with the approval of the Board upon application by Hydro. The RSP should not set out specific

amounts in relation to rates for these customers beyond 2007 as these elements must be approved by the Board in subsequent Orders based on circumstances at that time.

Hydro will be required to revise the RSP rules to remove reference to the specific amounts in the Rural Rate Alteration calculation for the years beyond 2007.

Pursuant to the Settlement Agreements Hydro also proposed a special adjustment to the Hydraulic Production Variation Balance in the RSP for both NP and the Industrial Customers. The Board accepts the proposed special adjustment as set out separately in Schedule B to this Decision and Order. Hydro will be required to distribute the balance in the reserve account that was established pursuant to Order No. P. U. 46(2006), in accordance with Schedule B. Hydro proposed that this one-time adjustment be set out in the RSP rules. Given that it has been specifically included as Schedule B to this Decision and Order Hydro should now remove this special adjustment from the RSP rules.

Hydro will be required to distribute the balance of the reserve account established in Order No. P. U. 46(2006) in accordance with the special adjustment to the RSP Hydraulic Production Variation Balance as set out in Schedule B. Hydro will be required to revise the RSP rules to exclude reference to this one-time adjustment.

Hydro seeks approval of changes to the RSP rules which are necessary with the implementation of the proposed AAM. As discussed later in Part II - Section VII of this Decision and Order the Board will not approve Hydro's proposal to implement an AAM at this time. As the proposed RSP rules were prepared contemplating the implementation of an AAM the language will have to be changed to remove all reference to an AAM.

Hydro will be required to revise the RSP rules to remove reference to the AAM.

Hydro will be required to file for the Board's approval, within fifteen days of the Order approving final rates for customers of NP, revised RSP rules in accordance with the findings of the Board as set out in this Decision and Order.

Hydro also proposed the addition of new language in the RSP rules requiring that the most recently available fuel rider be used with the implementation of new test year base rates. This proposal was accepted by the parties in the October 20, 2006 Agreement, which the parties clearly state is a non-severable agreement. Given that Hydro's rates are implemented effective January 1, 2007 this provision will not be operative for the 2007 test year. The Board has concerns that the provision as written could complicate the implementation of rates in future test years. However, the Board will accept this proposal in principle since it cannot be used until the next general rate application and a review of the RSP will be completed before that time. To ensure that the purpose and language of this provision is appropriate for the next test year the Board suggests that this provision be placed on the list of items to be discussed in the RSP review.

With respect to the proposed review of the RSP as agreed to by the parties in the Settlement Agreements, the Board agrees that a review of the RSP design may be appropriate.

The RSP was established by the Board in 1985 and many changes have been made flowing from Hydro's previous general rate applications in 2001 and 2003. While commending the parties' agreement to undertake such a review, the Board notes that the Settlement Agreements do not specifically contemplate a role for the Board. According to the Settlement Agreements the specifics of the process to be followed in the review were to be established by the parties before February 1, 2007. In particular the Settlement Agreements contemplate a technical conference being held before October 31, 2007, yet neither the format nor scope of this conference is detailed. In addition the Settlement Agreements state that unresolved issues may be submitted to the Board for resolution. How these unresolved issues, or indeed issues which are resolved for that matter, get brought before the Board is not addressed.

The Board notes the importance of the RSP as it is the mechanism through which variations in fuel prices are managed. These variations have been the biggest driver for rate changes in recent years. Since the approval of the Board would be necessary for any changes to this mechanism, the involvement of the Board early in this process would facilitate an efficient and timely determination of the issues. However it is difficult at this stage to determine the appropriate level of involvement of the Board in advance of the filing of the terms contemplated in the Settlement Agreements. The participation of the Board may be influenced by the process and substance proposed by the parties for the review. With these particulars the Board would be in a better position to decide if and how it should participate in the RSP review. To this end the Board will require Hydro to file with the Board, on behalf of the parties, a description of the terms of reference, the specific review objectives, a list of participants, a planned timeline, and an outline of the review process. The Board will then be in a position to make a determination as to its participation in the RSP review and advise the parties accordingly.

Hydro will be required to file with the Board no later than May 31, 2007 a copy of the terms which are proposed for the RSP review, setting out the terms of reference, the specific review objectives, a list of participants, a planned timeline, and an outline of the review process.

PART FOUR. BOARD ORDER

IT IS THEREFORE ORDERED THAT:

Rate Base and Rate of Return

1. Pursuant to Section 78 of the *Act* the Board approves the forecast average rate base for the 2007 test year of $1,489,323,000.

2. Pursuant to Section 80 of the *Act* the Board hereby allows a rate of return on rate base, based on the 2007 test year, of 7.44%, within a range of 7.29% to 7.59%.

Rates, Rules and Regulations

3. Pursuant to Sections 70 and 75 of the *Act* the Board hereby approves, on a final basis, the interim rates approved in Order Nos. P.U. 41(2006) and P.U. 3(2007) for Utility and Industrial Customers, as set out in Schedule A of this Decision and Order, effective for consumption on and after January 1, 2007.

4. Hydro shall, within fifteen days of the Order approving final rates for customers of NP, apply to the Board for approval of final rates and Rules and Regulations for its Rural customers, and RSP Rules.

5. Hydro shall distribute the balance of the reserve account established in Order No. P.U. 46(2006) in accordance with the provisions of the special adjustment to the RSP Hydraulic Production Variation Balance, as set out in Schedule B of this Decision and Order.

Reporting

6. Hydro shall file with the Board no later than May 31, 2007 a copy of the terms which are proposed for the RSP review, setting out the terms of reference, the specific review objectives, a list of participants, a planned timeline and an outline of the review process.

7. Hydro shall include in its quarterly reports, beginning with its June 30, 2007 report and ending with its December 31, 2008 report, an update on the progress of the development of a comprehensive maintenance plan and associated reliability standards.

8. Hydro shall file with the Board no later than October 31, 2007 a report updating the progress, as of September 30, 2007, of the development of an acceptable peer group for financial KPI's.

9. Hydro shall file with the Board no later than June 30, 2008 a report outlining its five-year strategic plan with respect to energy conservation initiatives, including a description, timing, and cost of the program elements to be implemented by Hydro and a copy of the CDM Potential Study.

Costs

10. Hydro shall pay the expenses of the Board arising from this Application, including the expenses of the Consumer Advocate incurred by the Board, pursuant to Sections 90(2) and 117 of the *Act.*

11. Hydro shall pay costs of the Industrial Customers in the amount of $195,000 pursuant to Section 90(1) of the *Act.*

Dated at St. John's, Newfoundland and Labrador this 12th day of April 2007.

Robert Noseworthy
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Cheryl Blundon
Board Secretary

PART FIVE. SCHEDULES AND APPENDICES

Board of Commissioners of Public Utilities Order No. P. U. 8(2007) List of Schedules and Appendices		
Schedule	**Description**	**Dated**
A	**Newfoundland and Labrador Hydro** *Schedule of Rates, Tolls and Charges – Utility and Industrial Customers*	April 12, 2007
B	**Newfoundland and Labrador Hydro** *Excerpt from Rate Stabilization Plan - Section F: Hydraulic Variation Special Adjustment December 31, 2006*	April 12, 2007
Appendix		
A	**Regulatory Framework** *Statutory Powers and Responsibilities*	April 12, 2007

NEWFOUNDLAND AND LABRADOR HYRO

UTILITY

Availability:

This rate is applicable to service to Newfoundland Power (NP).

Definitions:

"Billing Demand"

In the Months of January through March, billing demand shall be the greater of:

(a) the highest Native Load less the Generation Credit, beginning in the previous December and ending in the current Month; and
(b) the Minimum Billing Demand.

In the Months of April through December, billing demand shall be the greater of:

(a) the Weather-Adjusted Native Load less the Generation Credit, plus the Weather Adjustment True-up; and
(b) the Minimum Billing Demand.

"Generation Credit" refers to NP's net generation capacity less allowance for system reserve, as follows:

	kW
Hydraulic Generation Credit	80,104
Thermal Generation Credit	37,826
Total Generation Credit	117,930

In order to continue to avail of the Generation Credit, NP must demonstrate the capability to operate its generation to the level of the Generation Credit. This will be verified in a test by operating the generation at a minimum of this level for a period of one hour as measured by the generation demand metering used to determine the Native Load. The test will be carried out at a mutually agreed time between December 1 and March 31 each year. If the level is not sustained, Newfoundland Power will be provided an opportunity to repeat the test at another mutually agreed time during the same December 1 to March 31 period. If the level is not sustained in the second test, the Generation Credit will be reduced in calculating the associated billing demands for January to December to the highest level that could be sustained.

NEWFOUNDLAND AND LABRADOR HYRO

UTILITY (continued)

"Maximum Native Load" means the maximum Native Load of NP in the four-Month period beginning in December of the preceding year and ending in March of the current year.

"Minimum Billing Demand" means ninety-nine percent (99%) of:

NP's test year Native Load less the Generation Credit.

"Month" means for billing purposes, the period commencing at 12:01 hours on the last day of the previous month and ending at 12:00 hours on the last day of the month for which the bill applies.

"Native Load" is the sum of:

(a) the amount of electrical power, delivered at any time and measured in kilowatts, supplied by Hydro to NP, averaged over each consecutive period of fifteen minutes duration, commencing on the hour and ending each fifteen minute period thereafter; and

(b) the total generation by NP averaged over the same fifteen-minute periods.

"Weather-Adjusted Native Load" means the Maximum Native Load adjusted to normal weather conditions, calculated as:

Maximum Native Load
plus (Weather Adjustment, rounded to 3 decimal places, x 1000)

Weather Adjustment is further described and defined in the Weather Adjustment section.

"Weather Adjustment True-up" means one-ninth of the difference between:

(a) the greater of:
- the Weather Adjusted Native Load less the Generation Credit, times three; and
- the Minimum Billing Demand, times three; and

(b) the sum of the actual billed demands in the Months of January, February and March of the current year.

NEWFOUNDLAND AND LABRADOR HYRO

UTILITY (continued)

Monthly Rates:

Billing Demand Charge:
Billing Demand, as set out in the Definitions section, shall be charged at the following rate:

$4.00 per kW of billing demand

Energy Charge:

First 250,000,000 kilowatt-hours*	@ 3.246 ¢ per kWh
All excess kilowatt-hours*	@ 8.805 ¢ per kWh

Firming-up Charge:

Secondary energy supplied by Corner Brook Pulp and Paper Limited*	@ 0.841 ¢ per kWh

RSP Adjustment:

All kilowatt-hours	@ 0.425 ¢ per kWh

***Subject to RSP Adjustment:**

RSP Adjustment refers to all applicable adjustments arising from the operation of Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production, fuel cost, load and rural rates.

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied to metered demand and energy.

Adjustment for Station Services and Step-Up Transformer Losses:

If the metering point is not on the generator output terminals of NP's generators, an adjustment for Newfoundland Power's power consumption between the generator output terminals and the metering point as determined in consultation with the customer prior to the implementation of the metering, shall be applied to the metered demand.

NEWFOUNDLAND AND LABRADOR HYRO

UTILITY (continued)

Weather Adjustment: This section outlines procedures and calculations related to the weather adjustment applied to NP's Maximum Native Load.

(a) Weather adjustment shall be undertaken for NP's actual Maximum Native Load.

(b) Weather adjustment shall be derived from Hydro's general NP native peak demand forecasting model.

(c) By September 30th of each year, Hydro shall provide NP with updated weather adjustment coefficient incorporating the latest year of actuals.

(d) The underlying temperature and wind speed data utilized to derive weather adjustment shall be sourced to Environment Canada's weather station data for the St. John's, Gander, and Stephenville airports. NP's regional customer counts shall be used to weight regional weather data. Hydro shall consult with NP to resolve any circumstances arising the availability of, or revisions to, Environment Canada's weather data and/or wind chill formulation.

(e) The primary definition for the temperature weather variable is the average temperature for the peak demand hour and the preceding 19 hours. The primary definition for the wind weather data is the average wind speed for the peak demand hour and the preceding seven hours. Hydro will consult with NP should data anomalies indicate a departure from the primary definition on underlying weather data.

(f) Subject to the availability of Environment Canada weather data, Hydro shall prepare a preliminary estimate of the Weather-Adjusted Native Load by March 15th of each year, and a final calculation of Weather-Adjusted Native Load by April 5th of each year.

General:

This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.

With respect to all matters where the customer and Hydro consult on resolution but are unable to reach mutual agreement, the billing will be based on Hydro's best estimate.

NEWFOUNDLAND AND LABRADOR HYRO

INDUSTRIAL - FIRM

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Demand Charge:

The rate for Firm Power, as defined and set out in the Industrial Service Agreements, shall be $6.68 per month per kilowatt of billing demand.

Firm Energy Charge:

Base Rate* .....@ 3.676 ¢ per kWh

RSP Adjustment
Historic Plan ……@ 1.215 ¢ per kWh**
Current Plan …… @ (2.000) ¢ per kWh
Fuel Rider ……@ 0.000 ¢ per kWh

Total RSP Adjustment.....@ (0.785) ¢ per kWh

Energy Rate..... @ 2.891 ¢ per kWh
**Aur Resources Inc. Energy rate excluding Historic Plan ……@ 1.676 ¢ per kWh

***Subject to RSP Adjustment:**

RSP Adjustment refers to all applicable adjustments arising from the operation of Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production, fuel cost, load and rural rates.

** Aur Resources Inc. is not subject to Historic Plan component of the RSP Adjustment, in accordance with Order No. P.U. 1 (2007).

Specifically Assigned Charges:

The table below contains the additional specifically assigned charges for customer plant in service that is specifically assigned to the Customer.

	Annual Amount
Abitibi-Consolidated (Grand Falls)	$ 1,244
Abitibi-Consolidated (Stephenville)	$ 104,647
Corner Brook Pulp and Paper Limited	$ 347,167
North Atlantic Refining Limited	$ 150,976
Aur Resources Inc.	$ 186,169

NEWFOUNDLAND AND LABRADOR HYRO

INDUSTRIAL - FIRM

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 32 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – NON-FIRM

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Non-Firm Energy Charge (¢ per kWh):

Non-Firm Energy is deemed to be supplied from thermal sources. The following formula shall apply to calculate the Non-Firm Energy rate:

$$\{(A \div B) \times (1 + C) \times (1 \div (1 - D))\} \times 100$$

A = the monthly average cost of fuel per barrel for the energy source in the current month or, in the month the source was last used

B = the conversion factor for the source used (kWh/bbl)

C = the administrative and variable operating and maintenance charge (10%)

D = the average system losses on the Island Interconnected grid for the last five years ending in 2005 (2.68%).

The energy sources and associated conversion factors are:

1. Holyrood, using No. 6 fuel with a conversion factor of 630 kWh/bbl
2. Gas turbines using No. 2 fuel with a conversion factor of 475 kWh/bbl
3. Diesels using No. 2 fuel with a conversion factor of 556 kWh/bbl.

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - WHEELING

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy and whose Industrial Service Agreement so provides.

Rate:

Energy Charge:

All kWh (Net of losses)* .....@ 0.384 ¢ per kWh

* For the purpose of this Rate, losses shall be 2.68%, the average system losses on the Island Interconnected Grid for the last five years ending in 2005.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

AN INTERIM ORDER OF THE BOARD

NO. P. U. 34(2007)

IN THE MATTER OF the *Electrical Power Control Act*, RSNL 1994, Chapter E-5.1 (the "*EPCA*") and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the "*Act*") as amended, and their subordinate regulations;

AND

IN THE MATTER OF the application by Newfoundland and Labrador Hydro ("Hydro") for an Interim Order, affecting the Rate Stabilization Plan ("RSP") components of the rates to be charge to Industrial Customers pursuant to Sections 75 of the *Act*.

