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November 21, 2024
File No.: 240148.00971

Via Electronic Filing

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Energy Inc. – Application for a Certificate of Public Convenience and Necessity for the Okanagan Capacity Mitigation Project

We enclose for filing in the above proceeding the Final Submission of FortisBC Energy Inc., dated November 21, 2024.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Tariq Ahmed

Encl.

cc (email only): Registered Interveners

British Columbia Utilities Commission

FortisBC Energy Inc.

Application for a Certificate of Public Convenience and Necessity for the Okanagan Capacity Mitigation Project

Final Submission of FortisBC Energy Inc.

November 21, 2024

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PART ONE: INTRODUCTION

1. Customers of FortisBC Energy Inc. (FEI) have, for decades, relied on FEI to provide a dependable supply of gas at all times of the year so that they can heat their homes and operate their businesses. However, demand growth in the Okanagan has pushed FEI's system to its limits, to the point where, for the first time, customers reliant on firm service are at serious risk of being left without energy for heat and commercial uses in the coldest periods of winter. The BCUC has already confirmed the imminent need for additional system capacity. The Okanagan Capacity Mitigation Project (OCMP or the Project), as described in the application (Application)[1] and responses to information requests (IRs), meets the vital public interest of Okanagan customers continuing to receive uninterrupted service in the winter.

2. FEI developed the OCMP in response to the BCUC's Decision and Order G-361-23 dated December 22, 2023 (OCU Decision), in which the BCUC denied FEI's application for a certificate of public convenience and necessity (CPCN) for the Okanagan Capacity Upgrade (OCU) project. While the BCUC denied the CPCN for the OCU project, the BCUC found that a capacity shortfall on FEI's Interior Transmission System (ITS) is imminent and that there is a need to address this shortfall.[2] The BCUC noted that denying the CPCN for the OCU Project would put additional stress on the ITS' capacity levels, and that existing mitigation efforts would only provide short-term relief ending in the winter of 2026/2027. The BCUC determined that "[r]egardless of the approach taken, it is clear there is a need for FEI to address the ITS' projected capacity shortfall in a timely manner."[3]

3. The OCMP will be in service before the winter of 2026/2027 to ensure that, in conjunction with short-term temporary mitigation measures, FEI can avoid the serious risk of Okanagan customers losing gas service in the coldest periods of that winter. The OCMP will, for the life of the assets, provide approximately 14 TJ/d of additional peak capacity, which is the most capacity that can reasonably be provided given the size of the available site. While this is enough capacity

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1 Exhibit B-1, Application.

2 OCU Decision, p. 23.

3 OCU Decision, p. 25.

to reduce FEI's ongoing reliance on what should be regarded as temporary mitigation measures, further capital investment would be required to address demand beyond the winter of 2028/2029.[4]

4. The evidence demonstrates that the OCMP is the best alternative that can be constructed in the short time available to address the immediate need for a source of peaking supply in the Okanagan. FEI has properly evaluated the technical design, scope, cost, and environmental, archaeological and societal impacts of the OCMP.

5. FEI acknowledges that there is some opposition to the OCMP, though it is notable that all but two of the Letters of Comment filed in this proceeding appear to have been authored by people who are not affected by the imminent capacity shortfall, yet are effectively advocating for some customers to be exposed the risk of being without heat for a prolonged period in sub-zero temperatures. The result would be inequitable treatment of customers – customers in the parts of the Okanagan that stand to be affected by a shortfall will pay the same rate as customers elsewhere, but receive a substantially lower quality of service that entails self-evident health, safety and economic consequences. The BCUC should instead uphold the longstanding utility planning practice of ensuring that the system is capable of reliably serving firm customers throughout the year, which results in the fair and equitable treatment of customers across the system.

6. Therefore, FEI respectfully submits that the OCMP is in the public interest. The BCUC should grant a CPCN[5] pursuant to sections 45 and 46 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 (UCA). The BCUC should also approve:

- The proposed depreciation rate of 3.33 percent and a net salvage rate of 0.5 percent applicable to the new small-scale liquefied natural gas (LNG) tanks and vaporization (i.e., send-out) equipment as well as the LNG transport trailers related to the OCMP.

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[4] Exhibit B-1, Application, pp. 15-16.

[5] A draft form of Order sought is included as Appendix K-2 to the Application.

- The proposed treatment of the Application and Preliminary Stage Development costs related to the OCMP.

- Recovery of the actual preconstruction development costs related to the original OCU project, which were incurred from 2018 to 2023 to address the same imminent capacity shortfall in the region, through amortization of the newly titled OCMP Application and Preliminary Stage Development Costs deferral account over the requested four-year period.

Organization of Submissions

7. These Final Submissions are organized around the following points:

- **Part Two: The OCMP Project Is Needed to Avoid Imminent Service Interruptions** – Prior BCUC findings and FEI's further evidence in this proceeding establish a clear and imminent need for additional capacity in the Okanagan to maintain uninterrupted service to customers in the coldest periods of winter.

- **Part Three: FEI Has Appropriately Analyzed the Project Alternative**s – FEI evaluated the alternatives to meet the project need against appropriate criteria. The preferred Small Scale LNG Storage Facility is superior to the other feasible options in a number of respects.

- **Part Four: Project Description and Cost Estimate** – FEI has defined the OCMP, including its location, technical requirements and estimated costs, and considered and accounted for project risks, all in accordance with the CPCN Guidelines.

- **Part Five: OCMP Accounting Treatment and Financial Requests** – The requested accounting treatment for costs related to the OCMP is consistent with prior BCUC approvals and promotes intergenerational equity.

- **Part Six: Minimal Environmental and Archaeological Impacts Are Expected** – FEI expects minimal environmental and archaeological impacts for the Project based

on its preliminary assessment. Consistent with typical practice, FEI will continue to assess these impacts and use standard management practices and measures to mitigate them.

- **Part Seven: FEI's Ongoing Engagement Activities** – FEI has undertaken meaningful engagement with stakeholders and Indigenous Nations throughout the course of developing the OCMP, and will continue to do so.

- **Part Eight: Alignment with Provincial Energy and Climate Objectives** – The OCMP is aligned with the applicable British Columbia energy objectives, including by encouraging economic development and the creation and retention of jobs, and is not inconsistent with the provincial energy and climate objective to reduce greenhouse gas emissions.

- **Part Nine: Issues Raised by the BCUC** – There is no basis to deviate from the BCUC's typical approach to CPCN approvals, particularly given that the OCMP is intended to serve an imminent need.

PART TWO: THE OCMP IS NEEDED TO AVOID IMMINENT SERVICE INTERRUPTIONS

8. In this Part, FEI discusses the prior BCUC findings and evidence that establish a clear and imminent need for additional capacity in the Okanagan to maintain uninterrupted service to customers. Starting in the winter of 2026/2027, Okanagan customers who depend on gas for heat and commercial uses are at serious risk of being left without it in the coldest periods of winter. FEI submits that this would be an unacceptable outcome, in light of the self-evident health and safety implications, and financial harm to customers.

9. This Part is organized around the following supporting points:

- In the OCU Decision, the BCUC found that there was an imminent capacity shortfall on the ITS that needed to be addressed.
- The 2023 peak demand forecast confirms the need for the OCMP by the winter of 2026/2027, as FEI is facing an immediate and worsening capacity shortfall despite short-term mitigation measures.
- Recent data supports the validity of the 2023 peak demand forecast.
- The OCMP is driven by near term demand that has been acknowledged by the BCUC. This need will not disappear by virtue of policy development and dual-fuel heating technologies. Further, not all gas uses are prevented by the Zero Carbon Step Code, which does not become mandatory until 2030. While longer term load growth is up for debate, the OCMP will remain in the resource stack and be fully utilized going forward.
- FEI's reliance on current short-term temporary mitigation measures creates reliability risk and uncertainty that peak demand will be met.
- The OCMP has been scoped to address the incremental demand from customers forecast to connect to the system between now and 2029. A future project that augments the incremental capacity provided to the ITS by the OCMP will be

needed to address the needs of further customer demand increases beyond the winter of 2028/2029, but FEI requires time for it to be developed.

A. THE OCU DECISION DETERMINED PROJECT NEED

10. In the OCU Decision, the BCUC found that a capacity shortfall on FEI's ITS is imminent and that there is a need to address this shortfall.[6] The BCUC noted that denying the CPCN for the OCU project would "put additional stress on the ITS' capacity levels and existing mitigation efforts would only provide short-term relief ending in the winter of 2026/2027."[7] The BCUC determined that "[r]egardless of the approach taken, it is clear there is a need for FEI to address the ITS' projected capacity shortfall in a timely manner."[8]

11. The need has only become more acute in the time since the OCU Decision, as described below.

B. THE 2023 PEAK DEMAND FORECAST CONFIRMS THE NEED FOR THE OCMP BY THE WINTER OF 2026/2027

12. The 2023 Peak Demand Forecast is FEI's most up-to-date peak demand forecast and was developed using the established methodology that was used in prior years. It is based on FEI's forecast of customer growth for 2023 and the 2022 year-end customer attachment and load data.[9] The 2023 Peak Demand Forecast confirms that there will be a capacity shortfall on the ITS by the winter of 2026/2027 that cannot be addressed with the short-term temporary mitigation measures that FEI has already implemented.[10] While there may be developments that affect the longer term peak demand trajectory which will be taken into account in future peak demand forecasts as discussed later in these submissions, these developments will not affect the short-term peak demand to 2028/2029 that the OCMP is designed to address.

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6 OCU Decision, p. 23.

7 OCU Decision, p. 25.

8 OCU Decision, p. 25.

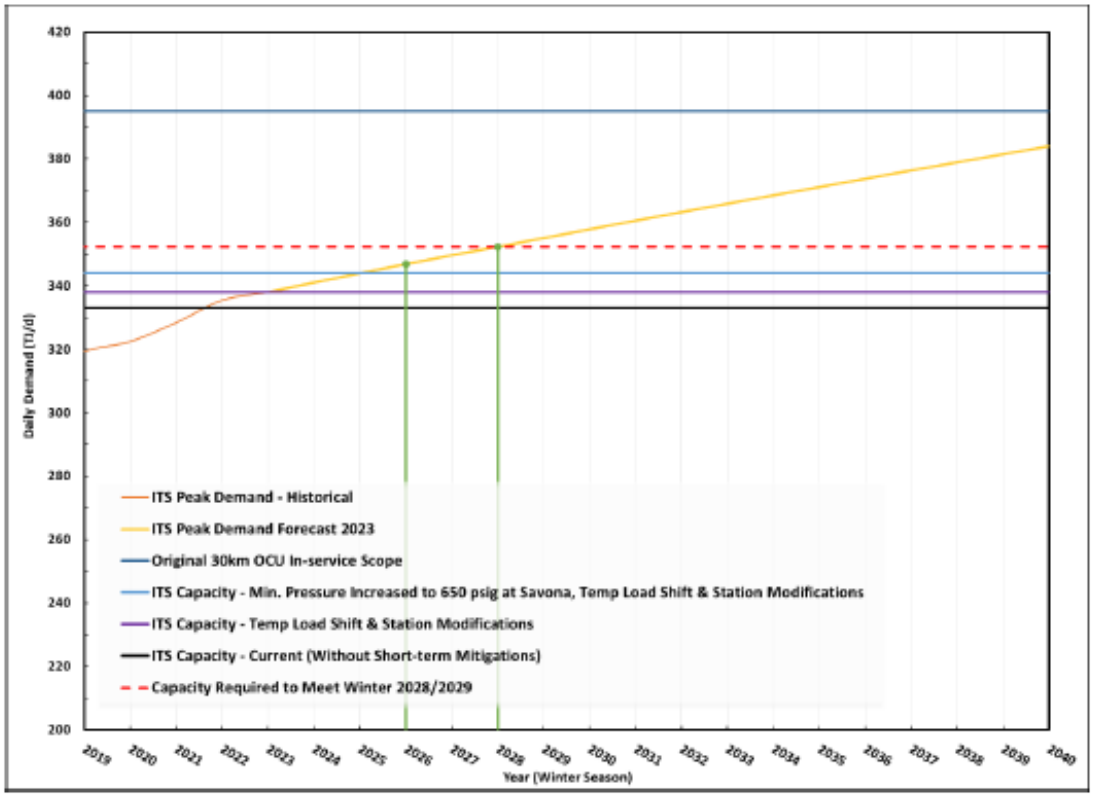
9 Exhibit B-1, Application, p. 12.

10 Exhibit B-1, Application, p. 11.

13. The following figure shows the 2023 Peak Demand Forecast (the solid yellow line), and the extent to which that peak demand is met by the short-term mitigation measures that FEI has been using since the winter of 2022/2023. The figure shows:[11]

- the 2023 Peak Demand Forecast (the solid yellow line) has already exceeded both the Current ITS Capacity (the solid black line) and the ITS Capacity with temporary load shifting and station modifications (solid purple line); and
- the 2023 Peak Demand Forecast is expected to exceed the ITS capacity with all of the short-term temporary capacity mitigations, namely 650 psig at Savona, temporary load shifting and station modifications (the solid light blue line), after the winter of 2025/2026.

Figure 3-1: 2023 Peak Demand Forecast



[11] Exhibit B-1, Application, p. 12.

14. In other words, based on the 2023 Peak Demand Forecast, by the winter of 2026/2027, the delivery requirements of the system in a 1-in-20-year cold weather event will exceed the delivery capacity of the system, even with the short-term temporary mitigation measures in place. The effect of this would be to leave customers without service on the coldest days of the year.[12]

C. RECENT DATA SUPPORTS VALIDITY OF 2023 PEAK DEMAND FORECAST

15. The validity of the 2023 Peak Demand Forecast is confirmed by actual year-end customer attachments for 2023 and 2023 peak use per customer.

16. FEI is currently in the process of completing the new peak demand forecast using the 2023 year-end data. As such, the 2024 peak demand forecast is not currently available. However, given the 2023 year-end data shows close alignment to the 2023 forecast, the 2023 Peak Demand Forecast provided in the Application remains valid for forecasting the near-term peak demand, and there is no impact to how FEI would scope the OCMP.[13]

17. The 2023 year-end data continues to show an upward trend of customer attachments in the Okanagan regions served by the ITS. The difference between the 2023 forecast and the 2023 actual year-end data is small.[14] FEI observed that:[15]

- The actual increase for RS 1 (Residential) customers in 2023 was similar to the 2023 forecast, with the difference being approximately 0.4 percent, while the UPCpeak remained essentially unchanged. As such, there would be no change to the near-term peak demand due to RS 1 customers.[16]

- Although the actual increases for RS 2 (Small Commercial) and RS 3 (Large Commercial) customers were higher than the 2023 forecast, the increase in the

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12 Exhibit B-4, BCSEA IR1 2.1.