WHEREAS Hydro is a corporation continued and existing under the *Hydro Corporation Act*, is a public utility within the meaning of the *Act*, and is subject to the provisions of the *EPCA*; and

WHEREAS Hydro has advised the Board that it has analyzed the information available in relation to the projected rate changes for its Industrial Customers as a result of the operation of the RSP and has concluded that there may be rate volatility, which is considered significant, due to the projected change in the RSP rate and a significant load change of one of its Industrial Customers; and

WHEREAS Hydro has also advised that it may be prudent to delay establishing final rates for the Industrial Customers to allow for further analysis by Hydro and consideration of impact of the operation of the RSP in the context of the significant load change and the critical level of year end hydraulic balances, which is not available until after December 31, 2007; and

WHEREAS Hydro proposes that the RSP components of the rates currently charged to the Industrial Customers be maintained on an interim basis so that rates to the Industrial Customers would not change until a further Order of the Board; and

WHEREAS Section 75 of the *Act* provides that the Board may make an interim Order unilaterally and without public hearing or notice, approving with or without modification a schedule of rates, tolls and charged submitted by a public utility upon the terms and conditions that it may decide; and

WHEREAS if, after a full review of the matter, it is determined that excess revenue has been earned by Hydro as a result of the interim Order the Board may order, pursuant to section 75 of the *Act*, that customers of Hydro receive a refund or that the excess revenue be placed in a reserve account for that purpose; and

WHEREAS the Board is satisfied that granting approval, on an interim basis, of a Schedule of Rates for the Industrial Customers that maintains existing rates is appropriate and reasonable in the circumstances.

IT IS THEREFORE ORDERED THAT:

1. Pursuant to Section 75 of the *Act*, the Board approves, on an interim basis, the Industrial Customer rates as attached in Schedule A, to be effective for consumption on and after January 1, 2008, until a final Order of the Board with respect to Industrial Customers' rates for 2008.
2. Hydro shall pay all expenses of the Board arising from this Application.

DATED at St. John's, Newfoundland and Labrador, this 21st day of December 2007.

Robert Noseworthy
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Cheryl Blundon
Board Secretary

Schedule A

Order No. P. U. 34 (2007)

Effective: January 1, 2008

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – FIRM - (INTERIM)

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Demand Charge:

The rate for Firm Power, as defined and set out in the Industrial Service Agreements, shall be $6.68 per month per kilowatt of billing demand.

Firm Energy Charge:

Base Rate* .....@ 3.676 ¢ per kWh

RSP Adjustment
Historic Plan ……@ 1.215 ¢ per kWh**
Current Plan …… @ (2.000) ¢ per kWh
Fuel Rider ……@ 0.000 ¢ per kWh

Total RSP Adjustment.....@ (0.785) ¢ per kWh

Energy Rate..... @ 2.891 ¢ per kWh
**Aur Resources Inc. Energy rate excluding Historic Plan ……@ 1.676 ¢ per kWh

***Subject to RSP Adjustment:**

RSP Adjustment refers to all applicable adjustments arising from the operation of Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production, fuel cost, load and rural rates.

** Aur Resources Inc. is not subject to Historic Plan component of the RSP Adjustment, in accordance with Order No. P.U. 1 (2007).

Specifically Assigned Charges:

The table below contains the additional specifically assigned charges for customer plant in service that is specifically assigned to the Customer.

	Annual Amount
Abitibi-Consolidated (Grand Falls)	$ 1,244
Abitibi-Consolidated (Stephenville)	$ 104,647
Corner Brook Pulp and Paper Limited	$ 347,167
North Atlantic Refining Limited	$ 150,976
Aur Resources Inc.	$ 186,169

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – FIRM - INTERIM

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – NON-FIRM – (INTERIM)

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Non-Firm Energy Charge (¢ per kWh):

Non-Firm Energy is deemed to be supplied from thermal sources. The following formula shall apply to calculate the Non-Firm Energy rate:

$$\{(A \div B) \times (1 + C) \times (1 \div (1 - D))\} \times 100$$

A = the monthly average cost of fuel per barrel for the energy source in the current month or, in the month the source was last used

B = the conversion factor for the source used (kWh/bbl)

C = the administrative and variable operating and maintenance charge (10%)

D = the average system losses on the Island Interconnected grid for the last five years ending in 2005 (2.68%).

The energy sources and associated conversion factors are:

1. Holyrood, using No. 6 fuel with a conversion factor of 630 kWh/bbl
2. Gas turbines using No. 2 fuel with a conversion factor of 475 kWh/bbl
3. Diesels using No. 2 fuel with a conversion factor of 556 kWh/bbl.

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – WHEELING – (INTERIM)

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy and whose Industrial Service Agreement so provides.

Rate:

Energy Charge:

All kWh (Net of losses)* .....@ 0.384 ¢ per kWh

* For the purpose of this Rate, losses shall be 2.68%, the average system losses on the Island Interconnected Grid for the last five years ending in 2005.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

AN INTERIM ORDER OF THE BOARD
NO. P. U. 37(2008)

IN THE MATTER OF the *Electrical Power Control Act*, RSNL 1994, Chapter E-5.1 (the "*EPCA*") and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the "*Act*") as amended, and their subordinate regulations;

AND

IN THE MATTER OF the application by Newfoundland and Labrador Hydro ("Hydro") for approval of the Rate Stabilization Plan components of the rates to be charged to Island Industrial Customers, pursuant to Sections 70 (1) of the *Act* (the "Application").

WHEREAS Hydro is a corporation continued and existing under the *Hydro Corporation Act*, is a public utility within the meaning of the *Act*, and is subject to the provisions of the *EPCA*; and

WHEREAS Order No. P. U. 40(2003) sets out the manner by which the Rate Stabilization Plan (RSP) is calculated and applied to the rates charged by Hydro to its Island Industrial Customers which includes special treatment and recovery of "Historical Plan Balances" that had accumulated in the RSP as of December 31, 2003; and

WHEREAS in Order No. P. U. 1(2007) and in Order No. P.U. 3(2007) the Board approved, on an interim basis rates, rules and regulations for the Island Industrial Customers such that Aur Resources Inc., a new Island Industrial Customer of Hydro would have rates similar to those of other Island Industrial Customers of Hydro excluding the portion of the RSP Adjustment derived from the Historical Plan Balance of the RSP; and

WHEREAS Order No. P. U. 8(2007) confirmed on a final basis the interim rates for Hydro's Island Industrial Customers to be effective January 1, 2007 until an application is filed by Hydro for new rates effective January 1, 2008 in accordance with the provisions of the RSP; and

WHEREAS on December 31, 2007 the five-year collection period to recover the Historical Plan Balance ended as per Section E of Hydro's RSP and as of December 31, 2007 any remaining balance in Historical Plan was transferred to the current plan and the Historical Plan Balance was set to zero; and

WHEREAS on December 20, 2007 Hydro filed an Application to the Board for an Interim Order continuing the rates currently in effect for the Island Industrial Customers until such time as the Board issues a final Order with respect to rates for Hydro's Island Industrial Customers for 2008, on the basis that the normal operation of the RSP could cause significant rate volatility for the Island Industrial Customers in the context of a significant load change of one of the Island Industrial Customers; and

WHEREAS Order No. P. U. 34(2007) approved Hydro's proposal and approved, on an interim basis, Island Industrial Customer rates to be effective for consumption on and after January 1, 2008, until a final Order of the Board with respect to Island Industrial Customers' rates for 2008; and

WHEREAS on December 11, 2008 Hydro filed the Application for approval to:

i) continue the existing Island Industrial Customer interim rates except that rates for Teck Cominco Limited (formerly Aur Resources Inc.) would be increased to the same level as Hydro's other Island Industrial Customers; and
ii) revise the Schedule of Rates and the RSP rules and regulations for Hydro's Island Industrial Customers to remove reference to the Historical Plan Balance; and

WHEREAS the Board provided notice of the Application and invited comments from the Consumer Advocate, Newfoundland Power and each of Hydro's Island Industrial Customers; and

WHEREAS the Board did not receive a submission from the Consumer Advocate in relation to the Application and Newfoundland Power advised by letter on December 16, 2008 that it did not intend to make any comments on the Application; and

WHEREAS the Island Industrial Customers made submissions on December 17, 2008 requesting that the interim rates be continued, with the existing differential for Teck Cominco Limited, until March 31, 2009 to provide an opportunity for all parties to request information, file evidence, request other pre-hearing procedures and a hearing and/or submissions, and requiring Hydro to file an application for final rates at least thirty days prior to the expiry of the interim rates; and

WHEREAS Hydro did not file a reply to the Island Industrial Customers' submission; and

WHEREAS the Schedule of Rates proposed by Hydro eliminates reference to the Historical Plan and continues the existing rates for all of Hydro's Island Industrial Customers maintaining the total energy rate but expressing the RSP Adjustment portion as a blended rate instead of three separate components, and increasing the rate charged to Teck Cominco Limited to the same as that being charged to Hydro's other Island Industrial Customers, which according to Hydro would result in a 38% rate increase for Teck Cominco Limited ; and

WHEREAS the Board has considered Hydro's Application as well as the submissions of the Island Industrial Customers, the only customers affected by the Application, and in the absence of a reply from Hydro as to these submissions has determined that the rates, rules and regulations for the Island Industrial Customers should be continued until final rates are established after a full examination of all of the issues with a full opportunity for interested persons to participate in the examination process; and

WHEREAS the Board is satisfied that it is reasonable and prudent to:

(i) Continue on an interim basis until March 31, 2009 the existing rates for the Island Industrial class of customers;

(ii) Continue the current RSP rules on an interim basis until final rates are established; and

(iii) Require Hydro to file an application for approval of final rates, rules and regulations for the Island Industrial Customers allowing sufficient time for a full examination of the matter.

IT IS THEREFORE ORDERED THAT:

1. The continuation of the rates, rules and regulations for Hydro's Island Industrial Customers is approved on an interim basis from January 1, 2009 to March 31, 2009, with the Schedule of Rates as attached in Schedule A.
2. Hydro shall make application to finalize the interim rates, rules and regulations for the Island Industrial Customers by January 30, 2009.
3. Hydro shall pay all expenses of the Board arising from this Application.

DATED at St. John's, Newfoundland and Labrador, this 24th day of December 2008.

Andrew Wells
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Dwanda Newman, LL.B.
Commissioner

Barbara Thistle
Assistant Board Secretary

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – FIRM – (INTERIM)

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Demand Charge:

The rate for Firm Power, as defined and set out in the Industrial Service Agreements, shall be $6.68 per month per kilowatt of billing demand.

Firm Energy Charge:

Base Rate*……@ 3.676 ¢ per kWh

RSP Adjustment…….....@ (0.785) ¢ per kWh**
**** Teck Cominco Limited RSP Adjustment** ……....@ (2.000) ¢ per kWh

Energy Rate.....….....@ 2.891 ¢ per kWh***
***** Teck Cominco Limited Energy Rate** ……..……@ 1.676 ¢ per kWh

***Subject to RSP Adjustment:**

RSP Adjustment refers to all applicable adjustments arising from the operation of Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production, fuel cost, load and rural rates.

Specifically Assigned Charges:

The table below contains the additional specifically assigned charges for customer plant in service that is specifically assigned to the Customer.

	Annual Amount
Abitibi-Consolidated (Grand Falls)	$ 1,244
Abitibi-Consolidated (Stephenville)	$ 104,647
Corner Brook Pulp and Paper Limited	$ 347,167
North Atlantic Refining Limited	$ 150,976
Teck Cominco Limited	$ 186,169

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – FIRM – (INTERIM) (continued)

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

AN ORDER OF THE BOARD
NO. P. U. 6(2009)

IN THE MATTER OF the *Electrical Power Control Act,* RSNL 1994, Chapter E-5.1 (the *"EPCA")* and the *Public Utilities Act,* RSNL 1990, Chapter P-47 (the *"Act")* as amended, and their subordinate regulations;

AND

IN THE MATTER OF an application by Newfoundland and Labrador Hydro (Hydro) for approval of the Rate Stabilization Plan components of the rates to be charged to Island Industrial Customers (the "Application"), pursuant to Section 41(3) of the *Act.*

WHEREAS Hydro is a corporation continued and existing under the *Hydro Corporation Act,* is a public utility within the meaning of the *Act,* and is subject to the provisions of the *EPCA;* and

WHEREAS Order No. P. U. 37(2008) continued the existing rates for the Island Industrial class of customers on an interim basis until March 31, 2009 and required Hydro to file an application for approval of final rates, rules and regulations for the Island Industrial Customers by January 30, 2009; and

WHEREAS Hydro has made Application for an Order: (1) extending the application filing deadline set in Order No. P. U. 37(2008) until June 30, 2009; and (2) approving a continuation of the existing rates, rules and regulations for Hydro's Island Industrial Customers on an interim basis until such time as the Board has dealt with the above referenced Application; and

WHEREAS the Board requested submissions from the Island Industrial Customers, the Consumer Advocate and Newfoundland Power by January 21, 2009 and then, at the request of the Industrial Customers, extended the submission date until January 26, 2009; and

WHEREAS Newfoundland Power indicated to the Board that they did not intend to make a submission; and

WHEREAS the Island Industrial Customers indicated to the Board that they would not make submissions by the extended submission date; and

WHEREAS the Consumer Advocate did not make a submission.

IT IS THEREFORE ORDERED THAT:

1. Hydro shall make application to finalize the interim rates, rules and regulations for the Island Industrial Customers by June 30, 2009.

2. The continuation of the rates, rules and regulations for Hydro's Island Industrial Customers is approved on an interim basis until a final Order of the Board with respect to the finalization of rates.

3. Hydro shall pay all expenses of the Board arising from this Application.

DATED at St. John's, Newfoundland and Labrador, this 30th day of January 2009.

Andy Wells
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Dwanda Newman, LL.B
Commissioner

Cheryl Blundon
Board Secretary

NEWFOUNDLAND AND LABRADOR HYDRO

SUPPLEMENTARY EVIDENCE OF SAM BANFIELD – NOV. 21, 2003

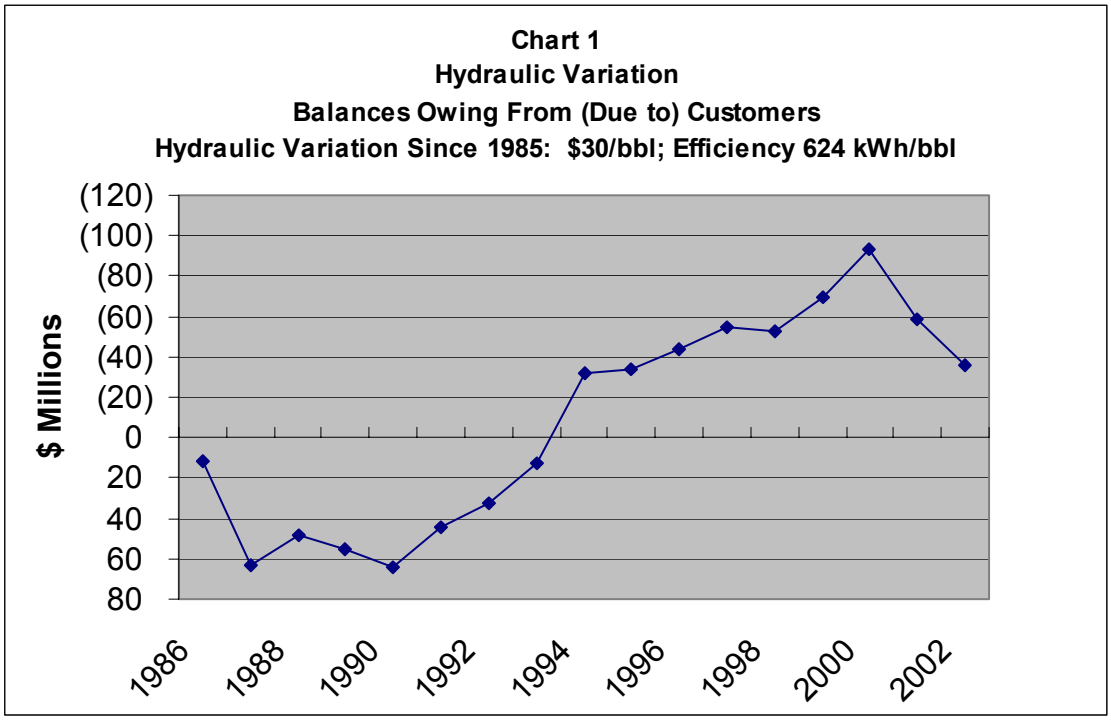
Q. The parties have reached agreement on proposed changes to the Rate Stabilization Plan (RSP) and have filed them with the Board as Consent # 2. Please explain the proposed changes to the Rate Stabilization Plan as outlined in Consent # 2 which has been submitted to the Board for its review and approval.

A. It is proposed that the four main elements of the Plan, that is, hydraulic, fuel, load, and rural rate alteration will continue. However, there are changes within each component.

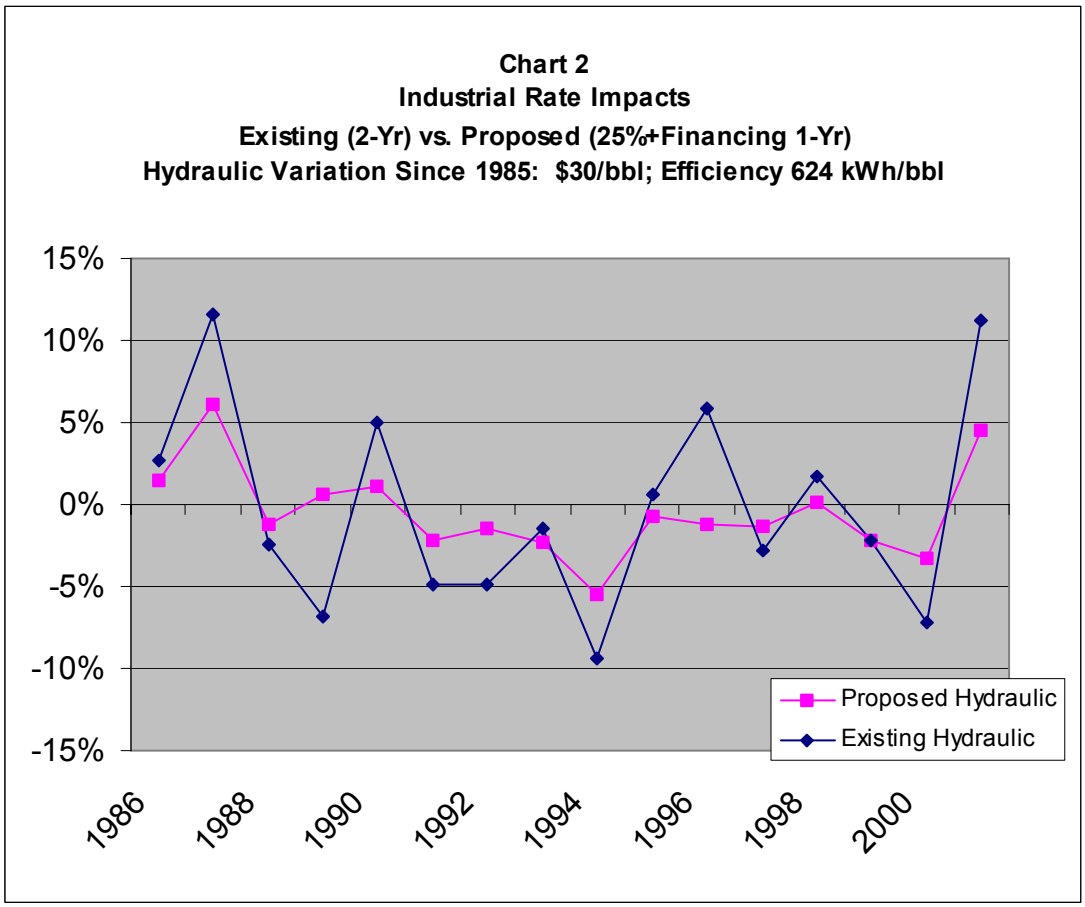
Q. Would you please explain the proposed changes to the hydraulic component of the RSP?

A. Yes. The calculation of the hydraulic variation provision will remain the same as in the current RSP but will be tracked separately from the other components. It had been contemplated that due to the nature of the hydraulic cycle (i.e., over time, the variation should tend to zero), this part of the RSP might never have to be recovered from or refunded to customers, similar to Hydro's treatment of the Water Equalization Provision prior to the 1986 introduction of the RSP. However, after analysis, using historic data of the amount to which the balance in this component could accumulate and the effect on Hydro's balance sheet and the risk to Hydro, it was agreed that a portion of the balance in this component would be assigned annually to each customer for collection or refund. It has been agreed that 25% of the balance in the hydraulic variation provision, plus 100% of the financing charges for that year, be recovered from or refunded to customers each year. This recovery or refund will be calculated at the end of each calendar year and allocated to

Newfoundland Power and Industrial Customers at that time. Based on the historic hydraulic cycle studied and an assumed $30/bbl fuel price, the balance in the hydraulic provision should not exceed a maximum of approximately $100 million and in most years the balance will be less. Based on the hydraulic cycle from 1985 to the present, the annual balances that would have accumulated in this hydraulic provision over that time frame are shown in Chart 1 below.



The proposed change in the recovery of the hydraulic portion of the RSP will reduce the volatility of the rate adjustments for customers relating to this provision of the plan. Chart 2 shows the range of Industrial Customers' rate adjustments, based on historical data, of the proposed 25% recovery, plus financing, in contrast to the existing two-year amortization of the entire balance in the hydraulic component.



Q. Would you please explain the proposed changes to the fuel component of the RSP?

A. Activity for the fuel component of the RSP will continue to be calculated in the same manner as currently. However, the present RSP has had large balances accumulate because of significant differences between the test year price and actual price of fuel. The parties agreed that a proactive mechanism to address this was needed. A fuel rider was developed and is proposed which will take into account the forecast price of fuel. Each year, three months before the recovery commences of the existing balance, a forecast price of No. 6 fuel based on the PIRA forecast will be determined to calculate the required fuel rider which will be combined with the recovery or refund of the existing plan balance.

Q. Will you please explain the proposed change in the load variation provision of the RSP?

A. Yes. The load variation provision has two elements, revenue and fuel. In the past, revenue variations were assigned to the customer class which caused the variation. Fuel costs were treated as common costs and shared proportionately among customer classes regardless of the customer class that caused the variation. It is proposed to treat the fuel component in the same manner as the revenue element is currently treated. This means that the fuel element resulting from the load variation will be assigned fully to the appropriate customer class. This recommended treatment results in the customer class that caused a change in load, being assigned the cost of fuel associated with that change.

Q. Please explain the proposed change in the Rural Rate Alteration component of the RSP?

A. The Rural Rate Alteration component of the RSP, as currently approved by the Board, is calculated to account for changes in Rural revenues which occur as a result of increases or decreases in Newfoundland Power rates. This is a result of the fact that Rural rates on the Island Interconnected and Isolated systems are, to a great extent, based on Newfoundland Power rates. Another provision will be added to this component of the RSP as outlined in the mediation agreement "Parties' Agreement on Cost of Service and Rate Design Issues". Hydro will adjust the Rural Rate Alteration component of the RSP based on its projection of the 5-year phase-in of Labrador rates and the revenue credit available from secondary energy sales to CFB Goose Bay.

Q. Please explain how the plan balances are to be recovered.

A. Recovery of the plan balance for each customer class is proposed to occur over a one-year amortization period rather than the current two-year period with the adjustment rate established to target a zero balance in the customer plans at the end of each recovery period. This aspect of the recommended changes will also tend to prevent a buildup in customer RSP balances.

Q. Would you please explain how the RSP adjustment rate will be set?

A. Yes. The RSP adjustment rate will be set to recover the plan balance over a 12-month recovery period for each customer class. This rate will be comprised of two components. The first component will be set to recover annually:

1) for Industrial Customers, the plan balance existing on December 31 of each year plus the projected financing costs of the plan balance for the next twelve months; and
2) for Newfoundland Power, the plan balance existing on March 31 of each year, less any projected recovery of the balance for April, May and June, plus the estimated financing costs of the plan balance to the end of the next recovery period.

The second component will be the fuel rider noted earlier in this supplementary evidence. This rider will be calculated for each customer class by first determining the anticipated amount owing to or from customers as a result of the fuel price forecast for the next recovery period (i.e. the difference between the price of fuel in base rates and the current forecast). This will be calculated in October for the Industrial Customers and in April for Newfoundland Power.

The total adjustment rate will be obtained by adding together the rate derived from the plan balance and the fuel rider. This adjustment rate will be charged to Industrial Customers on January 1 of each year and to Newfoundland Power on July 1 of each year.

Q. What will be the benefits of the proposed changes to the RSP outlined in this evidence?

A. The benefits of the proposed changes to the RSP are as follows:

- The Plan will have less tendency to build a significant balance because the projected fuel price variation is collected over one year;

- There will be an improved price signal to customers since the proposed Plan incorporates a projection of the anticipated fuel price for the upcoming period;

- The recommended hydraulic provision results in greater rate stability for this component of the Plan; and

- With the July 1 rate setting for Newfoundland Power being determined in April, rather than December, the price signal is more current.

Q. Will the Plan result in more stable rates for customers?

A. No, not necessarily. Although, as outlined previously, the hydraulic recovery or refund is anticipated to reduce rate volatility, the customer balance in the plan, including the fuel price variation, is being collected over one year and thus rates may overall, in fact, be more volatile.

However, rates will reflect a more current fuel price signal and thus provide customers with a timelier and more indicative price signal regarding their electricity consumption.

Q. Consent # 3, Historical Plan Balances has been filed with the Board and other parties. Please outline the proposed changes regarding the recovery of the historical Rate Stabilization Plan balances.

A. As of December 31, 2003, there is a forecast balance of $94.2 million remaining in the August 2002 RSP with a remaining amortization period of four years. There is also a forecast balance of $72.8 million in the RSP which commenced September 1, 2002, with an amortization period of two years. These projected balances would have resulted in an estimated additional increase of 6% to Newfoundland Power customers on July 1, 2004 and contribute to an estimated overall increase of 32.9% to Industrial Customers on January 1, 2004. To reduce the immediate impact on customers' rates, it is proposed that both RSP balances will be added together and recovered over a four-year period starting on January 1, 2004 for Industrial Customers and July 1, 2004 for Newfoundland Power.

This proposal results in a July 1, 2004 RSP forecast adjustment for Newfoundland Power customers of 3.1%, instead of the previously anticipated 6% and an overall forecast increase to Industrial Customers of 22.6% instead of the previously anticipated 32.9%. Table 1 below outlines the full impact of this proposed treatment of the RSP balances.

TABLE 1

NEWFOUNDLAND AND LABRADOR HYDRO
2004 Projected End Consumer Impacts
RSP: Proposed 4-Year Write-Off

	Dec 31, 2003 (mills/kWh)	Jan 1, 2004 (mills/kWh)	Wholesale Increase %	End Consumer Increase %	Jul 1, 2004 (mills/kWh)	Wholesale Increase %	End Consumer Increase %
NEWFOUNDLAND POWER							
Energy	47.89	53.62	12.0%	-	53.62	-	-
Aug 2002 RSP Balance	3.24	3.24	-	-	3.36	-	-
Dec 2003 RSP Bal (4-Yr Write-Off)	-	-	-	-	2.88	-	-
Total Rate	**51.13**	**56.86**	**11.2%**	**6.5%**	**59.86**	**5.3%**	**3.1%**

Newfoundland Power rates, including the July 1, 2004 adjustment, will be 17.1% higher than rates that were in effect at the end of 2003. End consumer rates will be 9.9% higher than rates in effect at the end of 2003.

INDUSTRIAL CUSTOMERS
Island Industrial customers, in combination with the 12.2% base rate increase, will see a total increase of 22.6% including the RSP adjustment.

Q. Mr. Banfield, other Hydro witnesses have been questioned regarding the Rural deficit. Could you please outline how the Rural deficit is calculated and if the calculation has been filed with the Board?

A. The Rural deficit is calculated as an integral part of the Cost of Service Study filed as an exhibit in the evidence of Mr. Robert Greneman. The deficit is calculated as revenues less allocated costs for Rural customers on the Island Interconnected system, as well as Rural customers on the Isolated systems, including L'Anse au Loup. There is a significant shortfall in revenues when compared to the costs of providing service to Rural customers, resulting in a deficit. It is important to note that while Rural revenues are readily identifiable by customer, allocated costs are more controversial and the subject of debate such as, for example, the assignment of the transmission on the Great Northern Peninsula. The

Board's decisions approving the costing methodology has had, and will continue to have, an impact on the amount reported as the Rural deficit. For example, assignment of the Great Northern Peninsula generation and transmission assets to Hydro Rural increases the Rural deficit by approximately $9 million. Costs are also allocated through the Cost of Service Study to Hydro Rural for materials management, finance, information technology, human resource management and other required services. Increases or decreases in the Rural deficit can only be explained through reference to the Cost of Service Study and analysis of Hydro's overall costs including, for example, fuel, power purchases and interest costs. Schedule 1 attached outlines changes in the Rural deficit from 1999 to 2004.

Q. How does Hydro manage the Rural deficit?

A. The Rural deficit is managed by maximizing revenues and controlling costs. In its original May filing, Hydro had submitted a number of initiatives regarding increasing Rural revenues, including elimination of preferential rates and elimination of the lifeline block for general service customers on Isolated systems. While these initiatives have been modified by direction from the Government, Hydro continues to seek to maximize revenues where possible. For instance, Hydro supports the implementation of a seasonal lifeline block for domestic customers on Isolated systems, however, this support is contingent on revenue neutrality which would result in no further increase in the Rural deficit. With regard to cost control in Rural areas, a number of initiatives have been outlined by Mr. Wells and Mr. Martin. Mr. Martin is responsible for the direct costs of Rural Operations.

Q. Is it reasonable to assume that the Rural deficit can be reduced?

A. While the Rural deficit can be controlled by the means outlined, it is unlikely that in the absence of increased revenues, through increased rates, that there can be a significant reduction in the deficit. As outlined in filed evidence, general inflationary pressures on costs will outstrip any offsetting incremental inflationary increase in revenues, which are a fraction of costs, resulting in a deficit which, all else being equal, will trend upward. Hydro is cognizant of this reality and will use whatever means possible to control the Rural deficit while also providing reliable customer service.

Rural Deficit ($millions)			
Year	**Rural Island Interconnected**	**Labrador & Island Isolated**	**Total**
2004 Test Year	19.2	21.9	41.1
2003 Forecast	21.9	22.2	44.1
2002 Actual	21.2 (1)	23.4	44.6
2001Actual	12.1 (2)	22.0	34.1
2000 Actual	6.7	20.0(3)	26.7
1999 Actual	5.8	16.3	22.1

(1) Increase over 2001 is mainly due to a change in assignment of Rural transmission and generation from common to specifically assigned.
(2) Increase over 2000 is mainly due to Rural share of No. 6 fuel costs which increased in total from $50m in 2000 to $99m in 2001.
(3) Increase over 1999 is mainly due to diesel fuel increase of $2m and operating costs increase of $1m.

Increase from 1999 to 2004:

Rural Island Interconnected

Increase from 1999 to 2004 is mainly due to a change in assignment of Rural transmission and generation from common to specifically assigned and Rural share of increased fuel, purchased power and interest costs which increased by approximately $80m on the Island Interconnected system from 1999 to 2004 partially offset by an increase in Rural revenues of $6m.

Labrador & Island Isolated

Increase from 1999 to 2004 is mainly due to increase in fuel of $4m, interest and depreciation of $2m and operating and maintenance of $3 partially offset by an increase in revenue of $3m.

NEWFOUNDLAND AND LABRADOR HYDRO

RATE STABILIZATION PLAN

The Rate Stabilization Plan of Newfoundland and Labrador Hydro (Hydro) is established for Hydro's Utility customer, Newfoundland Power, and Island Industrial customers to smooth rate impacts for variations between actual results and Test Year Cost of Service estimates for:

- hydraulic production;
- No. 6 fuel cost used at Hydro's Holyrood generating station;
- customer load (Utility and Island Industrial); and
- rural rates.

The formulae used to calculate the Plan's activity are outlined below. Positive values denote amounts owing from customers to Hydro whereas negative values denote amounts owing from Hydro to customers.

Section A: Hydraulic Production Variation

1. **Activity:**
   Actual monthly production is compared with the Test Year Cost of Service Study in accordance with the following formula:

   $$\{(A - B) \div C\} \times D$$

   Where:

   A = Test Year Cost of Service Net Hydraulic Production (kWh)
   B = Actual Net Hydraulic Production (kWh)
   C = Test Year Cost of Service Holyrood Net Conversion Factor (kWh /bbl.)
   D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)

2. **Financing:**
   Each month, financing charges, using Hydro's approved Test Year weighted average cost of capital, will be calculated on the balance.

3. **Hydraulic Variation Customer Assignment:**
   Customer assignment of hydraulic variations will be performed annually as follows:

   $$(E \times 25\%) + F$$

   Where:

   E = Hydraulic Variation Account Balance as of December 31, excluding financing charges
   F = Financing charges accumulated to December 31

   The total amount of the Hydraulic Customer Assignment shall be removed from the Hydraulic Variation Account.