13 Exhibit B-3, BCUC IR1 1.2; Exhibit B-6, CEC IR1 1.1.

14 Exhibit B-3, BCUC IR1 1.1 and 1.2.

15 Exhibit B-3, BCUC IR1 1.1 and 1.2.

16 Exhibit B-3, BCUC IR1 1.2.

peak demand due to the higher customer count is offset by the small reduction in the UPCpeak of both rate classes. Given RS 2 and RS 3 customers are only approximately 8.4 percent and 0.5 percent of the ITS total customer count in 2023, respectively, the impact to the near-term ITS peak demand forecast due to the higher than forecast increase in commercial customer count is expected to be small.[17]

- There is essentially no change between the 2023 forecast and actual industrial customer count (i.e., a net decrease of one customer between 2023 forecast and 2023 actual for RS 4, 5/25, 6, 7/27, and 22). FEI does not expect the near-term peak demand forecast would change due to the net decrease of one industrial customer.[18]

D. SHORT-TERM DEMAND UNAFFECTED BY POLICY AND DUAL-FUEL HEATING DEVELOPMENTS

18. The OCMP is driven by near term demand that has been acknowledged by the BCUC. This short-term need will not disappear by virtue of policy development and dual-fuel heating technologies. While longer term load growth is uncertain, the OCMP is a resource that will remain in the resource stack and be fully utilized going forward. Developments such as the BCUC's decision in the Revised Renewable Gas Comprehensive Review (RRGCR), changes to the BC Building Code, and electrification are not expected to result in any change to peak demand in the near-term nor avert the need for the Project.

(a) Short-Term Peak Demand Forecast and OCMP Scope Unaffected by RRGCR

19. FEI does not anticipate a change to its short-term peak demand forecast, nor the scope of the OCMP, due to the BCUC's decision in the RRGCR.

20. Municipalities in the Interior have not yet adopted advanced steps of the BC Energy Step Code in comparison to the Lower Mainland, nor has there been the same level of adoption of the

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[17] Exhibit B-3, BCUC IR1 1.2.

[18] Exhibit B-3, BCUC IR1 1.2.

Zero Carbon Step Code in the Okanagan region. Accordingly, FEI continues to connect customers that request gas service and the OCMP is sized to serve peak demand that is anticipated in the short-term.[19]

21. As described later in these submissions, FEI intends to develop a follow-up project consistent with the guidance provided by the BCUC in the OCU Decision that will address peak demand beyond the winter of 2028/2029. This follow-up project is intended to be scoped using a revised approach to forecasting peak demand and will reflect any policy-driven changes that have been enacted. Further, FEI will have the benefit of additional actual data at that time.[20]

(b) Short-Term Peak Demand Forecast and OCMP Scope Unaffected by BC Building Code

22. In the short-term, FEI also does not anticipate a change to its peak demand forecast as the current legislative requirements, including the BC Building Code, allow FEI to continue connecting customers to the gas system that request gas service, consistent with FEI's obligation to provide service to new customers.[21]

23. Over the longer-term, growth in peak demand could flatten as higher levels of the BC Energy Step Code and Zero Carbon Step Code become mandatory (2032 and 2030, respectively), absent any changes that would allow gas heating technologies in buildings. However, changes in building codes do not apply to all gas uses (e.g., cooking is excluded) or all gas customers (e.g., restaurants and industrial customers are excluded) so there remains some uncertainty on the timing and pace at which peak demand growth may change.[22]

(c) Dual-Fuel Heating Programs and Alternative Rate Structures Will Not Reduce Short-Term Demand

24. Programs such as dual-fuel heating system rebates or alternative rate structures are not a viable alternative in the short-term to avoid the need for the OCMP or reduce the sizing of the

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[19] Exhibit B-3, BCUC IR1 1.3.

[20] Exhibit B-3, BCUC IR1 1.3.

[21] Exhibit B-8, RCIA IR1 3.1.

[22] Exhibit B-8, RCIA IR1 3.1; Exhibit B-3, BCUC IR1 1.3.

OCMP given the imminent capacity shortfall on the ITS. Additionally, beyond the time period considered for the OCMP (i.e., beyond 2028/2029), gas demand in the Okanagan is expected to continue to outpace the ability of demand-side management (DSM) programs to reduce peak gas demand.[23]

25. While an electric heating rebate program has the potential to reduce annual gas demand, the extent to which potential uptake over the long-term could advance is not known with the level of certainty that is required for infrastructure planning to serve peak demand. FEI's ability to implement measures, whether a heat pump program or otherwise, over the longer-term to reduce peak capacity in the area served by the OCMP is uncertain because of uncertainty over customer adoption.[24]

26. Further, dual-fuel heating systems will reduce annual gas demand (and therefore GHGs) but are unlikely to have a material impact on peak demand.[25] Currently, dual-fuel systems are designed so that below a certain temperature (switch-over temperature) the entire heating load is provided by the gas furnace with none of the heating load provided by the heat pump. As a result, the gas peak load could only be affected by the difference in efficiency between a customer's existing furnace and the furnace that would be acquired with a dual-fuel system.[26]

27. Additionally, while FEI can offer a dual-fuel heating rebate, a customer must choose to participate. A customer's decision to participate can be influenced by access to capital and personal preferences, among other things, and FEI cannot predict how many customers will participate, the timing, or how much peak demand may change from the aforementioned difference in the efficiency between dual-fuel furnaces and the furnaces being replaced. Therefore, FEI does not consider adoption of dual-fuel heating systems as an alternative to, or mitigative of the need for, the OCMP.[27]

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[23] Exhibit B-3, BCUC IR1 2.1.

[24] Exhibit B-3, BCUC IR1 2.1.

[25] Exhibit B-3, BCUC IR1 2.4.

[26] Exhibit B-3, BCUC IR1 2.4. See also Exhibit B-7, FTFO IR1 2.2.

[27] Exhibit B-3, BCUC IR1 2.4.

28. FEI also did not consider alternative rate structures as a means to shed peak demand. While price signals, by way of rate structures, can provide a conservation signal, the price elasticity of demand for natural gas is very low, especially in the short term.[28] While price (via rate structure) can have a conservation impact in the long run, a change in rate structure would have little to no impact on peak demand in the short-term when considering the low price elasticity of natural gas.[29]

29. As stated by the BCUC in the OCU Decision, "it is clear there is a need for FEI to address the ITS' projected capacity shortfall in a timely manner." While FEI will be considering programs such as dual-fuel systems and different rate structures/rate designs in the future, none of these approaches are appropriate for addressing the immediate need to implement a solution that will be in service before the winter of 2026/2027 to ensure the capacity requirements in the Okanagan region can be met and customers continue to receive service on the coldest days of the year.[30]

(d) FEI Cannot Prioritize Electric Connections

30. FEI has not implemented, and does not currently plan to implement, any programs that overtly prioritize electric connections over gas connections for new buildings. Such an approach is not mandated by the existing legislation or regulations and would be inconsistent with FEI's tariff and the legal obligations on public utilities to serve customers.[31]

31. Customers are able to request new gas connections, including beyond the winter of 2028/2029 when the OCMP will no longer be sufficient to meet forecast peak demand. The Zero Carbon Step Code initiatives come into place in 2030, and even after 2030, not all end uses for gas are precluded (e.g., cooking, restaurants and industrial uses).[32]

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28 Exhibit B-3, BCUC IR1 2.4.

29 Exhibit B-3, BCUC IR1 2.4.

30 Exhibit B-3, BCUC IR1 2.4.

31 Exhibit B-3, BCUC IR1 2.2.

32 Exhibit B-3, BCUC IR1 2.2.

32. When a customer requests service, public utilities like FEI have a duty under the UCA to provide service to all persons that request it, and to do so without undue discrimination or undue delay. This is mandated in the UCA, including in sections 28, 38 and 39. The obligation to provide service to customers within a service territory is part and parcel of the regulatory compact that is fundamental to utility regulation. As the Supreme Court of Canada noted in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy &* Utilities *Board)*, 2006 SCC 4 at paragraph 63, "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."

33. The duty to serve exists to protect the public, specifically to prevent monopoly utilities from denying access to an essential service to persons that desire it. In *Princeton Light & Power Co. Ltd. v. MacDonald*, 2005 BCCA 296, the BC Court of Appeal considered sections 38 and 39 (the duty to serve provisions), and Justice Huddart stated (at para. 47):

> That provision [section 38], together with s. 39 (as did ss. 23 and 26 of the predecessor *Energy Act*, S.B.C. 1973, c. 29), affirms the common law obligation of a body "having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public . . . to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers": *Chastain et al. v. British Columbia Hydro and Power Authority* (1972), 1972 CanLII 985 (BC SC), 32 D.L.R. (3d) 443, (B.C.S.C.) per McIntyre J. at 454.
>
> [Emphasis added.]

34. FEI's BCUC-approved tariff abides by this obligation to serve, allowing potential customers to connect, and to do so in a non-discriminatory manner. In contrast, the prioritization of electric service would contradict FEI's duty to serve. Its intent would be to discourage or prohibit certain connections for potential new customers.[33]

35. Such an approach would also introduce undue discrimination in connections and service. It would require making distinctions among similarly situated potential customers in furtherance

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[33] Exhibit B-3, BCUC IR1 2.2.

of a particular outcome, rather than being based on the cost of service or a standard Bonbright rate design principle.[34]

36. Further, it is not clear that significantly increased electrification has the potential to provide service in the near term. The FortisBC Inc. (FBC) 2021 Long Term Electric Resource Plan (LTERP), accepted by the BCUC in December 2022, sets out and explains its long-term plan for meeting the forecast peak demand and energy requirements of customers with demand-side and supply-side resources over the 20-year planning horizon. The LTERP compares energy and capacity load forecasts against current resource capabilities and evaluates the potential for load reduction with DSM initiatives and other options specific to electric vehicle charging. Even after undertaking DSM, FBC's reference case scenario, which at that time did not contain any building electrification, showed that energy resource gaps begin in 2023 and capacity gaps begin in 2031. In the subsequent Kelowna Electrification Case Study, FBC demonstrated how there are electric grid power capacity constraints in the City of Kelowna, and that alternate scenarios with electrification could result in significant infrastructure requirements.[35]

37. The OCMP is responding to increasing customer-driven peak demand for gas. Electric DSM and code changes do not impact the immediate need for additional capacity into the region and are, therefore, not an alternative to the OCMP.

E. MITIGATION MEASURES IN PLACE SINCE 2022 ARE ONLY A TEMPORARY SOLUTION

38. In the absence of a capacity project, FEI has needed to rely on some short-term temporary mitigation measures since 2022 to meet peak capacity demand for a 1-in-20 year cold weather event.[36] The temporary measures available include: (1) minimum pressure increase; (2) temporary load shifting; and (3) station modifications. FEI will need to continue relying on some of these measures even with the OCMP in place. However, they are only a temporary solution

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[34] Exhibit B-3, BCUC IR1 2.2.

[35] Exhibit B-7, FTFO IR1 2.1.1.

[36] Exhibit B-1, Application, p. 14.

due to continued demand growth and the additional reliability risk associated with the temporary measures.

(a) Combination of Temporary Mitigation Measures and the OCMP Will Be Insufficient After Winter 2028/2029

39. Based on forecast demand growth, even the combination of the OCMP and the temporary mitigation measures will no longer be sufficient after the winter of 2028/2029.[37]

(b) Temporary Mitigation Measures Involve Significant Reliability Risk

40. FEI's reliance on the existing temporary mitigation measures indefinitely is not appropriate as it would involve excessive risk of service interruptions.[38]

41. By the winter of 2028/2029, even with the OCMP, every mitigation measure must be functioning to its full capabilities to avoid a capacity shortfall. This is not a given.

42. Some of the short-term mitigation measures are within the control of FEI, including temporary load shifting and station modifications, which provide approximately 5 TJ/d deliverability.[39] However, FEI would be exposed to the human element required in operating the station modifications during a cold weather event.[40]

43. The minimum pressure increase mitigation measure, in which Enbridge will attempt to temporarily maintain the Savona tap pressure at 650 psig to provide approximately 6 TJ/d of additional deliverability, is outside of FEI's control.[41]

44. FEI does not have any firm pressure commitments as Enbridge does not provide any firm contractual guarantees for pressure commitments in relation to the Savona tap. While Enbridge operates the T-South system by striving to maintain a minimum pressure of 500 psig, and while it may operate sections of its system in excess of this pressure in some instances, the risk of a

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37 Exhibit B-4, BCSEA IR1 2.1.

38 Exhibit B-4, BCSEA IR1 2.1.

39 Exhibit B-1, Application, p. 14.

40 Exhibit B-1, Application, p. 17.

41 Exhibit B-1, Application, p. 14.

compression interruption or facilities failure does not allow Enbridge to provide a pressure guarantee.[42] If the minimum operating pressure cannot be maintained, as could be the case in the event of a compressor outage or low line-pack, Enbridge retains the right to cut firm service, including agreed to shipper nominated energy. This right to cut firm service is part of ensuring the safe operation of the system. Furthermore, Enbridge has no obligation to provide compensation to FEI, or any other shipper on its system, if firm service cuts occur.[43]

45. FEI engaged with Enbridge in extensive discussions regarding the potential for a firm minimum pressure guarantee of 650 psig, or similar level, at the Savona tap. However, Enbridge would not agree to such a commitment. Enbridge will, nevertheless, attempt to maintain a minimum pressure of 650 psig at the Savona tap for short-term occurrences when requested by FEI. This understanding is not a firm contractual commitment and there is no guarantee that Enbridge will be able to provide or maintain pressure at 650 psig when FEI requests it.[44]

46. Recent data has shown the Savona Tap pressure drop below 650 psig during peak periods:[45]

- During the December 2022 period of peak demand, the pressure reached as low as 543 psig. Increases prior to and following periods of peak daily demand were essential to allow the pipeline to build and regain its linepack, which is generally reduced during the peak hours within a day. Maintaining only 543 psig would not allow for lost linepack to be regained during peak demand periods, which would lead to a cumulative reduction in deliverability through sustained periods of cold weather and high demand. While theoretical in this instance, it could have required FEI to curtail loads to prevent system collapse.

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[42] Exhibit B-3, BCUC IR1 5.3.

[43] Exhibit B-3, BCUC IR1 5.3.

[44] Exhibit B-3, BCUC IR1 5.5.

[45] Exhibit B-3, BCUC IR1 5.4.2.

- During the January 2024 period of peak demand, the minimum observed pressure was 612 psig. Between 7AM January 12 and 7AM January 13, the tap pressure was between 650 and 612 psig and FEI's Savona compressor was unable to maintain its discharge pressure setpoint during the peak hour periods in each of the mornings. Should the tap pressure have been at most 612 psig during this entire cold-weather event, the resultant discharge pressure from FEI's Savona compressor, and correspondingly the downstream delivery pressure at the Polson and Kelowna Gate Stations, would have been significantly reduced, posing a serious threat to deliverability.