4. **Customer Allocation:**
   The annual customer assignment will be allocated among the Island Interconnected customer groups of (1) Newfoundland Power; (2) Island Industrial Firm; and (3) Rural Island

Interconnected. The allocation will be based on percentages derived from 12 months-to-date kWh for: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The portion of the hydraulic customer assignment which is initially allocated to Rural Island Interconnected will be re-allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study.

The Newfoundland Power and Island Industrial customer allocations shall be included with the Newfoundland Power and Island Industrial RSP balances respectively as of December 31 each year. The Labrador Interconnected Hydraulic customer allocation shall be written off to Hydro's net income (loss).

Section B: Fuel Cost Variation, Load Variation and Rural Rate Alteration

1. **Activity**

1.1. **Fuel Cost Variations**

This is based on the consumption of No. 6 Fuel at the Holyrood Generating Station:

$$(G - D) \times H$$

Where:

D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)
G = Monthly Actual Average No. 6 Fuel Cost ($Can /bbl.)
H = Monthly Actual Quantity of No. 6 Fuel consumed less No. 6 fuel consumed for non-firm sales (bbl.)

1.2. Load Variations

Firm: Firm load variation is comprised of fuel and revenue components. The load variation is determined by calculating the difference between actual monthly sales and the Test Year Cost of service Study sales, and the resulting variance in No. 6 fuel costs and sales revenues. It is calculated separately for Newfoundland Power firm sales and Industrial firm sales, in accordance with the following formula:

$$(I - J) \times \{(D \div C) - K\}$$

Where:

C = Test Year Cost of Service Holyrood Net Conversion Factor (kWh /bbl.)
D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)
I = Actual Sales, by customer class (kWh)
J = Test Year Cost of Service Sales, by customer class (kWh)
K = Firm energy rate, by customer class

Secondary: Secondary load variation is based on the revenue variation for Utility Firmed-Up Secondary energy sales compared with the Test Year Cost of Service Study, in accordance with the following formula:

$$(J - I) \times L$$

Where:
I = Actual Sales (kWh)
J = Test Year Cost of Service Sales (kWh)
L = Secondary Energy Firming Up Charge

1.3. Rural Rate Alteration

(a) Newfoundland Power Rate Change Impacts:
This component is calculated for Hydro's rural customers whose rates are directly or indirectly impacted by Newfoundland Power's rate changes, with the following formula:

$$(M - N) \times O$$

Where:

M = Cost of Service rate [1]
N = Existing rate
O = Actual Units (kWh, bills, billing demand)

(b) Rural Labrador Interconnected Automatic Rate Adjustments:
This component reflects the impact of the automatic rate adjustments for Hydro's rural customers on the Labrador Interconnected system, which arise from the five-year phase-in of the application of the credit from secondary energy sales to CFB Goose Bay to the rural deficit.

Monthly adjustments commence January, 2005, and will be subject to revision when a new Test Year Cost of Service is approved by the Public Utilities Board for Hydro. The amount of the automatic rate adjustment is calculated as follows:

$$P = (Q - R) \div 12$$

Where:

P = the monthly amount of the automatic rate adjustment
Q = the CFB Revenue Credit applied to the rural deficit in Hydro's Final 2004 Test Year Cost of Service
R = the CFB Revenue Credit applied to the rural deficit in 2005 to 2008, included in existing rates and outlined in the table below:

[1] Hydro's schedule of rates for its rural customers impacted by Newfoundland Power's rate changes as a result of the pass-through of Hydro's rate changes associated with the Test Year Cost of Service Study.

	Q	R	Q – R	P
2005	$ 0	$445,722	($445,722)	($37,143)
2006	$ 0	$593,461	($593,461)	($49,455)
2007	$ 0	$1,477,393	($1,477,393)	($123,116)
2008 [2]	$ 0	$2,504,056	($2,504,056)	($208,671)

2. **Monthly Customer Allocation: Load and Fuel Activity**
Each month, the load variation will be assigned to the customer class for which the load variation occurred.

Each month, the year-to-date total for fuel price variation will be allocated among the Island Interconnected customer groups of (1) Newfoundland Power; (2) Island Industrial Firm; and (3) Rural Island Interconnected. The allocation will be based on percentages derived from 12 months-to-date kWh for: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The year-to-date portion of the fuel price variation which is initially allocated to Rural Island Interconnected will be re-allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study.

The current month's activity for Newfoundland Power, Island Industrials and regulated Labrador Interconnected customers will be calculated by subtracting year-to-date activity for the prior month from year-to-date activity for the current month. The current month's activity allocated to regulated Labrador Interconnected customers will be removed from the Plan and written off to Hydro's net income (loss).

3. **Monthly Customer Allocation: Rural Rate Alteration Activity**
Each month, the rural rate alteration will be allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study. The portion allocated to regulated Labrador Interconnected will be removed from the Plan and written off to Hydro's net income (loss).

4. **Plan Balances**
Separate plan balances for Newfoundland Power and for the Island Industrial customer class will be maintained. Financing charges on the plan balances will be calculated monthly using Hydro's approved Test Year weighted average cost of capital.

Section C: Fuel Price Projection

A fuel price projection will be calculated to anticipate forecast fuel price changes and to determine fuel riders for the rate adjustments. For industrial customers, this will occur in October each year,

[2] Monthly adjustments will continue after 2008 until a new Test Year Cost of Service is approved by the Public Utilities Board.

for inclusion with the RSP adjustment effective January 1. For Newfoundland Power, this will occur in April each year, for inclusion with the RSP adjustment effective July 1.

1. **Industrial Fuel Price Projection:**
In October each year, a fuel price projection for the following January to December shall be made to estimate a change from Test Year No. 6 Fuel Cost. Hydro's projection shall be based on the change from the average Test Year No. 6 fuel purchase price, in Canadian dollars per barrel, determined from the forecast oil prices provided by the PIRA Energy Group, and the current US exchange rate. The calculation for the projection is:

$$[\{(S - T) \times U\} - V] \times W$$

Where:

S = the September month-end PIRA Energy Group average monthly forecast for No. 6 fuel prices at New York Harbour for the following January to December

T = Hydro's average Test Year contract discount (US $/bbl)

U = the monthly average of the $Cdn / $US Bank of Canada Noon Exchange Rate for the month of September

V = average Test Year Cost of Service purchase price for No. 6 Fuel ($Can /bbl.)

W = the number of barrels of No. 6 fuel forecast to be consumed at the Holyrood Generating Station for the Test Year.

The industrial customer allocation of the forecast fuel price change will be based on 12 months-to-date kWh as of the end of September and is the ratio of Industrial Firm invoiced energy to the total of: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The amount of the forecast fuel price change, in Canadian dollars, and the details of an estimate of the fuel rider based on 12 months-to-date kWh sales to the end of September will be reported to industrial customers, Newfoundland Power, and the Public Utilities Board, by the 10th working day of October.

2. **Newfoundland Power Fuel Price Projection:**
In April each year, a fuel price projection for the following July to June shall be made to estimate a change from Test Year No. 6 Fuel Cost. Hydro's projection shall be based on the change from the average Test Year No. 6 fuel purchase price, in Canadian dollars per barrel, determined from the forecast oil prices provided by the PIRA Energy Group, and the current US exchange rate. The calculation for the projection is:

$$[\{(X - T) \times Y\} - V] \times W$$

Where:

T = Hydro's average Test Year contract discount (US $/bbl)

V = average Test Year Cost of Service purchase price for No. 6 Fuel ($Can /bbl.)

W = the number of barrels of No. 6 fuel forecast to be consumed at the Holyrood Generating Station for the Test Year.

X = the average of the March month-end PIRA Energy Group average monthly forecast for No. 6 fuel prices at New York Harbour for the following July to December, and the most recent long-term PIRA Energy Group average annual forecast for No. 6 fuel prices at New York Harbour for the following January to June.

Y = the monthly average of the $Cdn / $US Bank of Canada Noon Exchange Rate for the month of March.

The Newfoundland Power customer allocation of the forecast fuel price change will be based on 12 months-to-date kWh as of the end of March and is the ratio of Newfoundland Power Firm and Firmed-Up Secondary invoiced energy to the total of: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The amount of the forecast fuel price change, in Canadian dollars, and the details of the resulting fuel rider applied to the adjustment rate will be reported to Newfoundland Power, industrial customers, and the Public Utilities Board, by the 10th working day of April.

Section D: Adjustment

1. Newfoundland Power

As of March 31 each year, Newfoundland Power's adjustment rate for the 12-month period commencing the following July 1 is determined as the rate per kWh which is projected to collect:

Newfoundland Power March 31 Balance

less projected recovery / repayment of the balance for the following three months (if any), estimated using the energy sales (kWh) for April, May and June from the previous year

plus forecast financing charges to the end of the 12-month recovery period (i.e., June in the following calendar year),

divided by the 12-months-to-date firm plus firmed-up secondary kWh sales to the end of March.

A fuel rider shall be added to the above adjustment rate, based on the Newfoundland Power Fuel Price Projection amount (as per Section C.2 above) divided by 12-months-to-date kWh sales to the end of March.

Where a new Test Year comes into effect while there is an existing fuel rider in place, the fuel rider portion of the RSP Adjustment will be set to zero upon implementation of the new Test Year Cost of Service rates, until the time for the next fuel price projection.

2. Island Industrial Customers

As of December 31 each year, the adjustment rate for industrial customers for the 12-month period commencing January 1 is determined as the rate per kWh which is projected to collect:

Industrial December 31 Balance

plus forecast financing charges to the end of the following calendar year,

divided by 12-months-to-date kWh sales to the end of December.

A fuel rider shall be added to the above adjustment rate, based on the Industrial Fuel Price Projection (as per Section C.1 above) amount divided by 12-months-to-date kWh sales to the end of December.

Where a new Test Year comes into effect while there is an existing fuel rider in place, the fuel rider portion of the RSP Adjustment will be set to zero upon implementation of the new Test Year Cost of Service rates, until the time for the next fuel price projection.

Newfoundland and Labrador Hydro
2003 General Rate Hearing
Grant Thornton LLP
Supplementary Evidence

December 5, 2003

The purpose of this supplementary evidence is to provide additional commentary with respect to the following topics:

- Key Performance Indicators
- Rate Stabilization Plan
- Range of Rate of Return on Rate Base
- Automatic Adjustment Formula
- Revised Revenue Requirement

Key Performance Indicators

During this hearing there has been considerable evidence put before the Board through pre-filed evidence, reports, RFIs and through the examination of witnesses with respect to the topic of Key Performance Indicators (KPI) and a number of related topics including operating efficiencies, business process improvement initiatives and a productivity allowance. In some instances these topics were linked together while at other times they appear to have been examined as separate issues. It is our observation that all these topics are related and should be viewed that way from a regulatory perspective.

In Mr. Wells pre-filed evidence (pgs. 19-21) he has clearly articulated at a conceptual level how Hydro's goal of optimizing performance is operationalized through the assessment of business processes and measured through the development and implementation of key performance measures. However, while there has been discussion of business process improvement projects undertaken by Hydro (ref. Roberts pre-filed pgs.23-24; Transcript October 16th, pgs 137-145; Transcript October 27th, pg 87; NP-258 NLH) it may not be clear in the evidence how these all tie together and what they mean in terms of improvements in operational efficiency.

Hydro has presented evidence on the recommended KPIs in U-Hydro #17. However, it is our understanding that the 2004 KPIs are based on the revised October GRA filing but, as indicated in the undertaking, targets for 2004 have not been established. A more

transparent linkage between process improvement initiatives and the key performance measures may assist the Board in effectively monitoring Hydro's operating performance and efficiency.

The objective is to establish an effective regulatory framework and process for monitoring Hydro's operational efficiency on a go forward basis. With a view to achieving that objective, we recommend that Hydro be asked to submit annual targets (or objectives) with respect to each KPI being reported to the Board for regulatory purposes, together with the background support or rationale for the targets. We would expect the targets to be supported by or linked in some manner to certain business process improvement initiatives or arise from certain benchmarking analysis or inter-utility comparisons of performance.

The second item we wish to comment on with respect to the topic of KPIs is the issue of external benchmarking or inter-utility comparisons of performance. As stated in our Report on Regulatory Performance Measures, we believe that there is value to the Board, and also Hydro, from external benchmarking of performance. In Consent #1 (pg. 4, para. aa) all parties agreed that "Hydro will propose a peer group of utilities and measures upon which to compare its performance…". We support this statement and suggest that the measures to be compared should include the KPIs identified in our report as being appropriate from a regulatory perspective.

Rate Stabilization Plan

On November 13, 2003 Hydro filed Consent #2 and Consent #3. Both of these documents detailed changes to the existing Rate Stabilization Plan ("RSP") as negotiated by representatives for Hydro, Newfoundland Power Inc., Industrial Customers and the Consumer Advocate. In supplementary evidence filed on November 21, 2003, and in testimony of December 2, 2003, Mr. Sam Banfield explained the proposed changes to the various components of the RSP. He also confirmed that the proposed changes were a

result of negotiation involving give and take by all parties (Dec. 2, 2003 Transcript, Pg.147, lines 20-25).

Consent #2 describes the details and calculations of a revised RSP that, pending Board approval, will commence January 1, 2004. Consent #3 addresses the balance accumulated in the plan from September 1, 2002 to December 31, 2003 and will, pending Board approval, commence December 31, 2003. We have reviewed the changes as detailed in both consent documents and advise that we have not identified any concerns with the approach and methodology proposed. The changes described in both documents will have the following impacts:

- Reduce the overall impact of rate changes in 2004 by deferring the recovery of the September 1, 2002 to December 31, 2003 accumulated balance over four years as opposed to the two years currently required in the existing plan.

- Provides for 25% recovery of future hydraulic variation (excluding financing charges) as compared to a 100% recovery over two years under the existing plan.

- Provides for a timelier price signal to end consumers with regards to the impact of fuel price changes. This is the result of two changes in the proposed RSP: the addition of a fuel rider and the recovery of the accumulated balance, including forecast financing charges, over a one year period. The fuel rider calculation for each customer class is based on the PIRA forecast of fuel costs for the following twelve month period and a current foreign exchange rate.

- "Forward looking" mechanisms such as the forecast fuel costs used in the calculation of the fuel rider and the inclusion of the forecast finance charges during the recovery period in the rate adjustment calculation, along with the

one year recovery period should reduce the potential that significant balances will accumulate in future years.

- Both components of the load variation, revenue and fuel, will be fully assigned to the customer class that caused the load variation. Previously, the fuel component was treated as common costs and shared proportionately among the customer classes.

It was acknowledged by Mr. Banfield during cross examination that the proposed changes increase the level of complexity of the RSP and, as also indicated in his supplementary evidence, it is possible that the proposed changes may cause increased volatility in rates. In light of these comments we suggest that the Board consider the appropriate reporting requirements of the proposed RSP to permit effective monitoring of the plan, including the impact on customers.

Currently, Hydro is reporting on the activity in the RSP in its quarterly reports submitted to the Board. This report includes the accumulated year to date balance and the details for the last month of each quarter. During Mr. Banfield's testimony, he indicated that Hydro would have no difficulty in providing the monthly activity in its quarterly reports (Transcript Dec.2, 2003, pg. 153, lines 21-24). We recommend that Hydro be instructed to provide all monthly activity or summarized quarterly activity to the Board in its regular quarterly reports.

We considered whether a mechanism based on a maximum allowable balance should be included in the plan in order to trigger a review. However, based on a detailed review of the new plan including changes in the hydraulic variation, the use of a fuel rider and the one year recovery period, we do not consider such a mechanism to be necessary. However, we are recommending that Hydro be instructed to undertake a review of the new plan after a 24 month period. This review should assess the effectiveness of the new plan, assess the impact on and reaction of customers and determine whether any

modifications are appropriate. As part of this review all stakeholders should be provided the opportunity to comment on the operation of the new plan.

Range of Rate of Return on Rate Base

In our report prepared for this hearing we suggested the Board consider establishing a range and upper limit of allowed return on rate base and an excess earnings account for Hydro (GT Report, pg.22, lines 21-23). It is our understanding based on a review of the evidence that Hydro's position on this issue is that they have not requested a range be set but that the Board has the jurisdiction to establish such a range if deemed appropriate (Transcript October 16th, pgs. 80-81; NP-234 NLH).

It has been the practice in this jurisdiction in the regulation of Newfoundland Power Inc to prescribe an allowed range for rate of return on rate base. It has also been the practice to prescribe that any earnings in excess of the upper limit of the prescribed range be placed in an excess earnings account with the disposition of any such amount being determined by the Board. Based on our review of Hydro's application and the evidence presented during the hearing we see no compelling reason why Hydro should be treated any different from Newfoundland Power Inc. with respect to this issue.