F. A FUTURE PROJECT THAT BUILDS ON THE OCMP WILL BE NEEDED BUT REQUIRES TIME TO BE DEVELOPED

47. The OCMP has been scoped to address only short-term demand growth because the need is imminent, and a solution must be in service before the winter of 2026/2027.[46] FEI believes that an incremental capacity solution beyond the winter of 2028/2029 for the Okanagan region is needed. FEI continues to receive inquiries from larger customers seeking long-term firm service; however, FEI is not able to provide certainty for these customers regarding available capacity.[47]

48. While FEI expects that an incremental capacity solution will be required beyond the OCMP, it has not yet developed a project and is not seeking approval of such a project at this time. The OCMP, together with the mitigation measures, will provide time to develop potential incremental capacity solutions, since FEI will be able to serve customers in peak winter periods through the winter of 2028/2029 based on current demand forecasts.[48] FEI has begun the initial scoping process and feasibility assessment for a variety of potential project alternatives to meet the incremental peak demand beyond the winter of 2028/2029. FEI will explore all reasonable alternatives, including additional compression, pipeline extensions and LNG-based solutions. FEI will justify any such project based on the need at that time (including the then-current load

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[46] Exhibit B-5, BCOAPO IR1 1.2.

[47] Exhibit B-3, BCUC IR1 1.3.

[48] Exhibit B-5, BCOAPO IR1 1.2.

forecast). If such a project is required, FEI will file for any required approval of that project with the BCUC.[49]

[49] Exhibit B-5, BCOAPO IR1 1.1.

PART THREE: FEI HAS APPROPRIATELY ANALYZED THE PROJECT ALTERNATIVES

49. As discussed in this Part, FEI identified the relevant alternatives to meet the project need, analyzed and screened out alternatives that were not feasible, and further evaluated those that were feasible based on appropriate financial and non-financial criteria. The evidence supports FEI's identification of Alternative 6, the Small Scale LNG Storage Facility, as the preferred alternative. It provides sufficient capacity before the winter of 2026/2027 to maintain service to customers on the coldest days of the year, and alleviates FEI's current reliance on short-term mitigation measures which elevate reliability risk.

50. In the sections below, FEI focuses on the key topics explored in IRs with respect to the OCMP alternatives analysis, making the following points:

- FEI followed a structured alternatives analysis approach, consistent with previous projects, that identified all reasonable alternatives for assessment against Project objectives.

- FEI appropriately screened out options that could not be delivered in time to prevent outages in the winter of 2026/2027.

- FEI's evaluation framework for the three remaining feasible alternatives appropriately weighted relevant considerations reflecting the Project's objectives.

- FEI's analysis based on the evaluation criteria clearly indicates that Alternative 6, a Small Scale LNG Storage Facility, is the superior alternative to implement a solution that will be in service before the winter of 2026/2027 to ensure that the capacity requirements in the Okanagan region can be met.

- It is reasonable to scope the OCMP so that there will be sufficient capacity to meet peak demand on the ITS through the winter of 2028/2029 with reduced reliance on the existing short-term temporary mitigation measures.

A. FEI FOLLOWED A STRUCTURED APPROACH TO EVALUATE ALTERNATIVES

51. As discussed below, FEI followed a structured alternatives analysis approach, consistent with previous projects, that identified all reasonable alternatives for assessment against Project objectives.

52. Since the issuance of the OCU Decision in December 2023, FEI conducted an extensive investigation of alternatives to address the imminent capacity shortfall on the ITS. As part of these investigations, FEI consulted with Jenmar Concepts Inc. (Jenmar) on potential compressed natural gas (CNG) and LNG options, and Innovative Pipeline Projects Ltd. (IPP) on smaller-scale pipeline options.[50]

53. Given the timing constraints and complexity of this Project, FEI evaluated alternatives in the following sequence:[51]

- First, FEI evaluated alternatives that could meet 2026/2027 winter demand (i.e., the most critical and time sensitive component of the Project objective).
- Second, FEI evaluated feasible alternatives in meeting demand through the winter of 2028/2029 (i.e., a reasonable period of time to develop and execute a future project as necessary).
- Third, FEI evaluated increasing the scope of the preferred alternative to remove FEI's reliance on some of the short-term temporary mitigation measures.

54. In consideration of the OCU Decision and in consultation with Jenmar and IPP, FEI identified and investigated six potential alternatives as set out in the table below.[52]

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[50] Exhibit B-1, Application p. 20. See also Exhibit B-6, CEC IR1 16.1.

[51] Exhibit B-1, Application p. 20.

[52] Exhibit B-1, Application p. 21.

Alternative	Description
Alternative 1 – Pipeline Extension	Leveraging the work performed on the original 30 km alignment for the OCU project, FEI investigated the possibility of constructing a segment of the OLI-PEN 406 pipeline along the same alignment for the OCMP, tying into the VER-PEN 323 with a new Pressure Reduction Station (PRS). FEI determined that a 6.4 km installation of new NPS 16 pipeline would be required based on the hydraulic requirements of the system to provide adequate capacity through winter 2028/2029 and locations where the OCU project alignment and existing VER-PEN 323 pipeline physically converged. This alternative is further described in Section 4.3.1 of the Application.
Alternative 2 – CNG Storage Facility	Involves constructing a bulk CNG storage facility (referred to as "CNG Peak Shaving Facility" in the Jenmar Report) at Kelowna Gate, including 200 CNG storage vessels, compressors, and pressure reduction units (PRUs). During periods of low demand, FEI would use compressors to draw gas from the IP/DP system and fill bulk storage (at high pressure) in order to be able to re-inject the gas back into the system during peak demand. This alternative is further described in Section 4.3.2.1 of the Application.
Alternative 3 – LNG Production & Storage Facility	Involves constructing an LNG production and storage facility (referred to as an "LNG Peak Shaving Facility" in the Jenmar Report) at Kelowna Gate, including LNG liquefaction units, a boost compressor, storage vessels, and vaporization units. This alternative is further described in Section 4.3.2.2 of the Application.
Alternative 4 – CNG Trucking	The CNG Trucking (referred to as "CNG Virtual Pipeline" in the Jenmar Report) alternative involves filling bulk transport trailers with high-pressure CNG from a site with sufficient capacity, and trucking it to a location requiring supplemental gas, where it is depressurized and injected into the pipeline. Based on Jenmar's concept design of this alternative, trailers would be filled via mobile compressor at FEI's Princeton station, transported via Highway 5A/97C or 97, and the gas would be injected into the DP system at the Kelowna Gate Station. This alternative is further described in Section 4.4.1.1 of the Application.
Alternative 5 – LNG Trucking	LNG Trucking (referred to as "LNG Virtual Pipeline" in the Jenmar Report) involves the bulk transport of LNG from FEI's existing LNG truck loading facility at the Tilbury LNG plant in Delta, BC. The LNG would be trucked via Highway 5 and 97C and then vaporized, odorized, and injected into the DP system at the Kelowna Gate Station. This alternative is further described in Section 4.4.2.1 of the Application.
Alternative 6 – Small Scale LNG Storage Facility	The Small Scale LNG Storage Facility (referred to as "LNG Peak Shaving / Virtual Pipeline Hybrid" in the Jenmar Report) alternative involves bulk transport of LNG from the Tilbury LNG plant to the Kelowna Gate Station, where there would be permanently fixed LNG offload, storage, and vaporization equipment. FEI would fill LNG storage vessels via tankers during the shoulder seasons and would vaporize and inject into the system during peak demand. This alternative is further described in Section 4.4.3.1 of the Application.

55. "Stockpiling" renewable natural gas (RNG) at FEI's Kelowna Biogas Plant was not one of the options considered as it is not a feasible approach to mitigating a capacity shortfall. When

operating, RNG facilities produce a relatively consistent quantity of energy over time. They cannot quickly scale production and they have physical limits that cap maximum production. As such, any sort of "stockpiling" would have to be accomplished through storing the energy produced over the course of the year and injecting the stored energy during the winter peak. These energy storage solutions would be no different from Alternatives 2 (CNG Storage Facility) and 3 (LNG Production and Storage Facility), and the challenges associated with these alternatives driving infeasibility are all applicable to any RNG stockpiling solution.[53]

B. OPTIONS ARE ONLY FEASIBLE IF THEY CAN BE IN SERVICE IN TIME TO PREVENT OUTAGES

56. The objective of the OCMP is, ultimately, to mitigate the real risk that homes and businesses in the Okanagan will lose service in the coldest days of winter starting in the winter of 2026/2027. In order to prevent that outcome and the harm that comes with it, an alternative must be in place by the winter of 2026/2027. It was reasonable for FEI to screen out Alternatives 1 through 3 as infeasible, given that they cannot be delivered within that timeframe. The remainder of FEI's evaluation appropriately focused on Alternatives 4, 5 and 6.[54]

C. FEI APPLIED AN APPROPRIATE EVALUATION FRAMEWORK TO THE FEASIBLE OPTIONS

57. FEI's evaluation framework for the three remaining feasible alternatives, Alternatives 4, 5 and 6, appropriately weighted relevant considerations reflecting the Project's objectives.

58. The project scopes of Alternatives 4, 5 and 6, along with the schedule and associated financial information for the alternatives analysis, are summarized in the following table, reproduced from the Application.[55]

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[53] Exhibit B-7, FTFO IR1 1.1.1.

[54] Exhibit B-1, Application, p. 31.

[55] Exhibit B-1, Application, pp. 30-31, Table 4-4.

	Alternative 4: CNG Trucking	Alternative 5: LNG Trucking	Alternative 6: Small Scale LNG Storage Facility
Description	CNG bulk transport between Princeton Station and Kelowna Gate Station (i.e., with no storage at Kelowna Gate Station).	LNG bulk transport between Tilbury LNG Plant and Kelowna Gate Station with no storage at Kelowna Gate Station.	LNG bulk transport between Tilbury LNG Plant and Kelowna Gate Station with on-site storage at Kelowna Gate Station.
Equipment	• 10 CNG bulk transport trailers • 2 fixed or mobile CNG compressors • 2 fixed or mobile pressure reduction units	• 10 LNG bulk transport trailers • 2 LNG mobile day tanks (mobile storage and offloading system) • 2 mobile gas fired vaporizers	• 3 LNG bulk transport trailers • 3 LNG storage tanks • 1 LNG mobile day tank (mobile storage and offloading system) • 2 skidded gas fired vaporizers
Siting	Utilize existing FEI owned parcel at Kelowna Gate Station and acquire additional crown land at Princeton Station.	Utilize existing FEI owned parcel at Kelowna Gate Station.	Utilize existing FEI owned parcel at Kelowna Gate Station.
Schedule	22 months	22 months	Phase 1: 24 months[30]

	Alternative 4: CNG Trucking	Alternative 5: LNG Trucking	Alternative 6: Small Scale LNG Storage Facility
Project Costs, As-spent ($ millions)	40.870	24.950	37.492
Annual O&M Costs ($ millions)	0.438	0.723	0.673
PV of Incremental Revenue Requirement ($ millions)	57.402	36.040	50.969
Levelized Delivery Rate Impact (%) over 34 years	0.36%	0.23%	0.32%

59. The Class 4 cost estimates for the feasible alternatives were developed to the same level of rigor and utilized external third-party reports.[56] The cost estimate methodology was consistent for each alternative.[57]

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[56] Exhibit B-6, CEC IR1 19.3.

[57] Exhibit B-6, CEC IR1 19.3; Exhibit B-8, RCIA IR1 8.5.

60. Consistent with previous FEI projects, FEI developed a weighted scoring methodology and applied it to each of Alternatives 4 through 6 to determine their performance in relation to the evaluation criteria defined for the Project. The evaluation criteria and weightings for each category and sub-category were judgment based, developed through collaborative discussions and reviews with FEI's subject matter experts.[58]

61. FEI used 10 evaluation criteria, grouped into five primary categories: Community, Stakeholders & Rightsholders; Environmental; Asset Management; Technical; and Financial.[59]

62. FEI submits that the rationale for the weighting in each category is sound:[60]

(a) **Community, Stakeholders & Rightsholders** was weighted at 25 percent to reflect the importance of incorporating the needs and considerations of the community in FEI's solution, striving to minimize negative impacts. Within this category, Indigenous Relations and Socio-Economic were weighted equally (and higher than Health and Safety), as these two criteria would have a higher likelihood of variability in impact amongst the feasible alternatives.

(b) **Environmental** was weighted at 10 percent (and the sub-categories of Ecology and Cultural Heritage equally weighted at 5 percent) to reflect that the difference in ecological and cultural heritage impacts are limited between the various feasible alternatives and are less likely to have a direct impact on the overall objective or execution of the Project.

(c) **Asset Management** was weighted the most heavily at 30 percent to reflect the importance of meeting the Project's main objective of implementing a solution that maintains safe and reliable gas service to customers in the Okanagan region. The sub-category of System Reliability & Capacity was accordingly weighted higher than Operation (20 percent versus 10 percent).

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58 Exhibit B-1, Application, p. 34; Exhibit B-3, BCUC IR1 3.1; Exhibit B-6, CEC IR1 7.1.

59 Exhibit B-1, Application, p. 34; Exhibit B-3, BCUC IR1 3.1; Exhibit B-6, CEC IR1 7.1.

60 Exhibit B-3, BCUC IR1 3.1.

(d) **Technical** was weighted at 25 percent to reflect the importance of implementing a solution that not only maintains safe and reliable gas service, but that also has a high execution certainty to ensure the Project can be completed by the winter of 2026/2027. The importance of completing the Project before the winter of 2026/2027 therefore also resulted in FEI weighting Execution Certainty more heavily than Constructability (15 percent versus 10 percent).

(e) **Financial** was weighted at 10 percent because the OCMP is considered a scope and schedule driven Project. While the cost and rate impact of the alternatives are an important consideration, the rate impacts of all the feasible alternatives are reasonably comparable, with the levelized rate impacts ranging between 0.23 percent and 0.36 percent. Therefore, FEI determined that the Financial criterion should have less of an influence on the results compared to other categories such as Asset Management, Technical, and Community, Stakeholders & Rightsholders.

D. ALTERNATIVE 6 IS SUPERIOR TO OTHER ALTERNATIVES

63. FEI's analysis based on the evaluation criteria clearly indicates that the Small Scale LNG Storage Facility (Alternative 6) is the superior alternative.[61]

64. Table 4-7 of the Application, reproduced below, provides a summary of FEI's assessment of Alternatives 4, 5 and 6 against the evaluation criteria. Alternative 6 has the highest (best) total weighted score.

[61] Exhibit B-1, Application, p. 35.

Table 4-7: Alternatives Analysis Results

Criteria		Weighting	CNG Trucking	LNG Trucking	Small Scale LNG Storage Facility
Community, Stakeholder & Rightsholder (25%)	Indigenous Relations	10%	3	4	3
	Socio-Economic	10%	1	2	3
	Health and Safety	5%	2	1	3
Environmental (10%)	Ecology	5%	2	3	4
	Cultural Heritage	5%	3	4	3
Asset Management (30%)	Operation	10%	1	2	3
	System Reliability & Capacity	20%	1	2	4
Technical (25%)	Constructability	10%	2	3	4
	Execution Certainty	15%	3	3	4
Financial (10%)	Cost	10%	2	4	3
Final Score with Weighting		100%	1.90	2.75	3.50

65. Importantly, Alternative 6 is also the highest (best) in the Constructability and Execution Certainty categories of the analysis, meaning that given the timeline constraints to having adequate capacity in place for the winter of 2026/2027, it provides the most reliable and safe means to deliver gas to FEI's customers.