In the interest of regulatory consistency, we recommend the Board establish an allowed range and upper limit of rate of return on rate base for Hydro in its decision. In addition we recommend the Board instruct Hydro to establish an "excess earnings account" to deal with any earnings generated in excess of the upper limit as prescribed.

We do not have a position with respect to the specific range of rate of return for Hydro as the Board would need to assess the range in the context of its findings on other related financial matters. The range of rate of return prescribed for Newfoundland Power Inc. may be an appropriate starting point which could be adjusted, if necessary, to take into account the Board's decision on these other matters.

Automatic Adjustment Formula

Another matter related to rate of return on rate base is the issue of utilizing an Automatic Adjustment Formula (AAF) for adjusting the allowed rate of return on an annual basis. The use of such a formula is also an established practice in this jurisdiction which has been implemented with the objective of enhancing regulatory efficiency. The issue of regulatory efficiency would appear to be an issue equally relevant to Hydro and we see no reason why this regulatory practice would not apply. In the interest of regulatory consistency we recommend that the Board address whether implementation of an AAF is appropriate for Hydro at this time.

If the Board were to decide that implementation of an AAF was appropriate it should request that Hydro file a proposal detailing how implementation could be achieved for 2005.

Revised Revenue Requirement

On October 31, 2003 Hydro submitted its revised revenue requirement for the 2004 test year incorporating actual results to August 31, 2003, the impacts of the 2004 approved capital budget and the most recent forecast for matters such as No.6 fuel price, load, interest rate and exchange rates. The overall impact of these revisions resulted in a 2004 test year revenue requirement of $367.510 million in comparison to $371.841 million included in the August, 2003 filing; this represents a decrease of $4.331 million.

Schedule II (2nd Revision – Oct.31, 2003), Page 1 of 8 included in Mr. J.C. Roberts pre-filed evidence summarizes the changes in the 2004 revenue requirement from the August filing in comparison to the October filing. Pages 5 and 6 of 8 of the same Schedule also provide explanations to support the revisions. We have reviewed the revised revenue requirement as filed and can verify that Hydro has updated the 2004 test year data for the key assumptions as recommended in our report.

We have identified one issue related to the revisions which should be brought to the Board's attention. The increase in the loss on disposal of capital assets of $725,000 due to the projected discontinuation of service in the isolated community of Davis Inlet is unusual and not recurring in nature. We believe it is inappropriate to include an unusual item such as this in a test year revenue requirement that will be used to set rates until the next general rate hearing. We recommend that the cost associated with the discontinuation of service at Davis Inlet be amortized over a period of several years to normalize the forecast of 2004 test year revenue requirement. An amortization period of three to five years would be considered reasonable.

IN THE MATTER OF the Public Utilities Act, R.S.N., c. P-42 (the *"Act")*

AND

IN THE MATTER OF a General Rate Application (the "Application") by Newfoundland and Labrador Hydro ("Hydro") for approvals of, under Section 70 of the *Act,* changes in the rates to be charged for the supply of power and energy to Newfoundland Power Inc. ("NP"), Rural Customers and Industrial Customers; and under Section 71 of the *Act,* changes in the Rules and Regulations applicable to the supply of electricity to Rural Customers.

Parties' Agreement on Cost of Service, Rate Design And Rate Stabilization Plan

Terms of Agreement

1. As a result of this Agreement, reached through a negotiation process, the Parties consent to the admission in the record of this Application of all pre-filed testimony and exhibits pertaining to: (1) cost of service; (2) rate design; (3) rate stabilization plan matters and (4) tariff rules and regulations without the calling of witnesses for the purpose of cross-examination insofar as such testimony and exhibits relate to the issues agreed to. The Parties recommend that the Board make its determinations on the agreed upon issues in accordance with the proposed resolution of these issues as stated in this Agreement. This Agreement represents a reasoned consensus on the stated issues and the individual agreements of the Parties are not intended to be severable. Issues not agreed upon should be determined by the Board based on the full record of the hearing.

Matters Agreed Upon

2. Except as otherwise stated in this Agreement, the undersigned Parties have reached agreement on cost of service, rate design, and rate stabilization plan matters. The rate design principles as provided in Attachment A were accepted and used by the Parties in coming to agreement. Matters not agreed upon by the Parties are as follows:

    a. The treatment of customer-owned generation in the cost of service study,

    b. Hydro's Rate Stabilization Plan (RSP) proposals relating to the treatment of the CFB Goose Bay credit and limitations on the effects of variations in Rural diesel fuel and power purchase costs on Hydro's net income,

    c. the disposition of the forecast hydraulic production variation balance, and

    d. the calculation and application of specifically assigned charges to customers.

Hydro COS Study

3. All Parties consider that Hydro's cost of service (COS) study filed in this proceeding is in compliance with Board Orders regarding the use of embedded cost of service studies as a guide in determining the revenue requirement to be applied to each customer class.

4. All parties agree on the cost of service methodologies in Exhibit RDG-1 ("2007 Forecast Cost of Service") with respect to Functionalization, Classification and Allocation, with the exception of:

    a. the treatment of customer owned generation and matters relating thereto, or issues arising as a result of any changes made to the current treatment of customer-owned generation, and

    b. the calculation and application of specifically assigned charges to customers.

Wholesale Rate

5. With respect to rates for Newfoundland Power, the Parties agree as follows:

    a. Except as otherwise stated in this Agreement, rate designs and other tariff provisions for Newfoundland Power as outlined in the Application should continue to apply.

    b. Hydro's energy rate to Newfoundland Power should continue to be a two-block structure as follows:

        i. the first-block energy charge should be applied to the first 250 GWh of energy purchases per month,

        ii. the energy charge for the first block would be calculated in accordance with the Board's Decision and Order, and

        iii. the energy charge for the end or 'run out' block rate would be set at a level that reflects the production cost at the Holyrood thermal plant, which production cost shall be as determined by the Board in its Decision and Order.

    c. It is appropriate to reduce Hydro's demand rate to Newfoundland Power to $4.00 per kW per month to better reflect the marginal capacity costs currently indicated on the Island Interconnected System (see July 2006 report entitled Implications of *Marginal Cost Results for Class Revenue Allocation and Rate Design*).

    d. Unless altered as a result of the Board's decision with respect to the treatment of customer-owned generation, Hydro's demand rate to Newfoundland Power will continue to apply to the single highest weather adjusted native load for the winter season.

    e. Following the current GRA, Hydro and Newfoundland Power will enter into discussions toward development of a demand billing approach to reflect the marginal cost of capacity during the winter months. A report documenting the agreement and

justifications (or if agreement is not reached, the reasons why agreement was not reached) will be prepared by Hydro and submitted to the Board on or before June 30, 2007.

IC Rate Design

6. With respect to rates for the Industrial Customers, the Parties agree that except as otherwise stated in this Agreement, rate designs and other tariff provisions for the Industrial Customers as outlined in the Application should continue to apply.

RSP Design

7. With respect to the Rate Stabilization Plan, the Parties agree as follows:
    a. The current provisions of the Rate Stabilization Plan should continue as approved for all hydraulic, fuel and load related components and all recovery-related calculations with the exception of the three issues identified in paragraph (c.) below.
    b. When new test year base rates are implemented, if the fuel rider forecast is more current, a fuel rider which incorporates the new forecast should be implemented at the same time as the change in base rates.
    c. The following issues have not been agreed upon:
        i. Whether there should be any limitations on the potential effects of variations in Rural diesel fuel costs and Rural power purchase costs on Hydro's net income;
        ii. Whether there should be any limitations on the potential effects of the full or partial closure of the CFB Goose Bay facility on Hydro's net income; and
        iii. The disposition of the forecast hydraulic production variation balance in the RSP.

Review Processes

8. Three review processes applying the principles set out in Attachment A shall be initiated by Hydro in 2007 to examine:

    i. The wholesale power rate design for Newfoundland Power as described in paragraph 5 (e);

    ii. The rate design for ICs; and

    iii. Re-design of the RSP to better meet design objectives.

9. The "Framework for Industrial Customers' Rate Design Review" (Attachment B) will apply to the review process on the rate design for the ICs.

10. By February 1, 2007, the Parties shall establish such further terms as needed for each of the three review processes, including the proposal for discussions, detailed schedule, confidentiality terms, role and involvement of the Parties, and payment of costs for participants and the Parties.

11. Matters dealt with in the review processes but which are not resolved through negotiations may be submitted to the Board for resolution.

12. The Parties agree to use their best efforts to achieve an implementation date of January 1, 2008 for rate design and the design of the RSP.

Wholesale Rate Review Report

13. Hydro shall file a report pertaining to the review of the wholesale power rate design for Newfoundland

Power as described in paragraph 5(e) by June 30, 2007. The report will document the review results relating to the Newfoundland Power rate design and all matters arising, and provide recommendations to the Board relating to implementation.

RSP Review Objectives

14. The RSP will be reviewed with the intent to better reflect design objectives. This review will include, but not be limited to:

    i. Definition of the design objectives against which the current RSP and all proposed modifications will be evaluated.

    ii. A review of the necessity of a load variation component of the RSP, given potential changes to IC rates to reflect marginal fuel costs.

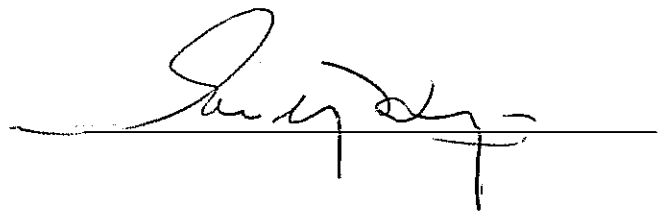
    iii. Modification of the RSP to enhance the price signal for marginal consumption by ICs and NP.

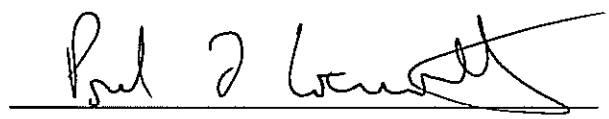
    iv. Simplification of the RSP by separately tracking provisions not related to the hydraulic and fuel price components of the Plan through an accounting mechanism discrete from the RSP.

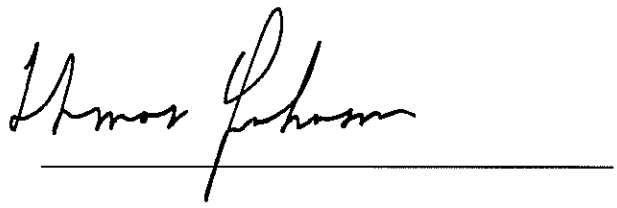
RSP and IC Rate Design Report

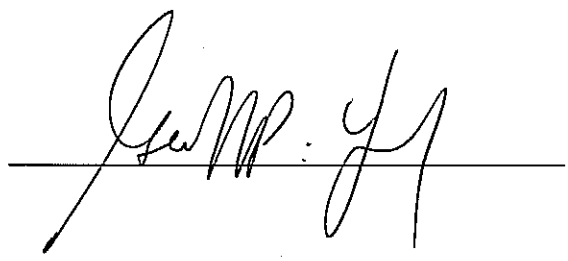
15. As soon as practicable following the conduct of the review of the IC rate design and re-design of the RSP, and in no event later than October 31, 2007, Hydro shall host a Technical Conference, to be attended by the Parties and others as determined by the Parties, to further discuss the IC rate design and re-design of the RSP.

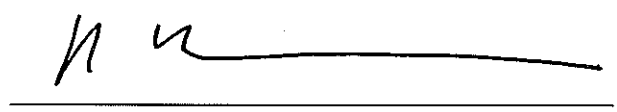
Agreed to this 20th day of October, 2006

For Newfoundland Power: 

For Industrial Customers: 

For the Consumer Advocate: 

For Newfoundland & Labrador Hydro: 

For Board Appointed Facilitator: 

Attachment A

Parties' Agreement on Rate Design Principles

1.0 The Use of Embedded Cost Studies

The use of embedded cost of service studies to attribute cost responsibility follows logically from the generally accepted principles of good rate design. These principles are codified in James Bonbright's *Principles of Public Utility Rates*. The principles that relate most to cost of service studies are effectiveness in yielding total revenue requirements and fairness in the apportionment of total cost of service among the different ratepayers. The goal of achieving fairness in the apportionment of total cost of service among the different ratepayers and preventing undue discrimination is the stated purpose of most cost of service studies. This Board has accepted the use of embedded cost of service studies as the method to be used in determining reasonable cost recovery among customer classes.

2.0 Reflecting Marginal Costs in Rate Design

Reflecting marginal costs in rate designs is also consistent with the generally accepted principles. Rates for marginal demand and energy use that reflect marginal costs send more efficient price signals to consumers and are consistent with energy efficiency/demand management programs and Government environmental initiatives such as greenhouse gas emissions reduction.

3.0 Rate Design Principles

Giving consideration to the generally accepted principles and past regulatory practice in this jurisdiction, the Industrial customers and Newfoundland Power rate designs will be developed and implemented based on the following principles:

A. Rates will be designed to recover the class revenue requirement derived in the embedded cost of service study.

B. Rate design will give consideration to the fairness of embedded cost recovery from individual customers within classes.

C. Capacity and energy rate components will reflect current forecasts of time varying marginal costs of system capacity and energy when the benefits resulting from more complex rate designs are judged to exceed the costs of implementation.

D. The rate designs will take into account trends in marginal costs. For example, if system marginal capacity costs are expected to increase over time, they may be averaged over a number of years in the future in order to capture a portion of the expected increase. Trends and the relevance of future capacity additions may be given more or less weighting depending on the objectives at the time.

E. Rate designs will incorporate an element of revenue / price stability, certainty, predictability and understandability. This will include consideration of marginal costs over a number of years into the future.

4.0 Other Considerations

The parties will consider the implications for Newfoundland Power and Industrial Customers to:

- implement demand management or energy conservation activities;
- operate and expand generation capabilities; and,
- maximize the economic benefits from use of electricity.

Rate design principles can often conflict with one another, requiring that a balance be struck when designing rates. This balancing must guard against unintended consequences such as the inefficient dispatch of customer-owned generation, etc.

Attachment B

Framework for Industrial Customers' Rate Design Review

1.0 Current Rate Design Methodology

The current Industrial Customer (IC) firm rate design entails a single demand charge applied to all Power on Order each month and a single energy charge applied to all firm kWh consumed. Non-firm kWh are priced largely at the cost of fuel at Holyrood.

2.0 Rate Design Review

In light of the principles identified in Attachment A, Hydro and the ICs will enter into discussions following the 2006 GRA directed toward development of a suitable revised Island industrial rate design focused on the following points:

1) New rate designs will continue to be based on recovering the full IC revenue requirement measured by the embedded Cost-of-Service study, but with a marginal price signal on the discretionary or marginal components of the load.

2) The discussions will focus on development of a suitable and practical industrial rate design for future implementation subject to review by stakeholders and the Board.

3) A variety of issues related to practical implementation and fairness require careful consideration. Guidance on these matters will be sought through discussions at times with each of the Industrial Customers regarding the unique characteristics of their operations and specific facility plans, and through review of similar rate structures in other jurisdictions. Practical issues include, but are not limited to:

a. **Energy Blocks:** Determination of a reasonable approach for sizing first block energy versus run-out (marginal) blocks, including:

- The means to set an initial annual division between the first block for each customer versus the run-out or second block.
- The basis and timing under which the size of the first block might be adjusted for each customer (both short-term and long-term).
- Approaches used to set the first block energy allocation to new industrial customers coming on the system.
- Means to apply the annual first block energy concept to monthly billing.

b. Demand Charges: Interaction between demand changes, actual metered peak loads, Power on Order and delimitation between firm and non-firm supplies.

c. Customer Generation: Interaction with customer generation including impacts on dispatch and expansion of generation capability.

d. Other Contract Provisions: Interactions with other provisions in the existing industrial customer contracts such as Force Majeure events, and interaction with non-firm rate provisions.

e. Impacts on Loads and Customer Decisions: Impacts on the economics of customer choices with respect to expansions of operations, or reductions. This matter should include an understanding of any likely impact of the rate design on the future growth and development of the level of industrial activity of Newfoundland.

f. DSM and Conservation: Implications for IC to implement DSM or conservation activities to reduce net loads on Hydro's system and capture long-term system savings.