66. As scoped, Alternative 6 would have more flexibility and functionality than the trucking options because the LNG is staged prior to winter. Once the permanent tanks are installed as part of Phase 2, the Phase 1 LNG trailers and mobile day tank are not expected to be needed during a cold weather event. FEI could potentially utilize those mobile assets in other parts of the system when not otherwise required.[62]

67. In contrast, the trucking equipment for Alternatives 4 and 5 could only be utilized to reach other areas of potential shortfall if they are not required in the ITS. While there is more mobile equipment available under these alternatives, the same equipment cannot address multiple capacity shortfalls concurrently. From a planning perspective, the equipment has the same limitations as Alternative 6, as the equipment in all cases is needed to support the ITS during a peak cold weather event. In addition, Alternatives 4 and 5 could not likely act as a foundation for a future project due to the safety and reliability concerns associated with heavy reliance on trucking energy through mountain passes during peak cold weather events.[63]

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[62] Exhibit B-6, CEC IR1 15.1.1.

[63] Exhibit B-6, CEC IR1 15.1.1. See also Exhibit B-6, CEC IR1 5.1 and 24.1.

E. ADDING STORAGE TANKS TO ALTERNATIVE 6 WILL REDUCE RISK OF CONTINUING TO DEPEND ON TEMPORARY MITIGATION MEASURES

68. Adding an additional three tanks to Alternative 6 is a prudent step to mitigate customer outage risk associated with the potential to lose access to even just one of the temporary mitigation measures.

69. The alternatives evaluated all depend on FEI continuing to have full access to all of the temporary mitigation measures that FEI has had to rely on since 2022. As discussed in Part 2, Section E, there is risk associated with each of these mitigation measures and they are not all within FEI's control, such that a strategy of depending on all of those measures being available at all times entails considerable risk for customers. Therefore, after evaluating the feasible alternatives, FEI expanded the scope of Alternative 6 to reduce FEI's reliance on the temporary mitigation measures in 2028/2029. The expanded scope of Alternative 6 would allow FEI to lose access to some mitigation measures in 2028/2029 without customers losing service.[64]

70. The current capacity shortfall (with all of the short-term mitigations implemented) is approximately 8 TJ/d; however, if the short-term mitigations are not relied upon, the capacity shortfall increases to 19 TJ/d. Therefore, FEI considered possible ways to offset the current short-term mitigation strategies and to increase the available capacity within the given time and footprint constraints. Ultimately, FEI determined that it could expand the scope of Alternative 6 to address approximately 14 TJ/d of the capacity shortfall, thus significantly reducing the reliance on the short-term mitigation measures but not eliminating the reliance.[65]

71. The primary change in requirements for Alternative 6 under the expanded scope is that the number of permanent onsite LNG storage tanks increases from three to six tanks. There is no change to the number of bulk transport trailers, vaporizers, or the mobile day tank. Due to the available footprint on site, the storage tanks would be stacked on a custom steel structure. The additional storage tanks were scoped to not affect the feasibility, and are not expected to affect the execution timeline of the OCMP. The impact on the OCMP capital cost is an increase of

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[64] Exhibit B-1, Application, pp. 16-17.

[65] Exhibit B-1, Application, p. 40.

$12.897 million, and the impact on the annual O&M costs is an increase of approximately $0.139 million.[66]

[66] Exhibit B-1, Application, p. 41.

PART FOUR: PROJECT DESCRIPTION AND COST ESTIMATE

72. This Part addresses the evidence on the Project description and cost estimate.

73. Section 5 of the Application describes the proposed OCMP, including the project components, site selection process, basis of design and engineering, construction, project schedule, risk assessment and analysis, and contingency estimate and cost estimate. Appendices to the Application include the supporting Scope and Estimate Report and Addendum, Cost Estimates, Risk Analysis reports, Project Schedule, and Financial Schedules.

74. The cost estimate for the OCMP is $50.389 million in as-spent dollars, including contingency and allowance for funds used during construction (AFUDC).[67] The OCMP will result in an estimated delivery rate impact of 1.35 percent in 2028 when all construction is complete and after all assets are placed in service. For an average FEI residential customer consuming 90 GJ per year, this equates to a bill impact of approximately $6.93 in 2028.[68]

75. The evidence demonstrates, and the BCUC should find, that the OCMP is well-defined and the cost estimates are reasonable. FEI has appropriately considered project risks, and incorporated those risks into the contingency for the Project. FEI has processes in place to manage risks throughout the life of the Project.

76. In the subsections below, FEI addresses the key topics explored in the IRs related to the OCMP description and cost estimate. FEI makes the following points:

- The Kelowna Gate Station site best meets the OCMP requirements.
- FEI has appropriately scoped the OCMP.

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[67] Exhibit B-1, Application, p. 3.

[68] Exhibit B-1, Application, p. 3. As explained in Section 6.3 of the Application and Exhibit B-5, BCOAPO IR1 2.1, the delivery rate impact of 1.35 percent in 2028 (or levelized delivery rate impact of 0.61 percent over the 34-year analysis period) includes both the forecast OCMP costs of $50.389 million and the prior OCU project CPCN development costs of approximately $22.153 million (total cost of $72.541 million). If the prior OCU project CPCN Development Costs were excluded, the estimated delivery rate impact in 2028 would be 0.66 percent.

- The OCMP is a permanent solution to address the imminent capacity shortfall that would serve as a complementary solution to any future project.
- The OCMP schedule was designed to address the Project's requirements.
- FEI has accounted for required permits and approvals.
- FEI's cost estimate is credible and reasonable.
- FEI has properly considered and addressed project risk.

A. KELOWNA GATE STATION SITE BEST MEETS OCMP REQUIREMENTS

77. The evidence demonstrates that the Kelowna Gate Station site best meets the OCMP requirements. FEI used a thorough site identification and evaluation process, and the Kelowna Gate Station location obtained the best score in every category during evaluation. It provides the highest likelihood of meeting the required schedule execution timeline, is the least cost alternative, and received the highest technical score.[69]

(a) FEI Conducted a Thorough Site Identification and Evaluation Process

78. FEI's facility location selection process involved identifying locations of interest and then narrowing the locations of interest down to feasible sites based on key objectives. FEI determined that the final site location must meet the following objectives:[70]

- Safe (to construct and to operate);
- Provide sufficient peak demand capacity to the system in the event of a 1 in 20-year cold weather event by the winter of 2026/2027;
- Minimize the impacts to the community, stakeholders and Indigenous groups; and
- Minimize rate impacts to customers.

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[69] Exhibit B-1, Application, p. 49. Exhibit B-8, RCIA IR1 4.3.

[70] Exhibit B-1, Application, p. 45.

79. While FEI has ultimately proposed to construct the small scale LNG storage facility at its existing Kelowna Gate Station, FEI undertook an extensive search and assessment process to select this location. FEI identified 21 potential sites for the initial screening process. These locations of interest were selected primarily based on the availability of sufficient land area for LNG equipment and proximity to existing natural gas infrastructure.[71] FEI screened the initial 21 potential sites down to seven sites.[72] More details on FEI's site selection are contained in the Site Selection Report, included as Appendix C to the Application.

80. Of the seven remaining sites, only three met the technical criteria and could be acquired in a reasonable time, ensuring the Project timeline would not be compromised.[73]

(b) FEI Evaluated Feasible Sites through a Structured Evaluation Process

81. FEI evaluated the remaining feasible sites through a structured evaluation process. In evaluating the three sites that were feasible for the OCMP, FEI considered five broad categories during the site options evaluation:[74] (1) Technical; (2) Community and Stakeholder Impacts; (3) Land Ownership, Permitting and Zoning; (4) Schedule and Project Execution; and (5) Financial.

82. Weightings were determined through collaborative discussions and reviews with FEI's subject matter experts, based on the impacts of the scope of each of the site options and how they would support the OCMP objectives and FEI's ongoing operation in the community:[75]

- As a schedule driven project, the Schedule and Project Execution category was weighted the highest to reflect the importance of selecting a site location that would allow the OCMP to be executed by the winter of 2026/2027.

- The Community and Stakeholder Impacts category was weighted at 25 percent to reflect the importance the OCMP would have on the community and the

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71 Exhibit B-1, Application, p. 45.

72 Exhibit B-1, Application, p. 46.

73 Exhibit B-1, Application, p. 46.

74 Exhibit B-1, Application, p. 46.

75 Exhibit B-1, Application, p. 47; Exhibit B-6, CEC IR1 22.1.

environment. FEI considers 25 percent to be appropriate to ensure the site selection considers the impact to the community, stakeholders and Indigenous groups.

- The Land Ownership, Permitting and Zoning category and the Technical category were weighted at 20 percent and 15 percent, respectively, to reflect the importance of selecting a site location that will support long-term operations and that has the lowest potential risks (e.g., land acquisition, regulatory requirements, etc.) that could ultimately impact the overall Project objectives and execution.

- The Financial category was weighted at 10 percent because the OCMP is considered a scope and schedule driven project. Although minimizing rate impacts to customers is important, FEI considered the impacts and risks of the other categories to outweigh the financial component in this case.

83. The three feasible options were analyzed and reviewed against the evaluation categories to identify the preferred site. Details and commentary regarding the determination of scores (1-5) are provided in the Site Selection Report in Appendix C. A summary of the final weighted scores is shown in Table 5-3 of the Application, reproduced below.

Table 5-3: Site Evaluation Weighted Scoring Summary

Category	Weighting	Kelowna Gate (1569 Spall Rd)	980 Stevens Road	Intersection of Highway 97 & Westlake Road
Technical	15%	5	4	3
Community and Stakeholder	25%	4	3	2
Land Ownership, Permitting and Zoning	20%	4	3	2
Schedule and Execution	30%	3	3	2
Financial	10%	5	4	3
Weighted Total (out of 5)	**100%**	**3.95**	**3.25**	**2.25**

84. After a comprehensive desktop analysis of the evaluation categories, FEI selected the Kelowna Gate Station location. This site obtained the best score in every category during evaluation. It provides the highest likelihood of meeting the required schedule execution

timeline, ensuring optimal operation and efficiency. The Kelowna Gate Station is also the least cost alternative (as the land is already FEI-owned) and received the highest technical score.[76]

B. THE OCMP IS APPROPRIATELY SCOPED

85. In considering the degree of reliance on the existing short-term temporary mitigation measures, FEI sought to strike a balance between reducing the reliability risk of continuing to depend on the short-term temporary measures and the need to have a project in-service by the winter of 2026/2027.[77] FEI has appropriately scoped the OCMP, including the design, construction and commissioning of the following:[78]

- LNG storage, vaporization, odorization and injection to the distribution system operating at 420 kPa at the Kelowna Gate Station; and
- LNG transport capability between FEI's LNG facilities and the Kelowna Gate Station.

(a) Scoped Storage Capacity Reduces Reliance on Some Mitigation Measures

86. The OCMP as proposed includes six permanent LNG storage tanks to reduce the risk of relying on some of the existing short-term temporary mitigation measures.

87. As described in Part 3 above, FEI considered the impact of increasing the size of the OCMP to address the short-term temporary measures and the time available to implement the Project for the winter of 2026/2027. Ultimately, FEI scoped the OCMP to provide approximately 14 TJ/d of additional capacity to alleviate its reliance on the existing short-term mitigation measures, which FEI considers to be an appropriate balance between reliability risk and project executability.[79]

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[76] Exhibit B-1, Application, p. 49; Exhibit B-8, RCIA IR1 4.3.

[77] Exhibit B-1, Application, p. 17.

[78] Exhibit B-1, Application, p. 45.

[79] Exhibit B-1, Application, p. 17.

88. FEI selected the largest commercially available LNG storage tanks for the Project and maximized the storage capacity within the available footprint at the Kelowna Gate Station.[80]

89. Given the current capacity requirements in the Okanagan region, the continued growth in customer attachments, and when considering that the OCMP is not fully able to meet the expected capacity shortfall without the use of short-term temporary mitigations through the winter of 2028/2029, FEI considers the risk that the LNG storage capacity is undersized to be higher than the risk of being oversized.[81]

90. FEI considers the expanded LNG storage capacity to be necessary and does not foresee a scenario where the additional LNG storage capacity would be underutilized.[82] However, if the capacity provided by the short-term temporary mitigation measures were to hypothetically be considered available in a reliable manner, the assets associated with the expanded LNG storage facility would still be utilized elsewhere.[83]

91. In considering the degree of reliance on the existing short-term temporary mitigation measures, FEI sought to strike a balance between reducing the reliability risk of continuing to depend on the short-term temporary measures and the need to have a project in-service by the winter of 2026/2027, as projects with increased scopes may increase the execution timeline due to factors such as land constraints and permitting.[84]

(b) Mobile Equipment Requirements Were Considered

92. The requirements for mobile equipment were reviewed based on the transport of the two types of equipment trailers required for LNG trucking activities: bulk transport trailers and LNG mobile day tanks. A mobile day tank is only transported during mobilization and

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80 Exhibit B-3, BCUC IR1 7.3.2 and 8.3.

81 Exhibit B-3, BCUC IR1 7.3.

82 Exhibit B-3, BCUC IR1 7.2.

83 Exhibit B-3, BCUC IR1 7.2. See also BCUC IR1 8.1 and 8.2.

84 Exhibit B-1, Application, p. 17.

demobilization at the start and end of the heating season, respectively. The bulk transport trailers are moved continuously during operations.[85]

93. For the routes travelled by the OCMP equipment (Highways 1, 5, 97C, and 97), seasonal road load restrictions are not anticipated. Mobilization is planned to occur in advance of the anticipated cold-weather events to allow time for coordination. Only one mobilization and de-mobilization is required per year.[86]

94. No restrictions related to the Transportation of Dangerous Goods (TDG) are anticipated along the OCMP trucking routes.[87] LNG transportation by tanker is a safe and established method, which FEI has undertaken numerous times.[88]

C. THE OCMP IS A PERMANENT SOLUTION

95. A number of information requests appeared to incorrectly assume that the OCMP was intended as a temporary measure. This is not the case. The OCMP is a permanent solution, but it will not address the forecast capacity shortfall on the ITS after the winter of 2028/2029.[89] And, even in the short-term, FEI will still need to continue to rely on some of the short-term temporary mitigations.[90]

96. Phase 1 of the OCMP provides a sufficient quantity of LNG to address the anticipated capacity shortfall in the winter of 2026/2027. However, peak demand is expected to increase each year beyond 2026/2027.[91] By the winter of 2027/2028, FEI expects the peak demand to increase beyond the limits of the LNG provided by Phase 1 of the OCMP. That is, there will not be sufficient LNG on site to maintain system pressures during a 1-in-20-year cold weather event.