REVIEW OF THE

RATE STABILIZATION PLAN

NEWFOUNDLAND AND LABRADOR HYDRO

MAY 31, 2007

Table of Contents

1 Introduction 1
2 Background 3
3 Study Terms of Reference and Objectives 5
4 Design Components and Issues to be Reviewed 6
5 RSP Review Participants 8
5.1 Participants 8
5.2 Role and Involvement of Participants 8
5.3 Confidentiality 9
5.4 Payment of Costs 9
6 Outline of Review Process and Timeline 10

1 INTRODUCTION

This report is filed with the Board of Commissioners of Public Utilities (the Board) in response to Order No. P.U. 8 (2007), page 32 and page 65, item III, 8, wherein the Board ordered:

> *"Hydro will be required to file with the Board no later than May 31, 2007 a copy of the terms which are proposed for the RSP review, setting out terms of reference, the specific review objectives, a list of participants, a planned timeline, and an outline of the review process."*

The Board plans to use this filing to determine its participation in the Rate Stabilization Plan (RSP) review and advise the parties accordingly.

The Board's Order was issued in response to the October 20, 2006 Agreement on Cost of Service, Rate Design and Rate Stabilization Plan, filed as part of Newfoundland and Labrador Hydro's (Hydro) 2006 General Rate Application (GRA), in particular, paragraph 8 stating:

> *"Three review processes applying the principles set out in Attachment A shall be initiated by Hydro in 2007 to examine…*
> *iii. Re-design of the RSP to better meet design objectives*."

Since the conclusion of Hydro's 2006 General Rate Proceeding, the parties to the October 20, 2006 Agreement, including Hydro, Newfoundland Power, Industrial Customers and the Consumer Advocate (the Parties), have met on two occasions, exchanged data, and participated in the drafting of this document. The Parties have agreed to the RSP review terms and have initiated study, discussion and resolution of the issues. This report documents the review terms agreed upon by the Parties, thus meeting the requirements set out in the Board Order.

The report is organized as follows:

- Background;
- Study terms of reference and objectives;
- Design components and issues to be reviewed;
- RSP review participants, roles and involvement, confidentiality and payment of costs; and
- Outline of review process and timeline.

2 BACKGROUND

The RSP has been a significant point of interest and debate during Hydro rate applications since its inception in 1986. Prior to 1986, Hydro had two separate reserve accounts that adjusted for variations from test year costs, specifically a Water Equalization Provision and a Fuel Adjustment Charge. The Water Equalization Provision normalized for fuel cost variations related to changes from normal hydraulic production. There was no automatic adjustment mechanism for the balance, based on the premise that hydraulic production variations tend to zero over time. Instead, it included a maximum provision of $36 million that, when exceeded, required rate adjustments. The Fuel Adjustment Charge was a formula to recover generation costs attributable to fuel price differences from those reflected in test year rates. The adjustment was applied to rates in the month after the costs were incurred.

The RSP was implemented in 1986 as a result of a 1985 Board Report to Government. The purpose of the RSP was to smooth customer rate impacts that had occurred as a result of the Fuel Adjustment Charge, and includes variations between actual results and test year cost of service estimates for: 1) hydraulic production; 2) No. 6 fuel cost used at Holyrood generating station; and 3) customer load (Newfoundland Power and Industrial Customers). Rates were adjusted annually based on recovery of 1/3 of the annual balance.

Since its implementation in 1986, the RSP has gone through many modifications culminating in its current form. The current RSP includes the three original components, plus adjustments to account for variations in Hydro's rural revenues resulting from changes to rural rates that reflect the rates of Newfoundland Power. This latter component now relates specifically to Newfoundland Power, as Industrial Customers are now exempt from charges related to the Rural Deficit. In addition, a number of design changes have been made to the application and recovery of RSP amounts.

On June 30, 2006, Hydro filed a report on the operation of the RSP, which included proposals for further changes to the design. The RSP report, Hydro's 2006 GRA and this

review process identified these components to be reviewed: 1) isolated diesel fuel and purchased power costs; 2) municipal tax; and 3) CFB Goose Bay revenue credit.

The original RSP rules as well as the changes made since its inception have caused a number of concerns over the years by participants in Hydro's rate applications. Some of the concerns expressed include that the RSP: no longer reflects or meets its original intent and objectives; has become unwieldy and overly complex making it difficult to understand and audit; and may be providing incorrect incentives and benefits in its application. Some of these concerns were addressed during Hydro's 2003 GRA resulting in a major revision to the RSP. During Hydro's 2006 GRA, further discussions took place concerning the need for additional changes to the RSP. As a result of the discussions, the Parties to the proceeding agreed that a comprehensive review of the RSP will be undertaken.

3 STUDY TERMS OF REFERENCE AND OBJECTIVES

The purpose and objective of this RSP review as agreed to by the Parties is to undertake a comprehensive study with the intent to re-design the RSP as necessary to meet its defined objectives and ensure it is providing incentives and benefits to Hydro and consumers consistent with the *Electrical Power Control Act, 1994* and generally accepted sound utility practice. The terms of reference for the RSP review include:

- Review the history of the RSP;
- Define the objectives of the RSP which will form the basis for the evaluation;
- Evaluate the relevance and benefits of each of the current and proposed components of the RSP consistent with the objectives;
- Evaluate, and re-redesign where necessary, each component of the RSP judged to be of continued relevance and benefit;
- Draft rules to govern the application and administration of the re-designed RSP;
- Document the study results in a report filed with the Board;
- Provide a Technical Conference to the Board in accordance with the Agreements filed by the Parties during Hydro's 2006 GRA; and
- Apply to the Board for approval of proposed changes to the RSP.

4 DESIGN COMPONENTS AND ISSUES TO BE REVIEWED

The Parties have developed a list of RSP components and issues to be addressed in the review. The list is summarized in ***Table 1***. Other design components and issues will be evaluated and reported upon as necessary during the course of the study if they are believed to be more consistent with the objectives of the RSP.

Table 1- RSP Issues

RSP Component	*Issue*	*Source*
Fuel and Hydrology	Enhance Price Signal	Oct 20, 2006 agreement
Fuel and Hydrology	Discrete Write-off Period for Hydraulic Variation	Mar 2007 meeting
Fuel and Hydrology	Fuel Rider with New Test Year	Order No. PU 8 (2007), pp 31-32
Load Variation	Necessity of Load Variation	Oct 20, 2006 agreement
Load Variation	Customer Allocation	RSP Report, Jun 2006
Rural Deficit	Isolated Diesel Fuel and Purchased Power Costs	Oct 20, 2006 agreement
Rural Deficit	Municipal Tax Implications of Rural Rate Alteration	Mar 2007 meeting
Other	CFB Goose Bay Revenue Credit Risk for Loss of Load	Oct 20, 2006 agreement
Other	Simplification of RSP by Separating Fuel and Hydrology from Other Components	Oct 20, 2006 agreement
Other	Publication of Components of RSP Rate	Mar 2007 meeting
Other	No RSP for Newfoundland Power	Mar 2007 meeting

As items related to the Rural Deficit affect Newfoundland Power rates, but not the rates of the Industrial Customers, these items will be discussed primarily among Hydro, Newfoundland Power and the Consumer Advocate.

In addition, the Parties have agreed to the following RSP objectives. These objectives represent the starting point only, and are subject to change as the study progresses.

- To provide for acceptable levels of rate and revenue stability for customers and Hydro;
- To provide for regulatory efficiency by allowing changes in rates to recover changes in prudently incurred fuel costs without requiring a general rate proceeding;
- To provide for timely changes in rates and avoid material changes in the price signal that would promote inappropriate consumption decisions by customers;
- To provide for fair apportionment of costs among the customers impacted by the RSP;
- To mitigate material intergenerational equity concerns;
- To provide for ease of understanding; and
- To provide for ease and efficiency of administration.

No provisions in the RSP should provide an incentive to Hydro or its customers to operate in a manner that is inconsistent with the least cost power policy of the Province and generally accepted sound utility practice.

These RSP design objectives will be used to assess both the proposed changes to the RSP and whether any of the existing RSP provisions should be revised or eliminated.

5 RSP REVIEW PARTICIPANTS

5.1 Participants

The Parties that are participating in the review of the RSP include:

- Newfoundland Power;
- Industrial Customers;
- Consumer Advocate;
- Hydro; and
- Board Staff.

It is anticipated that Board staff will participate in the review process. However, as stated in the Board's Order, it will use this filing as the basis for determining the extent of its participation and advise the Parties accordingly.

5.2 Role and Involvement of Participants

This review process will be a joint effort by the parties, with the intended outcome a joint report and recommendations.

Hydro will be responsible for:

- Coordinating meetings and discussions;
- Preparing reports and analysis as required; and
- Preparing submissions to the Board.

Newfoundland Power, Industrial Customers and the Consumer Advocate will be responsible for:

- Participating in discussions to agree on the RSP design;
- Providing design alternatives to achieve the objectives; and
- Participating in preparation of draft and final reports.

5.3 Confidentiality

Discussions among the parties are confidential, and will not be released to the public without the agreement of the parties to the process.

5.4 Payment of Costs

Each party is responsible for paying the cost it incurs.

6 OUTLINE OF REVIEW PROCESS AND TIMELINE

The RSP review process and a tentative schedule are provided in ***Table 2***.

Table 2. Review Process and Timeline

Milestone	Date
Agreement on review process	January 31, 2007
Meetings with Parties to set design objectives and alternatives for RSP re-design	March 31, 2007
Report to Board on RSP study Terms of Reference	May 31, 2007
Preliminary report submitted for review of Parties	June 30, 2007
Completion of discussions among Parties and tentative agreement on design	July 31, 2007
Preliminary report on RSP review submitted to Board	August 31, 2007
Final report on RSP design	September 30, 2007
Technical Conference	October 31, 2007
Application to Board	November 30, 2007
Implementation	January 1, 2008

HYDRO
THE POWER OF COMMITMENT

File No.

NEWFOUNDLAND AND LABRADOR HYDRO
Head Office: St. John's, Newfoundland P.O. Box 12400 A1B 4K7
Telephone (709) 737-1400 • Fax (709) 737-1231 • Website: www.nlh.nf.ca

December 20, 2007

The Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road
P.O. Box 21040
St. John's, Newfoundland & Labrador
A1A 5B2

Attention: Ms. Cheryl Blundon
Director Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: Application by Newfoundland and Labrador Hydro for Interim Rates for Industrial Customers

Enclosed herewith are ten (10) copies of an Application for Interim rates for Industrial Customers, as set out in Schedule A, to be implemented as of January 1, 2008.

Yours truly,

Peter A. Hickman
Assistant Corporate Secretary and
Senior Legal Counsel

PAH/jc

e.c.c. Mr. Peter Alteen - Newfoundland Power
Mr. Bob Meyers - Newfoundland Power
Mr. Gerard Hayes - Newfoundland Power
Mr. Gordon Oldford - Abitibi-Consolidated Inc., Grand Falls
Mr. Jim Gartshore - Abitibi-Consolidated Inc., Montreal
Mr. Patrick Corriveau - Corner Brook Pulp & Paper Co. Ltd.
Mr. Kevin Goulding - Deer Lake Power
Mr. Glenn Mifflin - North Atlantic Refining Ltd.
Mr. Bob Kelly - Aur Resources Inc.
Mr. Thomas Johnson – Consumer Advocate
Mr. Joseph Hutchings, Q.C. - Poole Althouse
Mr. Paul Coxworthy - Stewart McKelvey Stirling Scales

IN THE MATTER OF the *Public Utilities Act*, (R.S.N. 1990, Chapter P-47 (the "Act"); and

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for an Interim Order, pursuant to Section 75 of the Act, affecting the Rate Stabilization Plan component of the rates to be charged to Industrial Customers.

TO: The Board of Commissioners of Public Utilities (the "Board")

THE APPLICATION of Newfoundland and Labrador Hydro (Hydro) states that:

1. Hydro is a corporation continued and existing under the *Hydro Corporation Act*, is a public utility within the meaning of the Act and is subject to the provisions of the *Electrical Power Control Act, 1994.*

2. By Order No. P.U. 40 (2003) the Board approved the manner by which the Rate Stabilization Plan (RSP) is calculated and by which RSP adjustments are applied to the rates charged by Hydro to its Island Interconnected Industrial Customers. Under that Order, Hydro is required to provide an Industrial Customer fuel price projection to the Board and to certain of Hydro's customers by the tenth working day of October of each year.

3. Due initially to a projected increase in the RSP rate and subsequently to a significant load change of one of Hydro's Industrial Customers, Hydro determined that there was potential volatility in its Industrial Customers' rates both for 2008 and in future years. The impact of these changes was deemed to be significant and it was judged to be prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.

4. Hydro wishes to have further opportunity to consider the appropriate means to address Industrial Customers' rates issues.

5. The Applicant makes Application that the Board approve and make an Interim Order that the rates currently in effect for Industrial Customers, which were approved in Order No. P. U. 8(2007) and which are set out in Schedule A , continue in effect on an interim basis until such time as the Board issues a final order with respect to Industrial Customers' rates for 2008.

DATED AT St. John's in the Province of Newfoundland and Labrador this 20th day of December 2007.

NEWFOUNDLAND AND LABRADOR HYDRO

Peter A. Hickman
Counsel for
Newfoundland and Labrador Hydro
P.O. Box 12400 Columbus Drive
St. John's, Newfoundland and Labrador
AlB 4K7
Telephone: (709) 737-1462
Facsimile: (709) 737-1782

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - FIRM

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Demand Charge:

The rate for Firm Power, as defined and set out in the Industrial Service Agreements, shall be $6.68 per month per kilowatt of billing demand.

Firm Energy Charge:

Base Rate* ..... @ 3.676 ¢ per kWh

RSP Adjustment

Historic Plan	@ 1.215 ¢ per kWh**
Current Plan	@ (2.000) ¢ per kWh
Fuel Rider	@ 0.000 ¢ per kWh
Total RSP Adjustment	@ (0.785) ¢ per kWh

Energy Rate	@ 2.891 ¢ per kWh
**Aur Resources Inc. Energy rate excluding Historic Plan	@ 1.676 ¢ per kWh

***Subject to RSP Adjustment:**

RSP Adjustment refers to all applicable adjustments arising from the operation of Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production, fuel cost, load and rural rates.

** Aur Resources Inc. is not subject to Historic Plan component of the RSP Adjustment, in accordance with Order No. P.U. 1 (2007).

Specifically Assigned Charges:

The table below contains the additional specifically assigned charges for customer plant in service that is specifically assigned to the Customer.

	Annual Amount
Abitibi-Consolidated (Grand Falls)	$ 1,244
Abitibi-Consolidated (Stephenville)	$ 104,647
Corner Brook Pulp and Paper Limited	$ 347,167
North Atlantic Refining Limited	$ 150,976
Aur Resources Inc.	$ 186,169

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - FIRM (continued)

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - NON-FIRM

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Non-Firm Energy Charge (¢ per kWh):

Non-Firm Energy is deemed to be supplied from thermal sources. The following formula shall apply to calculate the Non-Firm Energy rate:

$$\{(A \div B) \times (1 + C) \times (1 \div (1 - D))\} \times 100$$

A = the monthly average cost of fuel per barrel for the energy source in the current month or, in the month the source was last used

B = the conversion factor for the source used (kWh/bbl)

C = the administrative and variable operating and maintenance charge (10%)

D = the average system losses on the Island Interconnected grid for the last five years ending in 2005 (2.68%).

The energy sources and associated conversion factors are:

1. Holyrood, using No. 6 fuel with a conversion factor of 630 kWh/bbl
2. Gas turbines using No. 2 fuel with a conversion factor of 475 kWh/bbl
3. Diesels using No. 2 fuel with a conversion factor of 556 kWh/bbl.

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - WHEELING

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy and whose Industrial Service Agreement so provides.

Rate:

Energy Charge:

All kWh (Net of losses)* ..... @ 0.384 ¢ per kWh

* For the purpose of this Rate, losses shall be 2.68%, the average system losses on the Island Interconnected Grid for the last five years ending in 2005.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

IN THE MATTER OF the *Public Utilities Act,* (R.S.N. 1990, Chapter P-47 (the Act)*; and*

IN THE MATTER OF an Application (the "Application") by Newfoundland and Labrador Hydro for an Interim Order, pursuant to Section 75 of the Act, affecting the Rate Stabilization Plan component of the rates to be charged to Industrial Customers.

AFFIDAVIT

I, James R. Haynes of St. John's in the Province of Newfoundland and Labrador, make oath and say as follows:

1. I am Vice-President, Regulated Operations, of Newfoundland and Labrador Hydro, the Applicant named in the attached Application.

2. To the best of my knowledge, information and belief, all matters, facts and things set out in the attached Application are true.

SWORN at St. John's in the)
Province of Newfoundland)
this 20th day of December 2007,)
before me:)

Barrister – Newfoundland and Labrador

James R. Haynes

(DRAFT INTERIM ORDER)
NEWFOUNDLAND AND LABRADOR
AN ORDER OF THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

NO. **P.U. __ (2007)**

IN THE MATTER OF the *Public Utilities Act*, (the "Act"); and

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for an Interim Order, pursuant to Section 75 of the Act, affecting the Rate Stabilization Plan ("RSP") components of the rates to be charged to Industrial Customers.

WHEREAS Newfoundland and Labrador Hydro (Hydro), a corporation continued and existing under the *Hydro Corporation Act*, is a public utility within the meaning of the *Act* and is also subject to the provisions of the *Electrical Power Control Act, 1994*; and

WHEREAS Hydro has analyzed the relevant information available to the present date and has determined that the projected rate changes for its Industrial Customers will result in considerable rate volatility, due primarily to the impacts of changes in Industrial Customer load on the Industrial Customer component of the RSP; and

WHEREAS Hydro requires further opportunity to consider the appropriate means to address Industrial Customers' rates issues; and

WHEREAS section 75 of the Act provides that the Board may make an interim Order unilaterally and without public hearing or notice, approving with or without modification a schedule of rates, tolls and charges submitted by a public utility upon the terms and conditions that it may decide; and

WHEREAS if, after a full review of Hydro's Application for a final Order affecting the RSP components of the rates to be charged to Industrial Customers, it is determined that excess revenue has been earned by Hydro as a result of the interim Order the Board may order, pursuant to section 75(3) of the Act, that customers of Hydro receive a refund or that the excess revenue be placed in a reserve account for that purpose; and

WHEREAS the Board is satisfied that granting approval, on an interim basis, of certain RSP rates is appropriate and reasonable in the circumstances.

IT IS THEREFORE ORDERED THAT:

Pursuant to Section 75 of the Act, the Board approves, on an interim basis, the Industrial Customer rates as outlined on Schedule A, to be effective for consumption on and after January 1, 2008, until such time as the Board issues a final order with respect to Industrial Customers' rates for 2008.

DATED at St. John's, Newfoundland and Labrador this ___ day of December 2007.

Robert Noseworthy
Chair & Chief Executive Officer

Darlene Whalen, P. Eng.
Vice-Chair

G. Cheryl Blundon
Board Secretary

Schedule "A"

Order No. P. U. __(2007)

File No. _____

HYDRO
THE POWER OF COMMITMENT

NEWFOUNDLAND AND LABRADOR HYDRO
Head Office: St. John's, Newfoundland P.O. Box 12400 A1B 4K7
Telephone (709) 737 - 1400 • Fax (709) 737 - 1231 • Website: www.nlh.nf.ca

December 11, 2008

The Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road
P.O. Box 21040
St. John's, Newfoundland & Labrador
A1A 5B2

Attention: **Ms. Cheryl Blundon**
Director Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: Application for Continuation of Interim Rates for Industrial Customers

The Board, in Order No. P.U. 34 (2007), approved on an interim basis that the rates charged to Industrial Customers on January 1, 2008 would not change from 2007 rates until further Order of the Board. Hydro sought this interim order to allow it to perform further analysis and consideration of the impact of the operation of the Rate Stabilization Plan (RSP) in the context of the significant load change of one of its Industrial Customers (Corner Brook Pulp and Paper), the critical level of the 2007 year end hydraulic balances, and projected fuel prices.

Hydro had completed this analysis. However, in light of the recent announcement of the closure of Abitibi Consolidated (Grand Falls) and recent fuel price projections, Hydro has determined that there is further potential volatility in its Industrial Customers' rates both for 2009 and in future years. The impact of these changes is considered to be significant and it is prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.

Hydro recommends that the Board approve the continuation of the January 1, 2008 interim rates for Industrial Customers since this limits the rate volatility and a potential increase to industrial rates on January 1, 2009.

HYDRO
THE POWER OF COMMITMENT

Hydro also recommends an adjustment of Teck Cominco Limited (formerly Aur Resources Inc.) rates as a result of the termination of the Industrial Customer Historical Plan Balance of the RSP at December 31, 2007. As per Section E of Hydro's RSP, in 2008 the Industrial Customer Historical Plan Balance has been set to zero and the remaining Industrial Customer balance of $(1,382,925) was included in the 2008 Plan. In accordance with Order No. P.U. 1 (2007), Teck Cominco Limited is not subject to the Historic Plan component of the RSP Adjustment. As the Historic Plan component is no longer part of the RSP Adjustment due to the completion of its five-year collection period, Hydro is proposing that Teck Cominco Limited be charged the same RSP rate as all other Island Industrial Customers which will result in an estimated increase of 38% for this customer.

Enclosed herewith is an original, plus eight copies of the Application. Please note that, for ease of reference, proposed deletions to the RSP rules (Schedule B) are presented as strikethrough text. Should you have any questions, please contact the undersigned.

Yours truly,

Newfoundland and Labrador Hydro

Geoffrey P. Young
Senior Legal Counsel

cc: Mr. Peter Alteen - Newfoundland Power
Mr. Keith Aylward – Newfoundland Power
Mr. Gerard Hayes – Newfoundland Power
Mr. Brad Pelley – Abitibi-Consolidated Inc., Grand Falls
Mr. Patrick Corriveau – Corner Brook Pulp & Paper Co. Ltd.
Mr. Jim Gartshore – Abitibi-Consolidated Inc., Montreal
Mr. Kevin Goulding – Deer Lake Power Ltd.
Mr. Glenn Mifflin – North Atlantic Refining Ltd.
Mr. Thomas Johnson – Consumer Advocate
Mr. Bob Kelly – Teck Cominco Limited (Aur Resources Inc.)
Mr. Joseph S. Hutchings, Q.C., Poole Althouse
Mr. Paul Coxworthy – Stewart McKelvey Sterling Scales

IN THE MATTER OF the *Public Utilities Act*, (the Act); and

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for the approval, pursuant to Section 71 of the Act, of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers.

TO: The Board of Commissioners of Public Utilities (the Board)

THE APPLICATION OF NEWFOUNDLAND AND LABRADOR HYDRO (Hydro) STATES THAT:

1. Hydro is a corporation continued and existing under the Hydro Corporation Act, is a public utility within the meaning of the Act and is subject to the provisions of the Electrical Power Control Act, 1994.

Island Interconnected Industrial Customer Rates

2. Due to a projected increase in the RSP rate and subsequently to a significant load change for Corner Brook Pulp and Paper, one of Hydro's Industrial Customers, in late 2007 Hydro determined that there was potential volatility in its Industrial Customers' rates for 2008 and future years. The impact of these changes was significant and it was prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.

3. On December 20, 2007, Hydro made an Application to the Board to approve and make an Interim Order that the rates then in effect for Industrial Customers, which were approved in Order No. P. U. 8 (2007), continue in effect on an interim basis.

4. Order No. P.U. 34 (2007) approved, on an interim basis, the Industrial Customer rates to be effective for consumption on and after January 1, 2008, until a final Order of the Board with respect to Industrial Customers' rates for 2008.

5. On December 4, 2008, Abitibi Bowater Inc. announced the closure of its Grand Falls paper mill during the first quarter of 2009. This will cause a significant change in Hydro's Island Industrial customer load. Also, the past few months has seen a precipitous reduction in fuel prices. In light of this information, Hydro has determined it to be necessary to further analyze the impact that these factors will have on the RSP. In order to allow for further analysis, Hydro is proposing the interim rates continue until further Order of the Board.

Teck Cominco Limited (previously AUR Resources Inc.)

6. By Order No. P.U. 40 (2003) the Board approved changes to the RSP with regards to the special treatment and recovery of "Historical Plan Balances" that had accumulated in the RSP as being owed to Hydro by

its customers for energy consumed during periods ending December 31, 2003.

7. Pursuant to the RSP, the Historical Plan Balance annual recovery portion is converted to a mill rate, is added to the other components of the RSP (i.e. the current amount and fuel rider), and is charged to customers as a component of their energy rate.

8. On January 18, 2006 Hydro applied to the Board for approval of the provision of electrical service by Hydro to Aur Resources Inc. at the rates that applied to the provision of electrical service by Hydro to its other Island Industrial Customers, and that the rates to be charged by the Applicant to Aur Resources Inc. for the electrical energy it consumes be exclusive of the Island Industrial Historical Plan Balance component of the RSP.

9. On October 31, 2006 Hydro filed an agreement between Hydro, Aur Resources Inc., several other Industrial Customers and the Consumer Advocate setting out a consensus that the rates and rules and regulations for Aur Resources Inc., should be approved as proposed in the Application and that any amounts calculated by Hydro pursuant to the interim rates approved by the Board under Order No. P.U. 1 (2006)

that are in excess of the final rates approved by the Board should be refunded or credited to Aur Resources Inc.

10. The Board in Order No. P.U. 1 (2007) ordered that the rates, rules and regulations for Aur Resources Inc. should be similar to those of other Island Industrial Customers of Hydro except that, among other things, rates should exclude the Historical Plan Balance of the RSP.

11. On December 31, 2007 the five-year collection period to recover the Historical Plan Balance ended as per Section E of Hydro's RSP. In 2008, the Historical Plan Balance was therefore set to zero and the remaining Industrial Customer balance of $(1,382,925) was included in the 2008 Plan.

12. In 2007, Teck Cominco Limited acquired all the shares of Aur Resources Inc. and is now the operator of the Duck Pond Mine. The name Aur Resources Inc. was therefore changed to Teck Cominco Limited.

13. As the Historical Plan Balance is no longer a component of the RSP Adjustment due to the completion of its five-year collection period, Hydro is proposing that Teck Cominco Limited be charged the same RSP rate as all other Island Industrial Customers.

The Application

14. Hydro makes Application that the Board make an Order approving:

(a) a continuation of the interim rates currently in effect for Industrial Customers which were approved on an interim basis in Order No. P.U. 34 (2007) and which are set out in Schedule A; and

(b) that the rates for Teck Cominco Limited be the same as are in effect for all other Island Industrial customers; and

(c) a revision to the rules and regulations for the RSP to address the completion of the five-year collection period of the Historical Plan Balance.

DATED AT St. John's in the Province of Newfoundland and Labrador this 11th day of December 2008.

Geoffrey P. Young
Senior Legal Counsel
Newfoundland and Labrador Hydro,
500 Columbus Drive, P.O. Box 12400
St. John's, Newfoundland, A1B 4K7

IN THE MATTER OF the *Public Utilities Act,* (R.S.N. 1990, Chapter P-47 (the Act)*; and*

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for the approval, pursuant to Section 71 of the Act, of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers.

TO: The Board of Commissioners of Public Utilities (the Board)

AFFIDAVIT

I, James R. Haynes, Professional Engineer of St. John's, in the Province of Newfoundland and Labrador, make oath and swear as follows:

1. THAT I am employed by Newfoundland and Labrador Hydro, the Applicant herein, in the capacity of Vice-President, Regulated Operations, and as such I have knowledge of the matters and things to which I have herein deposed, and make this affidavit in support of the Application.

2. THAT I have read the contents of the Application and they are correct and true to the best of my knowledge, information and belief.

SWORN TO BEFORE ME in the City of St. John's, in the Province of Newfoundland and Labrador, this 11th day of December, 2008.

Barrister – Newfoundland and Labrador

James R. Haynes

(DRAFT ORDER)
NEWFOUNDLAND AND LABRADOR
AN ORDER OF THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

NO. **P.U. __ (2008)**

IN THE MATTER OF the *Public Utilities Act*, (R.S.N. 1990, Chapter P-47 (the *Act*), and

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro (Hydro) for the approval, pursuant to Section 70 (1) of the *Act*, of the Rate Stabilization Plan components of the rates to be charged to Island Industrial Customers.

WHEREAS Hydro is a corporation continued and existing under the *Hydro Corporation Act*, is a public utility within the meaning of the *Act* and is also subject to the provisions of the *Electrical Power Control Act, 1994*; and

WHEREAS Order No. P. U. 40 (2003) sets out the manner by which the Rate Stabilization Plan (RSP) is calculated and applied to the rates charged by Hydro to its Island Industrial Customers; and

WHEREAS on December 20, 2007, Hydro made an Application to the Board to approve and make an Interim Order that the rates currently in effect for Island Industrial Customers, which were approved in Order No. P. U. 8 (2007) and which are set out in Schedule A, continue in effect on an interim basis until such time as the Board issues a final order with respect to Island Industrial Customers' rates for 2008; and

WHEREAS Order No. P.U. 34 (2007) approved, on an interim basis, the Island Industrial Customer rates as attached in Schedule A, to be effective for consumption on and after January 1, 2008, until a final Order of the Board with respect to Island Industrial Customers' rates for 2008; and

WHEREAS Hydro has applied for approval of the continuation of Industrial Customer interim rates, approved, on an interim basis, in Order No. P.U. 34 (2007); and

WHEREAS Order No. P.U. 40 (2003) approved changes to the RSP with regards to the special treatment and recovery of "Historical Plan Balances" that had accumulated in the RSP as being owed to Hydro by its customers for energy consumed during periods ending December 31, 2003; and

WHEREAS On January 18, 2006 Hydro applied to the Board for approval of the provision of electrical service by Hydro to Aur Resources Inc. at the rates that apply to the provision of electrical service by Hydro to its other Island Industrial Customers and that the rates to be charged by the Applicant to Aur Resources Inc. for the electrical energy it consumes be exclusive of the Island Industrial Historical Plan Balance component of the RSP; and

WHEREAS Order No. P.U. 1 (2007) ordered that the rates, rules and regulations for Aur Resources Inc. should be similar to those of other Island Industrial Customers of Hydro except that, among other things, rates should exclude the Historical Plan Balance of the RSP; and

WHEREAS On December 31, 2007 the five-year collection period to recover the Historical Plan Balance ended as per Section E of Hydro's RSP, and thereby, in 2008 the Historical Plan Balance was set to zero and any remaining balance was included in the 2008 Plan; and

WHEREAS Hydro has applied for the RSP rate for Teck Cominco Limited (formerly Aur Resources Inc.) to be the same as is in effect for all other Island Industrial Customers; and

WHEREAS Hydro has applied for a revision to the RSP rules and regulations to remove reference to the Historical Plan Balance as set out in Schedule B of the application; and

WHEREAS the Board has considered Hydro's application and the information and calculations that accompanied it and is satisfied that the proposed rates to the Island Industrial class of customers is reasonable and prudent and will allow Hydro to manage the RSP balance in accordance with Order No. P. U. 40 (2003).

IT IS THEREFORE ORDERED THAT:

1. The Board hereby approves the continuation of the Industrial Customer interim rates attached hereto as Schedule "A".

2. The Board hereby approves the RSP rules as attached hereto as Schedule B to be effective January 1, 2009.

3. The Board hereby approves that the rates for Teck Cominco Limited be the same as are in effect for all other Island Industrial customers effective January 1, 2009.

Hydro shall pay the expenses of the Board incurred in connection with this matter.

DATED at St. John's, Newfoundland and Labrador, this __th day of December 2008.

Andrew Wells,
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.,
Vice-Chair

Dwanda Newman, LL.B
Commissioner

G. Cheryl Blundon,
Board Secretary

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – FIRM – (INTERIM)

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Demand Charge:

The rate for Firm Power, as defined and set out in the Industrial Service Agreements, shall be $6.68 per month per kilowatt of billing demand.

Firm Energy Charge:

Base Rate* ..... @ 3.676 ¢ per kWh

RSP Adjustment..... @ (0.785) ¢ per kWh

Energy Rate..... @ 2.891 ¢ per kWh

***Subject to RSP Adjustment:**

RSP Adjustment refers to all applicable adjustments arising from the operation of Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production, fuel cost, load and rural rates.

Specifically Assigned Charges:

The table below contains the additional specifically assigned charges for customer plant in service that is specifically assigned to the Customer.

	Annual Amount
Abitibi-Consolidated (Grand Falls)	$ 1,244
Abitibi-Consolidated (Stephenville)	$ 104,647
Corner Brook Pulp and Paper Limited	$ 347,167
North Atlantic Refining Limited	$ 150,976
Teck Cominco Limited	$ 186,169

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL – FIRM – (INTERIM) (continued)

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - NON-FIRM

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy.