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85 Exhibit B-1, Application, p. 54. See also Exhibit B-6, CEC IR1 11 series.

86 Exhibit B-1, Application, p. 54.

87 Exhibit B-1, Application, p. 54.

88 Exhibit B-6, CEC IR1 11.6.

89 Exhibit B-3, BCUC IR1 8.1; Exhibit B-5, BCOAPO IR1 1.1.

90 Exhibit B-3, BCUC IR1 8.1; Exhibit B-5, BCOAPO IR1 1.2.

91 Exhibit B-5, BCOAPO IR1 3.1 and 3.2.

Accordingly, FEI has staged the OCMP so that the full six-tank solution (i.e., Phase 2) will be in-service before the winter of 2027/2028.

97. If the demand continues to grow as forecast, the OCMP will only be able address the capacity shortfall through the winter of 2028/2029, and even over this short time horizon, FEI will need to rely on some of the temporary mitigation measures.[92]

98. FEI does not consider any amount of reliance upon short-term temporary mitigation measures to be appropriate in the long term, as each of the measures increases the risk that FEI will be unable to reliably serve customers during a cold weather event. FEI has proposed to reduce reliance on as many measures as possible through the OCMP, but cannot eliminate reliance completely due to the limitations imposed by the need to have a project in place before the winter of 2026/2027 to meet the expected capacity shortfall.[93]

99. Accordingly, the OCMP is intended to be a permanent storage facility that will have an ongoing role in FEI's operations beyond the winter of 2028/2029. FEI intends to continue using the facility and has no intention of decommissioning the facility after only three years, regardless of a future project to address the capacity constraints beyond 2028/2029. Any future project to address the expected capacity issues on the ITS will be designed with the 14 TJ/d of capacity available from the OCMP in mind; thus, the OCMP would serve as a complementary solution to any future project.[94]

D. OCMP SCHEDULE DESIGNED TO ADDRESS PROJECT REQUIREMENTS

100. The OCMP schedule has been designed consistent with the Project's objective of ensuring capacity to serve customer need in the winter of 2026/2027, and through the winter of 2028/2029.

101. The preliminary OCMP execution schedule is based on an in-service date for Phase 1 in Q3 2026. The schedule includes FEI undertaking a tendering process for engineering services

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92 Exhibit B-3, BCUC IR1 8.1.

93 Exhibit B-3, BCUC IR1 7.1.1.

94 Exhibit B-3, BCUC IR1 8.1.

while waiting for the BCUC's decision. The OCMP schedule is divided into two main phases: Phase 1 and Phase 2.[95]

102. The estimated lead time for LNG storage tanks is approximately two years, making it infeasible to have the LNG tanks in service prior to the winter of 2026/2027. However, the full six-tank storage quantity is not required to meet the 2026/2027 capacity demands. As such, FEI divided the project into two phases.[96]

103. Phase 1 entails system modifications and equipment procurement to transport LNG from the Tilbury LNG facility to inject it into the Kelowna Gate Station. This includes the entirety of the scope except installation of the six permanent LNG storage tanks. One mobile day tank and three bulk LNG transport trailers will be filled and connected to the system to meet storage requirements at the Kelowna Gate Station for the 2026/2027 heating season.[97]

104. Phase 2 consists of installation of the six permanent LNG storage tanks when they arrive, ready for operation before the 2027/2028 heating season. The bulk LNG transport trailers will continue to be used to fill the permanent tanks annually, while the mobile day tank will enter the LNG fleet and be utilized as needed.[98]

105. Both phases of the Project are required to meet forecast peak demand, as Phase 1 will only provide sufficient capacity to meet demand for the winter of 2026/2027.[99]

E. FEI HAS IDENTIFIED, AND ACCOUNTED FOR, REQUIRED PERMITS AND APPROVALS

106. As described in the Application, FEI has identified, and accounted for, required permits and approvals for the OCMP. The approvals that received the most attention in the course of IRs were the BCER permits. As explained below:

- No concerns have been raised to date by the BCER in relation to OCMP permitting;

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95 Exhibit B-1, Application, p. 55.

96 Exhibit B-1, Application, p. 56.

97 Exhibit B-1, Application, p. 56.

98 Exhibit B-1, Application, p. 56.

99 Exhibit B-5, BCOAPO IR1 1.5.

- Indigenous consultation is not anticipated as the facility will be located on an FEI-owned site with an already disturbed, gravelled surface and limited vegetation; and

- The risk of BCER permitting delay is limited and has been accounted for in the OCMP schedule.

(a) BCER Has Not Raised Permitting Concerns

107. FEI has engaged with the BCER regarding the OCMP's permitting requirements. The BCER's responses to date have provided guidance on how to successfully permit the project, and the BCER has not made any statements indicating that the proposed activity is not permissible.

108. In particular, FEI engaged with the BCER's Facility Engineering department to inquire about the OCMP, including required permitting. FEI representatives that specialize in BCER permitting presented the OCMP's scope and footprint to the BCER. FEI then requested the BCER's feedback to confirm if the scope and footprint would trigger BCER permitting requirements, and what type of permit application would be required. The BCER confirmed that the storage of LNG adjacent to the Kelowna Gate Station site was an activity that would require a BCER permit for a facility.[100]

109. The BCER indicated that it would expect a Facility permit application that has all the typical permit application deliverables, similar to any of the other types of Facility permits that it issues.[101]

110. The BCER has not shared any concerns to date about permitting for the Project. The BCER provided feedback indicating that it expects the facility design to meet CSA requirements, and that noise emissions must meet the BCER's "British Columbia Noise Control Best Practices Guideline".[102] As discussed below, FEI intends to design the facility to meet the requirements expected by the BCER.

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[100] Exhibit B-3, BCUC IR1 4.2.

[101] Exhibit B-3, BCUC IR1 4.2.

[102] Exhibit B-3, BCUC IR1 4.4.

(b) Indigenous Consultation Not Anticipated for BCER Permit

111. FEI does not anticipate that the OCMP permit applications will be referred to the BCER's consultation process with any of the local Indigenous Nations because the site is not known to be culturally significant to any of the local Nations and there are limited to no significant resources on the site, and no known archaeological sites present.[103]

112. FEI expects minimal impacts based on its preliminary assessment due to the facility being located on an FEI-owned site with an already disturbed, gravelled surface and limited vegetation. FEI will be undertaking an Archaeological Impact Assessment (AIA) which it will commence during the detailed engineering phase of the OCMP.[104]

(c) Low Risk of BCER Permitting Delay and Is Accounted for in OCMP Schedule

113. The BCER Facility permit is required for the permanent LNG storage tanks at the Kelowna Gate Station (i.e., Phase 2 of the Project). As Phase 1 construction activities do not include permanent LNG storage tanks at the Kelowna Gate Station, a BCER Facility permit is not required for the Phase 1 construction activities; therefore, FEI does not consider there to be a risk to the Project schedule for the October 2026 Phase 1 in-service date related to the BCER Facility permit.[105]

114. FEI has noted that a BCER Pipeline Permit Amendment is required for the Phase 1 activity of installing and operating natural gas appurtenances and piping that would handle natural gas above 700 kPa between the temporary storage trailers and the distribution network. However, the pipeline permit amendment application and process to register the appurtenances and piping is a standard application process that FEI successfully applies for on a routine basis and is clearly understood.[106]

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[103] Exhibit B-3, BCUC IR1 9.1.

[104] Exhibit B-3, BCUC IR1 4.6. See also the risk register provided in Confidential Appendix G of the Application which describes the risks and the actions identified to manage or mitigate the risks.

[105] Exhibit B-3, BCUC IR1 4.5.

[106] Exhibit B-3, BCUC IR1 4.5.

115. While there could be a risk of delays to the in-service date of Phase 2 of the Project due to the consultation requirements associated with a BCER Facility permit (i.e., there is a requirement for consultation and notification to registered landowners and rights holders in a 1,300 metre radius of the facility) or due to the BCER requesting additional information and mitigation measures, the planned in-service date for Phase 2 provides some buffer before the winter season when the Phase 2 solution will be required. However, in the event that a delay in the BCER Facility permit resulted in a delay to the in-service timing of Phase 2 such that the permanent tanks were not in place for the winter season, FEI would have to operate an additional winter season using the mobile storage and regasification tank and would need to consider strategic alternatives, including winter trips of the bulk LNG transport trailers from Delta, BC to the Kelowna Gate Station, to address the shortfall in onsite storage capacity. There would be no impact in the send out capacity to meet peak demand.[107]

116. FEI confirmed that the long lead material required for Phase 2 construction will be procured prior to receiving the Facility permit from the BCER. This approach is required in order to ensure the permanent equipment is installed and commissioned prior to the capacity shortfall forecast for the winter peak of 2027/2028 (Phase 2).[108]

117. FEI considers the financial risk of this approach to be low, as FEI has already been engaging with the BCER to discuss the Project, system constraints, schedule constraints, and to solicit early feedback. FEI will continue to engage with the BCER upon receiving BCUC approval of the Project and prior to advancing the design and procuring the long lead items. FEI intends to design the facility to meet CSA Z276 requirements, as expected by the BCER. Thus, FEI does not foresee any risk that the BCER will reject the Facility permit application or impose size restrictions that would result in financial losses.[109]

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[107] Exhibit B-3, BCUC IR1 4.5.

[108] Exhibit B-3, BCUC IR1 9.5.

[109] Exhibit B-3, BCUC IR1 9.5.

F. THE COST ESTIMATE IS CREDIBLE AND REASONABLE

118. The evidence, discussed below, demonstrates that the cost estimate is reasonable.

119. The total Project cost is $50.389 million in as-spent dollars and will result in an estimated rate impact of 1.35 percent in 2028 when all construction is complete and after all assets are placed in service. For an average FEI residential customer consuming 90 GJ per year, this equates to a bill impact of approximately $6.93 in 2028.[110]

120. The OCMP is estimated to have an incremental revenue requirement of $15.392 million and a delivery rate impact of approximately 1.35 percent in 2028 when all new assets are expected to be in-service and included in FEI's rate base on January 1, 2028. The delivery rate impact is compared to the currently approved 2024 delivery rates and is based on all new assets related to the Project being in-service by 2027 (in multiple phases in 2025, 2026, and 2027) and added to FEI's rate base on January 1, 2028. The delivery rate impact also includes the amortization of the OCMP Application and Preliminary Stage Development Costs deferral account with a proposed amortization period of four years.[111]

121. FEI's cost estimate for the Project is based on an AACE Class 4 level of definition. FEI recognizes that the BCUC's CPCN Guidelines contemplate the inclusion of a cost estimate at an AACE Class 3 level of definition. However, due to the short timeframe between the issuance of the BCUC's Decision in December 2023 and the deadline to file this short-term mitigation plan, FEI has not prepared a Class 3 estimate. A Class 3 estimate requires additional time that the Project schedule cannot accommodate, as the Project needs to be in-service to meet the potential capacity shortfall in the Okanagan region by as soon as the winter of 2026/2027. In light of the imminent requirement to address the capacity shortfall, FEI determined that it should proceed with the filing of this Application based on a Class 4 estimate.[112]

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[110] Exhibit B-1, Application, p. 80.

[111] Exhibit B-1, Application, pp. 79-80.

[112] Exhibit B-1, Application, pp. 43-44.

G. FEI HAS IDENTIFIED AND ACCOUNTED FOR PROJECT RISK

122. The evidence demonstrates, and the BCUC should find, that FEI has identified and accounted for Project risks.

123. FEI conducted a qualitative risk analysis to identify all risks associated with the OCMP. Multiple workshops informed the development of a risk register for the Project to identify risks that could likely occur. In addition, FEI retained Validation Estimating LLC, USA, a company that provides services in estimate validation, risk analysis and contingency estimation, to complete an escalation estimate and a quantitative analysis for the Project.[113]

124. The risk identification and qualitative analysis conducted by FEI was completed using the AACE International Recommended Practice 62R-11: Risk Assessment: Identification and Qualitative Analysis (AACE 62R-11, Revision May 11, 2012) as a guide.[114]

125. The risk identification process identified a number of risks which were tabulated in the risk register included in Confidential Appendix G to the Application. The risk response actions to deal with the identified risks were also recorded in the risk register. Once the risks were identified, a qualitative analysis was completed to prioritize or rank the risks so that the Project team could focus on risk response actions and recommendations.[115]

126. FEI will fund escalation at the P50 level of confidence, or 4.2 percent of the base cost estimate. This equates to $1.848 million.[116]

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[113] Exhibit B-1, Application, pp. 63-64.

[114] Exhibit B-1, Application, p. 64.

[115] Exhibit B-1, Application, p. 64.

[116] Exhibit B-1, Application, p. 66.

PART FIVE: OCMP ACCOUNTING TREATMENT AND FINANCIAL REQUESTS

127. The requested approvals provide FEI with the ability to recover costs associated with this beneficial Project from customers in a manner that promotes intergenerational equity.

128. The Application provides a breakdown of the total Project cost and summarizes the financial analysis, the accounting treatment of the Project capital costs, and the delivery rate impact of the Project. As described in this Part, in addition to a CPCN for the Project, pursuant to sections 59 to 61 of the UCA, FEI is seeking approval of:

- The proposed depreciation rate of 3.33 percent and a net salvage rate of 0.5 percent applicable to the new small-scale LNG tank and vaporization (i.e., send-out) equipment as well as the LNG transport trailers related to the Project;

- The Application and Preliminary Stage Development costs related to the OCMP in the existing non-rate base OCU Preliminary Stage Development Costs deferral account, attracting a weighted average cost of capital return. FEI proposes to rename this deferral account the "OCMP Application and Preliminary Stage Development Costs" deferral account. FEI seeks approval to transfer the balance in the deferral account to rate base on January 1 of the year following a decision on this Application and to amortize the balance over a four-year period; and

- Recovery of the actual pre-construction development costs related to the original OCU project which were incurred from 2018 to 2023 through amortization of the newly titled OCMP Application and Preliminary Stage Development Costs deferral account over the requested four-year period.