Rate:

Non-Firm Energy Charge (¢ per kWh):

Non-Firm Energy is deemed to be supplied from thermal sources. The following formula shall apply to calculate the Non-Firm Energy rate:

$$\{(A \div B) \times (1 + C) \times (1 \div (1 - D))\} \times 100$$

A = the monthly average cost of fuel per barrel for the energy source in the current month or, in the month the source was last used

B = the conversion factor for the source used (kWh/bbl)

C = the administrative and variable operating and maintenance charge (10%)

D = the average system losses on the Island Interconnected grid for the last five years ending in 2005 (2.68%).

The energy sources and associated conversion factors are:

1. Holyrood, using No. 6 fuel with a conversion factor of 630 kWh/bbl
2. Gas turbines using No. 2 fuel with a conversion factor of 475 kWh/bbl
3. Diesels using No. 2 fuel with a conversion factor of 556 kWh/bbl.

Adjustment for Losses:

If the metering point is on the load side of the transformer, either owned by the customer or specifically assigned to the customer, an adjustment for losses as determined in consultation with the customer prior to January 31 of each year, shall be applied.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

NEWFOUNDLAND AND LABRADOR HYDRO

INDUSTRIAL - WHEELING

Availability:

Any person purchasing power, other than a retailer, supplied from the Interconnected Island bulk transmission grid at voltages of 66 kV or greater on the primary side of any transformation equipment directly supplying the person and who has entered into a contract with Hydro for the purchase of firm power and energy and whose Industrial Service Agreement so provides.

Rate:

Energy Charge:

All kWh (Net of losses)* ..... @ 0.384 ¢ per kWh

* For the purpose of this Rate, losses shall be 2.68%, the average system losses on the Island Interconnected Grid for the last five years ending in 2005.

General:

Details regarding the conditions of Service are outlined in the Industrial Service Agreements. **This rate schedule does not include the Harmonized Sales Tax (HST) which applies to electricity bills.**

The Rate Stabilization Plan of Newfoundland and Labrador Hydro (Hydro) is established for Hydro's Utility customer, Newfoundland Power, and Island Industrial customers to smooth rate impacts for variations between actual results and Test Year Cost of Service estimates for:

- hydraulic production;
- No. 6 fuel cost used at Hydro's Holyrood generating station;
- customer load (Utility and Island Industrial); and
- rural rates.

The formulae used to calculate the Plan's activity are outlined below. Positive values denote amounts owing from customers to Hydro whereas negative values denote amounts owing from Hydro to customers.

Section A: Hydraulic Production Variation

1. **Activity:**
   Actual monthly production is compared with the Test Year Cost of Service Study in accordance with the following formula:

   $$\{(A - B) \div C\} \times D$$

   Where:

   A = Test Year Cost of Service Net Hydraulic Production (kWh)
   B = Actual Net Hydraulic Production (kWh)
   C = Test Year Cost of Service Holyrood Net Conversion Factor (kWh /bbl.)
   D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)

2. **Financing:**
   Each month, financing charges, using Hydro's approved Test Year weighted average cost of capital, will be calculated on the balance.

3. **Hydraulic Variation Customer Assignment:**
   Customer assignment of hydraulic variations will be performed annually as follows:

   $$(E \times 25\%) + F$$

   Where:

   E = Hydraulic Variation Account Balance as of December 31, excluding financing charges
   F = Financing charges accumulated to December 31

   The total amount of the Hydraulic Customer Assignment shall be removed from the Hydraulic Variation Account.

4. Customer Allocation:

The annual customer assignment will be allocated among the Island Interconnected customer groups of (1) Newfoundland Power; (2) Island Industrial Firm; and (3) Rural Island Interconnected. The allocation will be based on percentages derived from 12 months-to-date kWh for: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The portion of the hydraulic customer assignment which is initially allocated to Rural Island Interconnected will be re-allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study.

The Newfoundland Power and Island Industrial customer allocations shall be included with the Newfoundland Power and Island Industrial RSP balances respectively as of December 31 each year. The Labrador Interconnected Hydraulic customer allocation shall be written off to Hydro's net income (loss).

Section B: Fuel Cost Variation, Load Variation and Rural Rate Alteration

1. Activity

1.1 Fuel Cost Variations

This is based on the consumption of No. 6 Fuel at the Holyrood Generating Station:

$$(G - D) \times H$$

Where:

D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)
G = Monthly Actual Average No. 6 Fuel Cost ($Can /bbl.)
H = Monthly Actual Quantity of No. 6 Fuel consumed less No. 6 fuel consumed for non-firm sales (bbl.)

1.2 Load Variations

Firm: Firm load variation is comprised of fuel and revenue components. The load variation is determined by calculating the difference between actual monthly sales and the Test Year Cost of service Study sales, and the resulting variance in No. 6 fuel costs and sales revenues. It is calculated separately for Newfoundland Power firm sales and Industrial firm sales, in accordance with the following formula:

$$(I - J) \times \{(D \div C) - K\}$$

Where:

C = Test Year Cost of Service Holyrood Net Conversion Factor (kWh /bbl.)
D = Monthly Test Year Cost of Service No. 6 Fuel Cost ($Can /bbl.)
I = Actual Sales, by customer class (kWh)
J = Test Year Cost of Service Sales, by customer class (kWh)
K = Firm energy rate, by customer class

Secondary: Secondary load variation is based on the revenue variation for Utility Firmed-Up Secondary energy sales compared with the Test Year Cost of Service Study, in accordance with the following formula:

$$(J - I) \times L$$

Where:
I = Actual Sales (kWh)
J = Test Year Cost of Service Sales (kWh)
L = Secondary Energy Firming Up Charge

1.3 Rural Rate Alteration

(a) Newfoundland Power Rate Change Impacts:
This component is calculated for Hydro's rural customers whose rates are directly or indirectly impacted by Newfoundland Power's rate changes, with the following formula:

$$(M - N) \times O$$

Where:

M = Cost of Service rate [1]
N = Existing rate
O = Actual Units (kWh, bills, billing demand)

(b) Rural Labrador Interconnected Automatic Rate Adjustments:
This component reflects the impact of the automatic rate adjustments for Hydro's rural customers on the Labrador Interconnected system, which arise from the phase-in of the application of the credit from secondary energy sales to CFB Goose Bay to the rural deficit.

Monthly adjustments will be subject to revision when a new Test Year Cost of Service is approved by the Public Utilities Board for Hydro. The amount of the automatic rate adjustment is calculated as follows:

1

- Hydro's schedule of rates for its rural customers not affected by the December 6th, 2006 Government directive.
- For customers affected by the December 6th, 2006 Government directive, the Cost of Service rate equals the phased-in 2007 Forecast Cost of Service Rates for diesel rate classes 1.2D, 2.1D and 2.2D.
- No Rural Rate Alternation will arise from the phase-in of 2007 Forecast Cost of Service rates for the customers affected by the December 6th, 2006 Government directive.

$$P = (Q - R) \div 12$$

Where:

P = the monthly amount of the automatic rate adjustment

Q = the CFB Revenue Credit applied to the rural deficit in Hydro's Final 2007 Test Year Cost of Service

R = the CFB Revenue Credit applied to the rural deficit from 2007 to 2011, included in existing rates and outlined in the table below:

	Q	R	Q - R	P
2008	$3,380,796	$2,991,599	$389,197	$32,433

2. **Monthly Customer Allocation: Load and Fuel Activity**
Each month, the load variation will be assigned to the customer class for which the load variation occurred.

Each month, the year-to-date total for fuel price variation will be allocated among the Island Interconnected customer groups of (1) Newfoundland Power; (2) Island Industrial Firm; and (3) Rural Island Interconnected. The allocation will be based on percentages derived from 12 months-to-date kWh for: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The year-to-date portion of the fuel price variation which is initially allocated to Rural Island Interconnected will be re-allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study.

The current month's activity for Newfoundland Power, Island Industrials and regulated Labrador Interconnected customers will be calculated by subtracting year-to-date activity for the prior month from year-to-date activity for the current month. The current month's activity allocated to regulated Labrador Interconnected customers will be removed from the Plan and written off to Hydro's net income (loss).

3. **Monthly Customer Allocation: Rural Rate Alteration Activity**
Each month, the rural rate alteration will be allocated between Newfoundland Power and regulated Labrador Interconnected customers in the same proportion which the Rural Deficit was allocated in the approved Test Year Cost of Service Study. The portion allocated to regulated Labrador Interconnected will be removed from the Plan and written off to Hydro's net income (loss).

4. **Plan Balances**
Separate plan balances for Newfoundland Power and for the Island Industrial customer class will be maintained. Financing charges on the plan balances will be calculated monthly using Hydro's approved Test Year weighted average cost of capital.

Section C: Fuel Price Projection

A fuel price projection will be calculated to anticipate forecast fuel price changes and to determine fuel riders for the rate adjustments. For industrial customers, this will occur in October each year, for inclusion with the RSP adjustment effective January 1. For Newfoundland Power, this will occur in April each year, for inclusion with the RSP adjustment effective July 1.

1. Industrial Fuel Price Projection:

In October each year, a fuel price projection for the following January to December shall be made to estimate a change from Test Year No. 6 Fuel Cost. Hydro's projection shall be based on the change from the average Test Year No. 6 fuel purchase price, in Canadian dollars per barrel, determined from the forecast oil prices provided by the PIRA Energy Group, and the current US exchange rate. The calculation for the projection is:

$$[\{(S - T) \times U\} - V] \times W$$

Where:

S = the September month-end PIRA Energy Group average monthly forecast for No. 6 fuel prices at New York Harbour for the following January to December

T = Hydro's average Test Year contract discount (US $/bbl)

U = the monthly average of the $Cdn / $US Bank of Canada Noon Exchange Rate for the month of September

V = average Test Year Cost of Service purchase price for No. 6 Fuel ($Can /bbl.)

W = the number of barrels of No. 6 fuel forecast to be consumed at the Holyrood Generating Station for the Test Year. .

The industrial customer allocation of the forecast fuel price change will be based on 12 months-to-date kWh as of the end of September and is the ratio of Industrial Firm invoiced energy to the total of: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy.

The amount of the forecast fuel price change, in Canadian dollars, and the details of an estimate of the fuel rider based on 12 months-to-date kWh sales to the end of September will be reported to industrial customers, Newfoundland Power, and the Public Utilities Board, by the 10th working day of October.

2. Newfoundland Power Fuel Price Projection:

In April each year, a fuel price projection for the following July to June shall be made to estimate a change from Test Year No. 6 Fuel Cost. Hydro's projection shall be based on the change from the average Test Year No. 6 fuel purchase price, in Canadian dollars per barrel, determined from the forecast oil prices provided by the PIRA Energy Group, and the current US exchange rate. The calculation for the projection is:

$$[\{(X - T) \times Y\} - V] \times W$$

Where:

T = Hydro's average Test Year contract discount (US $/bbl)

V = average Test Year Cost of Service purchase price for No. 6 Fuel ($Can /bbl.)

W = the number of barrels of No. 6 fuel forecast to be consumed at the Holyrood Generating Station for the Test Year. For the 2007 Test Year, test year barrels are reduced by 323,336 based on the reduction in forecast Island Industrial customer load caused by the shutdown of one of the paper machines at Corner Brook Pulp and Paper.

X = the average of the March month-end PIRA Energy Group average monthly forecast for No. 6 fuel prices at New York Harbour for the following July to December, and the most recent long-term PIRA Energy Group average annual forecast for No. 6 fuel prices at New York Harbour for the following January to June.

Y = the monthly average of the $Cdn / $US Bank of Canada Noon Exchange Rate for the month of March.

The Newfoundland Power customer allocation of the forecast fuel price change will be based on 12 months-to-date kWh as of the end of March and is the ratio of Newfoundland Power Firm and Firmed-Up Secondary invoiced energy to the total of: Utility Firm and Firmed-Up Secondary invoiced energy, Industrial Firm invoiced energy, and Rural Island Interconnected bulk transmission energy. For the 12 months-to-date (April 2007 - March 2008) Industrial Firm invoiced energy is reduced by 115,700,000 kWh to reflect the forecast reduction in CBPP load.

The amount of the forecast fuel price change, in Canadian dollars, and the details of the resulting fuel rider applied to the adjustment rate will be reported to Newfoundland Power, industrial customers, and the Public Utilities Board, by the 10th working day of April.

Section D: Adjustment

1. Newfoundland Power

As of March 31 each year, Newfoundland Power's adjustment rate for the 12-month period commencing the following July 1 is determined as the rate per kWh which is projected to collect:

Newfoundland Power March 31 Balance

less projected recovery / repayment of the balance for the following three months (if any), estimated using the energy sales (kWh) for April, May and June from the previous year

plus forecast financing charges to the end of the 12-month recovery period (i.e., June in the following calendar year),

divided by the 12-months-to-date firm plus firmed-up secondary kWh sales to the end of March.

A fuel rider shall be added to the above adjustment rate, based on the Newfoundland Power Fuel

Price Projection amount (as per Section C.2 above) divided by 12-months-to-date kWh sales to the end of March.

When new Test Year base rates come into effect, if a fuel rider forecast (either March or September) is more current than the test year fuel forecast, a fuel rider will be implemented at the same time as the change in base rates reflecting the more current fuel forecast and the new test year values.

Otherwise, the fuel rider portion of the RSP Adjustment will be set to zero upon implementation of the new Test Year Cost of Service rates, until the time for the next fuel price projection.

2. Island Industrial Customers

As of December 31 each year, the adjustment rate for industrial customers for the 12-month period commencing January 1 is determined as the rate per kWh which is projected to collect:

Industrial December 31 Balance

plus forecast financing charges to the end of the following calendar year,

divided by 12-months-to-date kWh sales to the end of December.

A fuel rider shall be added to the above adjustment rate, based on the Industrial Fuel Price Projection (as per Section C.1 above) amount divided by 12-months-to-date kWh sales to the end of December.

When new Test Year base rates come into effect, if a fuel rider forecast (either March or September) is more current than the test year fuel forecast, a fuel rider will be implemented at the same time as the change in base rates reflecting the more current fuel forecast and the new test year values. Otherwise, the fuel rider portion of the RSP Adjustment will be set to zero upon implementation of the new Test Year Cost of Service rates, until the time for the next fuel price projection.

~~**Section E: Historical Plan Balances:**~~

~~**1. August 2002 Balance:**~~

~~Newfoundland Power and Island Industrial customer balances accumulated in the Plan as at August 2002 will be recovered over a 5-year collection period, with adjustment rates established each December 31, commencing December 31, 2002. Financing charges on the plan balances will be calculated monthly using Hydro's approved Test Year annual weighted average cost of capital.~~

~~**Newfoundland Power**~~

~~The adjustment rate for each year of the five-year adjustment period will be determined as follows:~~

~~$A = (B - C + D) \div E \div F$~~

~~where~~

~~A = adjustment rate ($ per kWh) for the 12-month period commencing the following July 1.~~

~~B = Balance December 31~~

~~C = projected recovery to the following June 30 (if any), estimated using the most recent energy sales (kWh) for the period January to June.~~
~~D = projected financing charges to the following June 30~~
~~E = number of years remaining in the adjustment period~~
~~F = energy sales (kWh) (firm and firmed-up secondary) to Newfoundland Power for the most recent 12 months ended December 31~~

~~Recovery and financing will be applied to the balance each month. At the end of the five-year recovery period, any remaining balance will be added to the plan then in effect.~~

~~**Island Industrial Customers, excluding Teck Cominco Limited [Exempted pursuant to Order No. P.U.1(2007)]**~~
~~The adjustment rate for each year of the five-year adjustment period will be determined as follows:~~

~~G = H ÷ I ÷ J~~

~~where~~

~~G = adjustment rate ($ per kWh) for the 12-month period commencing the following January 1.~~
~~H = Balance December 31~~
~~I = number of years remaining in the adjustment period~~
~~J = firm energy sales (kWh) to Industrial Customers, excluding sales to Aur Resources Inc., for the most recent 12 months ended December 31~~

~~Recovery and financing will be applied to the balance each month. At the end of the five-year recovery period, any remaining balance will be added to the plan then in effect.~~

~~**2. RSP Balance, December 31, 2003:**~~

~~Newfoundland Power and Island Industrial customer balances accumulated in the Plan as at December 31, 2003 will be consolidated with the outstanding August 2002 customer balances as of December 31, 2003, and will be included with the Newfoundland Power and Island Industrial customer balances respectively for rate-setting purposes as of December 31, 2003.~~