A. PROPOSED LNG ASSET DEPRECIATION AND NET SALVAGE RATE CONSISTENT WITH SERVICE LIFE

129. Pursuant to sections 59 to 61 of the UCA, FEI is seeking approval for a depreciation rate of 3.33 percent and a net salvage rate of 0.5 percent applicable to the new small-scale LNG tank and vaporization (i.e., send-out) equipment as well as LNG transport trailers related to the Project. This is because, under pool asset accounting, FEI does not have existing asset classes that

are of a similar enough nature or category as the new small-scale LNG assets proposed as part of the Project.[117]

130. The proposed depreciation rate is based on FEI's consultation with Jenmar, who recommended an average service life for the fixed LNG equipment of 30 years before a full overhaul or replacement is required. This is consistent with the manufacturers' specifications and Jenmar's experience with LNG facilities of similar sizes to this Project. Additionally, Jenmar considers 30 years to be appropriate for the LNG transport trailers because the trailers are not expected to require re-certification within the first 30 years of purchase if routine inspections are performed. For the net salvage rate, FEI assumed 15 percent of the capitalized value of the LNG equipment over 30 years (i.e., 0.15 / 30 years x 100 = 0.5 percent) which is determined based on the estimated cost to remove the LNG assets installed at the end of the expected service life of 30 years.[118]

B. TRANSFER OF OCMP APPLICATION AND PRELIMINARY STAGE DEVELOPMENT COSTS CONSISTENT WITH PAST PROJECTS

131. FEI is seeking BCUC approval under sections 59 to 61 of the UCA for deferral treatment of the Application and preliminary stage development costs related to the Project. As directed by the BCUC in the OCU Decision, the existing non-rate base OCU Preliminary Stage Development Costs deferral account currently contains the actual pre-construction development costs from 2018 to 2023 related to the original OCU project CPCN. FEI is also seeking BCUC approval to recover these prior OCU project CPCN development costs as part of this Application.[119]

132. In order to develop the short-term mitigation plan to address the imminent capacity shortfall on the ITS (i.e., the OCMP), FEI is incurring Application and preliminary stage development costs.[120] Consistent with the approved treatment for past projects, FEI proposes

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[117] Exhibit B-1, Application, p. 71.

[118] Exhibit B-1, Application, p. 71.

[119] Exhibit B-1, Application, p. 73.

[120] Exhibit B-1, Application, pp. 73-74.

to transfer the balance of the deferral account to rate base on January 1 of the year following a decision on this Application.[121]

C. PRIOR OCU PROJECT CPCN PRE-CONSTRUCTION DEVELOPMENT COSTS WERE NECESSARY

133. All the pre-construction development costs related to the OCMP have been necessary and prudently incurred. FEI developed the original OCU project to address the capacity shortfall in the ITS which continues to exist. While the BCUC ultimately did not approve the original OCU project as proposed by FEI, the BCUC found that "there is an immediate need to address this imminent capacity shortfall"[122] and also acknowledged that denying the original OCU project will "put additional stress on the ITS' capacity levels and existing mitigation efforts will provide only short-term relief ending in the winter of 2026/2027".[123]

134. FEI not only developed the original OCU project in accordance with the CPCN Guidelines, but it also undertook the necessary activities, including extensive engagement with impacted Indigenous groups, to progress the project to a point that, if approved, construction could be completed in time to address the imminent capacity shortfall in the Okanagan region in order to continue providing safe and reliable service to customers. Further, the pre-construction development work completed for the original OCU project has been used to develop the OCMP, including the demand forecasts. This previous work has informed FEI's assessment of the alternatives to address the imminent capacity shortfall with the OCMP. [124]

135. Up to November 2020, when the original OCU project CPCN application was filed, all costs incurred were required to prepare the CPCN application in accordance with the BCUC's CPCN Guidelines. As such, these were necessary costs to prepare a comprehensive CPCN application in compliance with the CPCN Guidelines, including providing adequate evidence to support the project need, exploring a range of alternatives for meeting the project need, and developing a

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121 Exhibit B-1, Application, p. 74.

122 OCU Decision, p. 23.

123 Exhibit B-1, Application, p. 75.

124 Exhibit B-1, Application, p. 75.

detailed design, schedule, cost estimate and risk assessment for the preferred alternative. These costs are consistent in nature with the costs of preparing and developing past CPCN applications, and FEI should be allowed to recover these costs regardless of the OCU Decision.[125]

136. For the subsequent 16-month period of regulatory process between November 2020 when the original OCU project CPCN application was filed and February 2022 when the regulatory process was adjourned, FEI had to advance the project's engineering and design (to approximately 60 percent of engineering) since the evidence at that time indicated that the ITS capacity shortfall would occur in the winter of 2023/2024. As such, FEI was targeting to have construction commence in early 2022 in order to achieve an in-service date prior to winter 2023/2024 in order to ensure safe and reliable service to customers in the Okanagan region.[126]

137. The adjournment of the regulatory process in February 2022 allowed FEI the opportunity to continue engagement with Indigenous communities. During the 14-month period from March 2022 when the regulatory process was adjourned to May 2023 when FEI submitted the Supplementary Filing, FEI continued to incur costs to negotiate with Indigenous communities. Further, based on the understanding with Indigenous communities and the advanced engineering and design work completed since the original Class 3 estimate was prepared, FEI updated and filed a revised Class 3 estimate with the Supplementary Filing. The negotiations with the Indigenous community, advancement of project engineering and design work, revisions to the Class 3 cost estimate and other activities were all undertaken to further support the successful execution of the original OCU project to meet the updated timing of the expected ITS capacity shortfall in the winter of 2026/2027.[127]

138. Finally, for the period from the BCUC re-commencing the regulatory process in June 2023 to the issuance of the Decision on December 23, 2023, FEI continued to incur costs to negotiate with the *snpink'tn* community (Penticton Indian Band) and to update the engineering and design for re-aligning the pipeline route based on the negotiation and understanding at the time with

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[125] Exhibit B-1, Application, p. 77.

[126] Exhibit B-1, Application, p. 77.

[127] Exhibit B-1, Application, p. 78.

the *snpink'tn* community. As noted in the letter filed by FEI to the BCUC on November 21, 2023, FEI ultimately received support from the *snpink'tn* community for the original OCU project.[128]

139. All of these pre-construction development costs for the original OCU project were incurred reasonably and prudently. These costs were required to prepare the original CPCN application as well as to support the execution of the project in time to address the imminent capacity shortfall on the ITS and prevent service interruption to customers in the Okanagan region. Further, much of the development work undertaken in support of the original OCU project was used to develop the OCMP Application, including the development of project alternatives presented in the Application. Accordingly, FEI should be permitted to recover these costs through amortization of the newly titled OCMP Application and Preliminary Stage Development Costs deferral account.[129]

140. The typical treatment for prudently incurred development costs is that the BCUC approves their recovery from customers through amortization in rates, regardless of whether a CPCN (or other type of application) is ultimately approved by the BCUC. Irrespective of whether an application is approved or not, prudently incurred development costs are recoverable in rates. Otherwise, the fair return standard would not be met.[130]

141. FEI developed the original OCU project and application based on an identified need, and undertook the actions necessary to assess the feasible alternatives, develop a Class 3 level cost estimate for the proposed project, and to engage with Indigenous groups and stakeholders. The actions undertaken by FEI during the regulatory process to continue to progress the project were reasonable and prudent given the circumstances at that time, and FEI's expectations of the timing of when the proposed project would need to be in-service to meet the anticipated capacity shortfall on the ITS. FEI believes that the original OCU project was the best alternative to meet

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[128] Exhibit B-1, Application, p. 78.

[129] Exhibit B-1, Application, p. 78.

[130] Exhibit B-6, CEC IR1 26.1.

the forecast capacity shortfall on the ITS, and it undertook the necessary steps to ensure that, if approved, the project would meet the in-service timelines.[131]

142. The BCUC's Decision and Order G-361-23 affirmed that there is an imminent capacity shortfall on the ITS that needs to be addressed, but disagreed that FEI's proposed project was the appropriate means to address that shortfall.[132]

143. In the OCU Decision, the BCUC expressed concern about the longer-term impacts of policy on the growth in peak demand and that "if the RRGCR application is denied in whole or in part, the forecast peak demand growth in FEI's ITS is highly unlikely to occur." However, at the time of the OCU Decision (after all development costs had been spent), FEI continued to have a reasonable expectation, had it been approved, that the Province would accept the compliance pathway it developed within the RRGCR application to connect residential and commercial customers to the gas system beyond 2030 under the Zero Carbon Step Code. FEI received the RRGCR decision (Order G-77-24) on March 24, 2024 denying a component of its Connections program, approximately three months after the OCU Decision.[133]

144. The steps that FEI undertook to progress the project were prudent and necessary given the circumstances at the time the original OCU project was developed and the CPCN application was filed in 2020. Accordingly, it is reasonable and appropriate for FEI to recover the development costs incurred for the original OCU project.[134]

D. FOUR-YEAR AMORTIZATION PERIOD BALANCES RATE IMPACTS WHILE ALIGNING WITH OCMP TIMING

145. FEI has proposed to transfer the balance of the non-rate base deferral account to rate base on January 1 of the year following the BCUC's decision on this Application, and begin amortization over a four-year period.[135] A four-year amortization period provides the best

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131 Exhibit B-6, CEC IR1 27.2.

132 Exhibit B-6, CEC IR1 27.2.

133 Exhibit B-6, CEC IR1 27.2.

134 Exhibit B-6, CEC IR1 26.1.

135 Exhibit B-1, Application, p. 79.

balance between minimizing the immediate delivery rate impact when amortization begins with some degree of rate smoothing, while aligning with the timing of when the OCMP would enter FEI's rate base.[136]

146. FEI's proposed approach of transferring the deferral account from non-rate base to rate base on January 1, 2025 and commencing amortization over a four-year period remains reasonable even if the BCUC's decision on this Application is not received until 2025. This is because FEI will be filing 2025 permanent delivery rates in mid-2025 following the BCUC's decision on the Rate Framework Application, which is expected in early 2025. FEI expects that at the time it files the 2025 permanent delivery rates application, the OCMP decision will be issued; therefore, FEI would be able to incorporate the transfer of the OCMP Application and Preliminary Stage deferral account to rate base on January 1, 2025 and begin amortization over a four-year period as part of the 2025 permanent delivery rates application.[137]

147. A four-year amortization that begins on January 1, 2025 is appropriate as it best addresses the following considerations: (i) alignment with the in-service date of the Project; (ii) the size of the deferral account balance; and (iii) the delivery rate/total bill impact.[138]

148. Relative to other options that were examined in IRs, FEI's proposed treatment of transferring the deferral account to rate base on January 1, 2025 would save FEI's customers approximately $1.4 million of financing costs and also would have the least impact on customers' rates and bills in 2025 given the deferred costs would be amortized over a four-year period instead of three, while remaining aligned with the expected in-service date of the Project (2028).[139]

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136 Exhibit B-1, Application, p. 79.

137 Exhibit B-3, BCUC IR1 10.1.

138 Exhibit B-3, BCUC IR1 10.1.

139 Exhibit B-3, BCUC IR1 10.1.

PART SIX: MINIMAL ENVIRONMENTAL AND ARCHAEOLOGICAL IMPACTS ARE EXPECTED

149. FEI expects minimal environmental and archaeological impacts for the Project based on its preliminary assessment. Consistent with typical practice, FEI will continue to assess these impacts and use standard management practices and measures to mitigate them.

150. FEI's identification and preliminary assessment of potential effects of the Project is appropriate for the stage of its development and consistent with the level of detail required for a CPCN application.

151. The OCMP is located on an active FEI facility site with a disturbed, gravelled surface and limited vegetation. As a result, FEI expects minimal environmental and archaeological Project impact based on its preliminary assessment.

152. Potential environmental impacts of the Project can be mitigated through the implementation of standard best management practices and mitigation measures. Impacts to construction timelines and costs as a result of encountering species at risk, fish habitat, or contaminated soil or groundwater can be minimized through additional investigations during the detailed engineering phase prior to construction.[140]

A. ENVIRONMENTAL RISK OF PROJECT IS LOW AND IMPACTS CAN BE MITIGATED

153. As the proposed Project location is within an urban area of Kelowna, on a previously disturbed property that is currently in use for utility/industrial activities, environmental impacts are anticipated to be minimal. Use of mitigation measures, both generic best management practices and site-specific measures, will support the reduction of potential environmental impacts to the Project site and surrounding area.[141]

154. FEI completed a preliminary, desktop review of potential environmental sensitivities in the area of the Project facility site.[142] The review was completed to identify and describe the biophysical environment and potential impacts to the biophysical environment from the Project,

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[140] Exhibit B-1, Application, p. 81.

[141] Exhibit B-1, Application, pp. 58 and 84.

[142] Exhibit B-1, Application, Appendix D.

and to determine the potential permitting requirements and recommended impact mitigations.[143]

155. A review of the Project footprint identified the site as an active, fenced, FEI facility site with a disturbed, gravelled surface and limited vegetation. Potential impacts include disturbance to adjacent environmental features such as terrestrial and aquatic resources, species at risk, and soils.[144]

156. Based on this preliminary assessment, the overall environmental risk of the Project is low and any potential environmental impacts from the Project can be mitigated through the application of standard environmental best management practices and mitigation measures.[145]

157. FEI will employ the services of a qualified environmental consulting firm to be the Owner's representative and auditor, and to be present during the construction of the Project, as needed. The environmental representative will be familiar with facility construction techniques and applicable guidelines and standards. The construction contractor will be required to retain a Qualified Environmental Professional (QEP) to provide planning and monitoring/inspection support. The environmental monitor will provide inspection of contractor environmental mitigation measures and respond to any environmental issues that may develop during construction.[146]

B. EXTENT OF ARCHAEOLOGICAL ASSESSMENT IS APPROPRIATE TO DATE

158. WSP Canada Inc. was retained to complete a desktop review of the Project area[147] to assess the modelled potential for archaeological and/or cultural heritage resources within the Project area and to determine the necessity of additional archaeological assessments prior to the commencement of ground disturbing activities.[148]

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143 Exhibit B-1, Application, p. 81.

144 Exhibit B-1, Application, p. 81.

145 Exhibit B-1, Application, p. 81.

146 Exhibit B-1, Application, p. 57.

147 Exhibit B-1, Application, Appendix E.

148 Exhibit B-1, Application, p. 86.

159. As is typical for projects of this nature, potential impacts to archaeological resources will be further assessed during the AIA, which will be initiated during the detailed engineering phase of the Project. The objective of the AIA will be to identify archaeological resources within the Project footprint and, if present, to evaluate impacts to those resources as a result of the Project and to provide recommendations to effectively manage the impacts to those resources stemming from the Project. The AIA will provide a detailed assessment to allow for development of site-specific mitigation strategies to offset any potential impacts to archaeological resources associated with the Project. Provincial and Indigenous archaeological permits will be obtained during the detailed engineering phase and, if necessary, during the construction phase.[149]

160. If required, archaeological monitoring will be undertaken during all archaeologically sensitive aspects of the work program and the designated archaeological monitor will have "stop work authority" in the event that works underway have the potential to result in unauthorized impacts to archaeological, historic heritage or cultural resources.[150]

[149] Exhibit B-1, Application, p. 87.

[150] Exhibit B-1, Application, p. 87.

PART SEVEN: FEI'S ONGOING ENGAGEMENT ACTIVITIES

161. FEI's consultation and engagement with stakeholders and Indigenous groups to date have been appropriate and reasonable, reflecting the OCMP's stage of development and schedule. FEI has demonstrated commitment to responding to feedback from Indigenous groups and stakeholders.

162. As described in the sections below:

- Public consultation to date on the Project has been sufficient and will continue; and
- FEI's engagement with Indigenous groups on the Project has been meaningful and will continue.

163. FEI will continue to work with stakeholders and Indigenous groups to address outstanding items related to the Project, and will track the Project specific interests, issues and concerns of those groups potentially impacted by the Project.

A. FEI HAS UNDERTAKEN PUBLIC CONSULTATION TO DATE AND IT IS ONGOING

164. Consultation and engagement are integral components of FEI's project development process. Accordingly, FEI created a Consultation and Engagement Plan (Engagement Plan) that sets out the general approach to consultation, engagement and communications activities with respect to the work on the OCMP.[151] FEI's public consultation and communication activities have been sufficient, appropriate, and reasonable to meet the requirements of the CPCN Guidelines.

165. The Engagement Plan takes into consideration the specific nature of the Project, which includes work entirely within an existing FEI facility. As a result, FEI's consultation and engagement activities are primarily targeted towards Indigenous groups, local governments, and those stakeholders who live and work in close proximity to the Project.

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[151] Exhibit B-1, Application, Section 8.

166. Feedback from local rightsholders and stakeholders will be valuable for FEI to address potential concerns. Additionally, FEI recognizes the importance of transparency and communication with all customers as it pertains to potential rate impacts and intends to take steps to notify customers. FEI initiated public consultation for the Project by meeting with City of Kelowna senior staff to outline the proposed Project location, scope and need to gather input and feedback on opportunities, concerns, or other issues in relation to the OCMP.[152]

167. FEI initiated public consultation with other non-Indigenous groups with respect to the OCMP by mailing notification letters on August 1 to residents and businesses in close proximity to the Project location, and emailing a notification letter on August 1 to local government staff from communities that could be impacted by a reduction in energy capacity, and local provincial and federal government offices. The notification letters outline the Project need, location, timelines and scope as well as information on the regulatory hearing process, a link to the Project webpage, and a Project-specific email address and phone number to contact FEI to be kept up to date on the Project's progress.[153] FEI has received limited responses to the August 1 notification letter from residents.[154] FEI has not yet received any responses from local government staff or from local provincial or federal government offices.[155]

168. Attachment 10.4 to the response to RCIA IR1 10.4 provides the stakeholder consultation log for the OCMP. In accordance with the BCUC's request,[156] FEI will file an update detailing its consultation and communication activities to date, including the issues raised at the planned information session on November 25, 2024, and FEI's responses or planned follow up.

169. FEI acknowledges that a number of Letters of Comment have been filed in this proceeding from individuals. The issues raised in the Letters of Comment (e.g., transportation of LNG on highways, electrification) are addressed in the Application and these submissions. It is notable

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[152] Exhibit B-1, Application, p. 89.

[153] Exhibit B-8, RCIA IR1 10.2.

[154] Exhibit B-8, RCIA IR1 10.2.

[155] Exhibit B-8, RCIA IR1 10.2.

[156] Exhibit A-5.

that all but two of the letters appear to have been authored by people who are not affected by the imminent capacity shortfall, yet are effectively advocating for some customers to be exposed the risk of being without heat for a prolonged period in sub-zero temperatures. The result would be inequitable treatment of customers – customers in the parts of the Okanagan that stand to be affected by a shortfall will pay the same rate as customers elsewhere, but receive a substantially lower quality of service that entails self-evident health and safety and economic consequences. The BCUC should instead uphold the longstanding utility planning practice of ensuring that the system is capable of reliably serving firm customers throughout the year, which results in the fair and equitable treatment of customers across the system.

170. FEI is committed to continue to engage with stakeholders potentially affected by the OCMP, including landowners and rightsholders in the vicinity of the facility as part of the BCER permitting process.

171. FEI's consultation and communication activities at the time of filing the Application and to date have been sufficient, appropriate, and reasonable when considering the short timeline to develop the Project and file the Application, and there will be ongoing consultation and engagement throughout the Project lifecycle.[157]

B. FEI ENGAGEMENT WITH INDIGENOUS GROUPS IS MEANINGFUL AND ONGOING

172. FEI submits that its evidence demonstrates a level of engagement with Indigenous groups that is appropriate for this stage of the Project planning and development, and for the BCUC regulatory review process. FEI's engagement is ongoing.

173. FEI seeks to build and maintain strong working relationships with Indigenous groups guided by FEI's Statement of Indigenous Principles. FEI's approach to engagement ensures that potential impacts of the Project on the title, rights, and interests of affected Indigenous groups are documented and considered. In keeping with these principles, FEI has and will continue to:[158]

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[157] Exhibit B-8, RCIA IR1 10.3.

[158] Exhibit B-1, Application, p. 93.

- Uphold a high standard of engagement through the Project lifecycle; and
- Endeavor to create Project benefits for local Indigenous groups, through capacity building and economic opportunities.

174. FEI is committed to thorough, timely and meaningful engagement with Indigenous groups and has taken this approach in developing its Engagement Plan for the Project. While the constitutional duty to consult with Indigenous groups rests with the Crown, FEI's Indigenous engagement activities will aid the appropriate Crown agencies in meeting that duty. FEI's goal is to incorporate feedback from Indigenous groups throughout the Project lifecycle, including Project planning (particularly the BCER permitting processes), construction and restoration. FEI is committed to working with Crown agencies, including the BCER, to identify, avoid and mitigate potential impacts on Indigenous title, rights, and interests and, when appropriate, to discuss and develop options for mitigation and/or accommodation.[159]

175. As outlined the Application, FEI emailed *snpink'tn* in January 2024 advising of the BCUC's decision on the original OCU project. Once FEI had developed preliminary alternatives for the OCMP, a meeting was held with *snpink'tn* to discuss the proposed alternatives and gather feedback. FEI sent an email following the meeting, summarizing the discussion, acknowledging the work done by *snpink'tn* and the requirements for a new agreement and community vote for a proposed staged pipeline option. FEI notified *snpink'tn* in May 2024 that the time required to negotiate an agreement could not meet the timeline needed for a project to be in place to address the winter capacity shortfall expected in 2026/2027; therefore, FEI advised that it would be pursuing options in and around Kelowna to meet the required service timeline.[160]

176. FEI initiated early engagement with the Intergovernmental Affairs staff of the local Indigenous group, Westbank First Nation (WFN), as the Kelowna Gate Station falls within WFN's Area of Responsibility within the syilx Okanagan Nation. The overall discussion was positive, with WFN advising they will likely want to participate in any archaeological and environmental studies.

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[159] Exhibit B-1, Application, p. 93.

[160] Exhibit B-4, BCSEA IR1 5.1.

FEI updated referral information previously submitted to WFN for further review and feedback, along with Environmental and Archaeological Desktop studies completed to date. At WFN's request, FEI agreed to provide further information such as detailed design and environmental studies once developed.[161]

177. FEI also sent notification letters to the other Indigenous communities that hold interest in the Project area, and, to date has not received any questions, concerns, comments, or requests for meetings to further engage on the Project.[162]

178. To mitigate delays associated with the BCER referring the Facility permit application to the Indigenous Nation consultation process, FEI will hold a pre-application meeting with the BCER and will seek a decision from the BCER on consultation requirements with Indigenous groups.[163]

179. Based on discussions to date, and FEI's commitment to provide further information as it becomes available, FEI does not anticipate concerns being raised from local Indigenous communities.[164]

180. FEI submits that there is sufficient evidence on the record to support a conclusion by the BCUC that there has been adequate Indigenous engagement to this stage.

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[161] Exhibit B-6, CEC IR1 28.1.

[162] Exhibit B-6, CEC IR1 28.1.

[163] Exhibit B-3, BCUC IR1 9.2.

[164] Exhibit B-6, CEC IR1 28.1.

PART EIGHT: ALIGNMENT WITH PROVINCIAL ENERGY AND CLIMATE OBJECTIVES

181. Section 46(3.1)(a) of the UCA requires the BCUC to consider "the applicable of British Columbia's energy objectives". In the case of the OCMP, consideration of most of British Columbia's energy objectives, however, is neutral vis-à-vis the Project as they either do not apply to FEI or the Project generally, or are not in conflict with the Project, as the Project is designed to meet short-term peak-demand requirements in the Okanagan region, and there is currently no feasible alternative peak resource available to serve this load.

182. As discussed in this Part, the OCMP primarily supports objective (d) "to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources", and objective (k) "to encourage economic development and the creation and retention of jobs". The Project is not inconsistent with provincial energy and climate objectives to reduce GHG emissions, and is consistent with FEI's most recently filed long-term gas resource plan.

A. SUPPORT OF BC ENERGY OBJECTIVE TO USE AND FOSTER THE DEVELOPMENT IN BC OF INNOVATIVE TECHNOLOGIES

183. Consistent with objective (d), the Project involves the installation of innovative, small scale LNG storage and regasification equipment to address near-term peak demand requirements in the Okanagan region through the winter of 2028/2029, thereby avoiding or deferring longer-term capacity solutions. The Project does not affect customer use of renewable natural gas, which is blended on FEI's system and allocated to FEI's sales customers.[165]

B. SUPPORT OF BC ENERGY OBJECTIVE TO ENCOURAGE ECONOMIC DEVELOPMENT

184. The Project will benefit the local economy during the construction phase by creating jobs in BC through FEI's contractors, and result in the procurement of goods and services from locally owned and operated vendors and subcontractors (i.e., the use of local hotels and restaurants for employees working on the construction sites). FEI is committed to working with Indigenous groups, community leaders and local organizations, developing the local workforce, supporting

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[165] Exhibit B-1, Application, p. 99.

local businesses, and connecting them to Project opportunities. The Project will also ensure adequate capacity is available to support economic activity and growth in the region through the winter of 2028/2029.[166]

C. THE PROJECT PLAYS A ROLE IN ACHIEVING PROVINCIAL ENERGY AND CLIMATE OBJECTIVES

185. The Project will play a role in achieving, i.e., is not inconsistent with, the provincial energy and climate objective to reduce greenhouse gas emissions, which is referenced in British Columbia's energy objectives (g), (h) and (i):

- The Project does not conflict with the reduction of greenhouse gas emissions in BC as the Project is designed to support near-term peak demand requirements in the Okanagan region during cold winter conditions, and there is currently no feasible alternative peak resource available to serve this load. Further, the Project will facilitate customers' continued use of renewable natural gas even during peak demand conditions, as the renewable natural gas is blended on FEI's system and allocated to FEI's sales customers, to reduce emissions in BC.[167]
- The Project is designed to meet near-term peak demand and will not prevent the switch to other energy sources that can decrease greenhouse gas emissions, such as electricity or renewable natural gas. The Project does not affect customer use of renewable natural gas, which is blended on FEI's system and allocated to FEI's sales customers, to reduce emissions in BC.[168]
- The Project is designed to meet near-term peak demand and will not prevent communities from reducing greenhouse gas emissions or using energy efficiently.[169]

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166 Exhibit B-1, Application, p. 100.

167 Exhibit B-1, Application, p. 100.

168 Exhibit B-1, Application, p. 100.

169 Exhibit B-1, Application, p. 100.

D. THE PROJECT IS CONSISTENT WITH FEI'S MOST RECENT RESOURCE PLAN

186. The original OCU project was identified in FEI's most recently filed long-term gas resource plan (2022 LTGRP). In the decision accepting the 2022 LTGRP (2022 LTGRP Decision), the BCUC noted that FEI projects a need for capacity upgrades on the ITS in the planning period. The BCUC also noted that the original OCU project was rejected, and that FEI was directed to examine other short-term solutions to meet requirements and file a mitigation plan with the BCUC by the end of July 2024. Accordingly, the OCMP is consistent with FEI's most recently accepted LTGRP.[170]

[170] Exhibit B-1, Application, p. 102.

PART NINE: ISSUES RAISED BY THE BCUC

187. On November 8, 2024 the BCUC requested that the parties address two issues in their submissions.[171] As set out below FEI submits that:

- An interim or contingent CPCN is not warranted and risks delaying the Project, which is required to address imminent need.
- There is no basis for a time-limited CPCN, and such an approach would harm customers.

A. AN INTERIM OR CONTINGENT CPCN IS NOT WARRANTED AND RISKS DELAYING THE PROJECT, WHICH IS REQUIRED TO ADDRESS IMMINENT NEED

188. FEI submits that the BCUC should grant the CPCN on the terms sought, which includes final approval of both phases of the proposed Project, without making any aspect of the approval "interim or contingent" in the manner suggested. There are three reasons for this.

189. First, there would be no real value in making the CPCN contingent on BCER approval, as FEI could not proceed with the Project without the required BCER approval in any event.

190. Second, a condition of this nature would be highly unusual, which stands to reason given its redundancy. Almost every capital project that is subject to the BCUC's CPCN requirements requires approvals or permits from multiple regulators. In past CPCN applications, the BCUC has avoided the redundancy and unnecessary complexity of making CPCNs conditional upon obtaining other regulatory approvals.

191. Third, while FEI has no objection to notifying the BCUC upon obtaining BCER approval, a CPCN that includes terms imposing more substantial process requirements after FEI has obtained BCER approval would only serve to exacerbate what is already a tight project timeline and add unnecessary costs. In any event, FEI's evidence is that it foresees no issues with the BCER

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[171] Exhibit A-5.

permitting that would merit a substantive re-examination of the CPCN approval after the BCER permit is issued.[172]

192. This is a circumstance that calls out for efficient regulation, which would be provided by the BCUC's typical approach to approving a CPCN without the contemplated conditions. The BCUC has already determined the need for prompt action to meet an imminent capacity shortfall. A capacity shortfall means that customers who have come to expect, and are paying for, reliable gas service for heating and commercial processes are facing losing gas service in the coldest periods of the winter. The loss of gas supply during winter, which is fully avoidable with prompt action, would pose a significant health and safety risk and result in significant economic harm.

193. The second part of Question 1 asks about "whether an alternative, such as Alternative 5 should be considered if the conditional approval for Phase 2 is not granted". FEI respectfully submits that the BCUC order in this proceeding should not leave FEI in the position of being unable to serve its customers in the coldest periods of upcoming winters. There are a number of reasons that proceeding with Alternative 5 after Phase 1 of Alternative 6 would be problematic:

- Proceeding with Phase 1 of Alternative 6 and then pivoting to Alternative 5 would result in duplicative and unnecessary equipment. For example, proceeding with Alternative 5 after Phase 1 of Alternative 6 would require FEI to acquire seven additional LNG bulk transport trailers, three additional LNG mobile day tanks and additional mobile gas fired vaporizers.[173] Such an approach may also present constructability issues in light of the required setbacks for Alternative 5,[174] which would be exacerbated by the additional constraints on property from the implementation of Phase 1 of Alternative 6.[175]

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[172] Part 3, Section F, above. See also Exhibit B-3, BCUC IR1 4.5.

[173] Exhibit B-1, Application, p. 41.

[174] Exhibit B-1, Application, p. 39.

[175] Exhibit B-8, RCIA IR1 7.4.

- As noted above, it is unlikely that Alternative 5 could act as a foundation for a future project. It becomes impractical as the capacity shortfall grows due to the volume of trucks required, space constraints at the proposed site, and the reliability and safety concerns associated with trucking over mountain roads during extreme cold weather events.[176]

- Alternative 5 has greater permitting risk than Phase 2 of Alternative 6. The required 15 metre setback between the fired vaporizer and mobile day tank may potentially be reduced based on a risk assessment and approval by the BCER. If CSA Z276 Clause B.5.2.9.3 cannot be applied, an alternative site may need to be acquired for spill impoundment and increased setbacks. Therefore, considering the uncertainties related to the BCER reduced setback approvals, Alternative 5 was assigned a poorer (lower) score than Alternative 6.[177]

B. THERE IS NO BASIS FOR A TIME-LIMITED CPCN, AND SUCH AN APPROACH WOULD HARM CUSTOMERS

194. FEI respectfully submits that the BCUC should not adopt the suggested approach for two reasons:

- The type of time limited CPCN envisaged in the question would represent an error in law; and

- Even if this type of order were legally valid (it would not be), the approach would be contrary to the public interest in light of the evidence before the BCUC.

(a) A Time Limited CPCN Would Represent an Error in Law

195. The type of time limited CPCN envisaged in the question would represent an error in law. Although the BCUC has broad discretion to impose conditions, it is not unfettered. Conditions must accord with the purpose of the legislation, adhere to the regulatory compact, and be based

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[176] Exhibit B-8, RCIA IR1 4.1.

[177] Exhibit B-8, RCIA IR1 7.4 and 7.9. See also Exhibit B-6, CEC IR1 14.1.

on evidence. The order envisaged would (i) violate the regulatory compact, and (ii) lack an evidentiary foundation.

Leaving Unrecovered Capital Would Violate the Fair Return Standard and Regulatory Compact

196. The order envisaged would violate the UCA and regulatory compact because FEI is legally entitled to recover prudently incurred costs and an opportunity to earn a return on and of its invested capital. These rights are well-established in the case law and decisions of the BCUC.

197. Public utilities like FEI recover their prudently incurred capital (i.e., earn a return <u>of</u> capital) through depreciation expense. In the normal course, the BCUC sets depreciation rates based on the expected life of assets, as determined by a depreciation study. At the end of the expected life of the asset, the utility will have recovered all of its prudently incurred invested capital via accumulated depreciation expense, thereby meeting the "return of capital" requirement of the regulatory compact.

198. Utilities are also entitled to a reasonable opportunity to earn their allowed return. The Supreme Court of Canada has described this right is "absolute",[178] meaning that it cannot be sacrificed in the interests of lower rates or non-legislated policy. A utility only has a reasonable opportunity to earn its allowed return if rates are set to recover all prudently incurred costs plus the allowed return. Disallowing recovery of prudently incurred costs drives down the effective return, and thus also breaches the fair return standard under the regulatory compact.

199. The expected lives of these assets are 30 years, as reflected in the approvals FEI is seeking. The contemplated order would terminate FEI's right to operate the assets before the end of their expected life. In effect, despite the assets being physically functional for decades, the CPCN would artificially shorten the useful life of the asset to the finite term of the contemplated time-limited CPCN. Unless the BCUC also adjusts depreciation rates to reflect that shorter period of time, so as to fully recover the capital cost of the Project over that short period, the time-limited CPCN would have the following effects:

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[178] *British Columbia Electric Railway Co. v. Public Utilities Commission*, [1960] S.C.R. 837 at 848.

- It would leave most of the invested capital unrecovered at the end of the CPCN "term"; and

- Each year thereafter, FEI's effective return on equity would be suppressed by virtue of not being able to recover legitimate, prudently incurred capital costs.

200. The first implication above violates the legal requirement to allow a utility an opportunity to recover prudently incurred capital costs (i.e., earn its return of capital). The second implication violates the legal requirement to provide FEI with a reasonable opportunity to earn the allowed return on equity. It would be, in short, a significant error in law.

Terms Must Be Based in Evidence and There Is No Evidence that the Project Will Cease to Be Needed in 2030

201. The question references the potential for FEI to have to return to the BCUC to demonstrate the need again in, for example, 2030. It would also be a legal error for the BCUC to impose such a term in the absence of evidence that the assets would be no longer needed as of a specific date.

202. It is a legal error to make determinations in the absence of evidence.[179]

203. The evidence before the BCUC is as follows:

- Load has been increasing, and there is no evidentiary basis to anticipate a decline in the near-term.

- There is no policy in place today or on the horizon that would prevent customers from requesting service from FEI and FEI connecting them under its obligation to serve.

- There is nothing to suggest that future projects would render this one redundant.

204. In the absence of evidence that a decline in load is imminent, that the policy environment is changing or that the assets will somehow be rendered useless, there is no evidentiary basis for a time limited CPCN.

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[179] *R. v. J.M.H.*, 2011 SCC 45 at para. 25.

(b) The Contemplated Order Would Be Contrary to the Public Interest

205. The approach envisaged would, in any event, be contrary to the public interest. As explained in more detail below, it would deprive customers of functioning assets that they paid for, drive rates much higher in the short-term, and create intergenerational inequity. It is also unnecessary, as there are other mechanisms available to the BCUC that do not have these unfavourable implications:

- **Customers lose the benefit of the asset:** The order would result in a scenario where, absent some future order of the BCUC, FEI would be unable to use perfectly functional assets to serve customers after 2030 because FEI would have lost the right to operate them.

- **Higher rates in the short-term:** Customers would be harmed even if the BCUC later decided to extend the CPCN. Under normal regulatory accounting practices, the capital costs are depreciated over the expected life of the assets. Artificially limiting the useful life of assets to only a few years means that the entire capital cost must be recovered in only a few years, instead of spreading it out over decades. (FEI submits that the BCUC would have to allow full recovery over this period to avoid legal error, but regardless as a practical matter no utility could be expected to reinvest in the system without a reasonable prospect of recovering its costs.) Customers would experience higher rates in the near term under the approach contemplated in the question than they would under FEI's proposal. To put this in perspective, under the normal accepted and established approach of recovering the costs over the expected life of the assets, the incremental depreciation in 2028 (when all assets related to OCMP enter FEI's rate base) would be approximately $1.5 million.[180] Fully amortizing that same capital cost over only three years (i.e., from 2028 when all assets enter FEI's rate base to 2030) would mean that the incremental depreciation expense would be at least 10 times more in 2028 (i.e., three years versus 10 years) at approximately $15

[180] Exhibit B-1-1, Confidential Appendix J, Schedule 1, Line 4, year 2028.

million ($1.5 million times 10), excluding the incremental impact of income tax on FEI's revenue requirement[181], and putting significant pressure on FEI's customers rates.

- **Intergenerational inequity:** Regulatory accounting practices are intended to align the costs of capital investments with the period over which they produce benefits for customers. FEI's proposal, consistent with regulatory practice, spreads the capital cost over the expected life of the assets. By contrast, the approach contemplated in the question would result in significant inter-generational inequity. The entire cost would be recovered from customers over three years, whereas customers every year thereafter would pay nothing for the fully depreciated assets.

206. Taking this harmful approach is also unnecessary. The concern underlying the approach contemplated in the question seems to be a fear that the assets will no longer be needed after 2030 due to changes in load. However, having constructed the assets already, and incorporated them into FEI's overall resource stack, after being fully depreciated, the assets would be, by definition, the cheapest available source of supply for customers.

207. Moreover, the regulatory mechanism available to address declining load over time is to periodically revisit the depreciation rates to ensure they continue to reflect the expected life of the asset, not to artificially revoke FEI's ability to operate fully functioning assets and amortize the entire cost over a few years. Even then, changes to amortization periods should not be shortened merely due to uncertainty about future gas demand levels, but based on a tangible and foreseeable change in the expected useful life of the assets.

208. If the underlying premise of the question was concern about the use of the OCMP assets beyond 2030 in light of hypothetical reduced future peak demand, FEI submits that it would be more appropriate to instead direct FEI to report on the OCMP's continued use to address peak demand at that time.

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[181] Income tax expense on the incremental add back of $15 million depreciation is approximately $5.5 million (i.e., $15 million / (1 – 0.73) x 27%), thus making the incremental revenue requirement increase in 2028 approximately $20.5 million.

PART TEN: CONCLUSION

209. The evidence demonstrates that the OCMP is in the public interest. It is necessary for FEI to continue to maintain safe and reliable gas service in the face of the expected capacity shortfall in the winter peak of 2026/2027 and thereafter so that FEI's customers can heat their homes and operate their businesses. The preferred alternative Small Scale LNG Storage Facility (Alternative 6) is the best alternative available in the short time available to address the immediate need for a source of peaking supply in the Okanagan and avoid the loss of gas supply during winter.

210. FEI respectfully submits that the BCUC should grant a CPCN and the associated approvals on the terms set out in the Application. A draft form of Order sought is included as Appendix K-2 to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated:
November 21, 2024

[original signed by Tariq Ahmed]
Tariq Ahmed
Counsel for FortisBC Energy Inc.

Dated:
November 21, 2024

[original signed by Matthew Ghikas]
Matthew Ghikas
Counsel for FortisBC Energy Inc.

Appendix A
BOOK OF AUTHORITIES

BOOK OF AUTHORITIES

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1. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4
2. *British Columbia Electric Railway Co. v. Public Utilities Commission,* [1960] S.C.R. 837
3. *Princeton Light & Power Co. Ltd. v. MacDonald,* 2005 BCCA 296
4. *R. v. J.M.H.,* 2011 SCC 45

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

v.

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

and

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

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

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2005: May 11; 2006: February 9.

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

N^{o} du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

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

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

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

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

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

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

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

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

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

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

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

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonnabilité. Lorsqu'elle

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

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

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

Cases Cited

By Bastarache J.

Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v.*

La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65, 31 juillet 2001; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41, 5 juillet 2000; *Pushpanathan c.*

Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, March 23, 1987; *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349;

Canada (Ministre de la Citoyenneté et de l'Immigration), [1998] 1 R.C.S. 982; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19; *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, conf. par [1977] 2 R.C.S. 822; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Décision nº E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, conf. par (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601; *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182, conf. par [1985] 1 R.C.S. 174; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186; *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, autorisation de pourvoi refusée, [1981] 2 R.C.S. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, 23 mars 1987; *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2

Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

Statutes and Regulations Cited

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, ss. 13, 15, 26(1), (2), 27.

R.C.S. 919, 2000 CSC 64; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167.

Citée par le juge Binnie (dissident)

Atco Ltd. c. Calgary Power Ltd., [1982] 2 R.C.S. 557; *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353; *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991; *Re Natural Resource Gas Ltd.*, C.É.O., RP-2002-0147, EB-2002-0446, 27 juin 2003; *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84116, 12 octobre 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Décision nº E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84115, 12 octobre 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984.

Lois et règlements cités

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 13, 15, 26(1), (2), 27.

Gas Utilities Act, R.S.A. 2000, c. G-5, ss. 16, 17, 22, 24, 26, 27(1), 36 to 45, 59.
Interpretation Act, R.S.A. 2000, c. I-8, s. 10.
Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).
Public Utilities Board Act, R.S.A. 2000, c. P-45, ss. 36, 37, 80, 85(1), 87, 89 to 95, 101(1), (2), 102(1).

Authors Cited

Anisman, Philip, and Robert F. Reid. *Administrative Law Issues and Practice*. Scarborough, Ont.: Carswell, 1995.

Black, Alexander J. "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349.

Blake, Sara. *Administrative Law in Canada*, 3rd ed. Markham, Ont.: Butterworths, 2001.

Brown, David M. *Energy Regulation in Ontario*. Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* Toronto: Butterworths, 1981.

Canadian Institute of Resources Law. *Canada Energy Law Service: Alberta*. Edited by Steven A. Kennett. Toronto: Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Cross, Phillip S. "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44.

Depoorter, Ben W. F. "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass.: Edward Elgar, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina. *Resetting Price Controls for Privatized Utilities: A Manual for Regulators*. Washington, D.C.: World Bank, 1999.

Kahn, Alfred E. *The Economics of Regulation: Principles and Institutions*, vol. 1, *Economic Principles*. Cambridge, Mass.: MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233.

Milner, H. R. "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101.

Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 16, 17, 22, 24, 26, 27(1), 36 à 45, 59.
Interpretation Act, R.S.A. 2000, ch. I-8, art. 10.
Public Utilities Act, S.A. 1915, ch. 6, art. 21, 23, 24, 29g).
Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 36, 37, 80, 85(1), 87, 89 à 95, 101(1), (2), 102(1).

Doctrine citée

Anisman, Philip, and Robert F. Reid. *Administrative Law Issues and Practice*. Scarborough, Ont. : Carswell, 1995.

Black, Alexander J. « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349.

Blake, Sara. *Administrative Law in Canada*, 3rd ed. Markham, Ont. : Butterworths, 2001.

Brown, David M. *Energy Regulation in Ontario*. Aurora, Ont. : Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto : Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* Toronto : Butterworths, 1981.

Côté, Pierre-André. *Interprétation des lois*, 3e éd. Montréal : Thémis, 1999.

Cross, Phillip S. « Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44.

Depoorter, Ben W. F. « Regulation of Natural Monopoly », in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass. : Edward Elgar, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina. *Resetting Price Controls for Privatized Utilities : A Manual for Regulators*. Washington, D.C. : World Bank, 1999.

Institut canadien du droit des ressources. *Canada Energy Law Service : Alberta*. Edited by Steven A. Kennett. Toronto : Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Kahn, Alfred E. *The Economics of Regulation : Principles and Institutions*, vol. 1, *Economic Principles*. Cambridge, Mass. : MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233.

Mullan, David J. *Administrative Law.* Toronto: Irwin Law, 2001.

Netz, Janet S. "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts.* Northampton, Mass.: Edward Elgar, 2000.

Reid, Robert F., and Hillel David. *Administrative Law and Practice*, 2nd ed. Toronto: Butterworths, 1978.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002.

Trebilcock, Michael J. "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada*. Toronto: Macmillan of Canada, 1978, 94.

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

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

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

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

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

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

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

Milner, H. R. « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101.

Mullan, David J. *Administrative Law.* Toronto : Irwin Law, 2001.

Netz, Janet S. « Price Regulation : A (Non-Technical) Overview », in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts.* Northampton, Mass. : Edward Elgar, 2000.

Reid, Robert F., and Hillel David. *Administrative Law and Practice*, 2nd ed. Toronto : Butterworths, 1978.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont. : Butterworths, 2002.

Trebilcock, Michael J. « The Consumer Interest and Regulatory Reform », in G. B. Doern, ed., *The Regulatory Process in Canada.* Toronto : Macmillan of Canada, 1978, 94.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (les juges Wittmann et LoVecchio (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, qui a infirmé une décision de l'Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O'Ferrall et *Daron K. Naffin*, pour l'appelante/intimée au pourvoi incident.

Clifton D. O'Brien, *c.r.*, *Lawrence E. Smith*, *c.r.*, *H. Martin Kay*, *c.r.*, et *Laurie A. Goldbach*, pour l'intimée/appelante au pourvoi incident.

J. Richard McKee et *Renée Marx*, pour l'intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh* et *Michael W. Lyle*, pour l'intervenante la Commission de l'énergie de l'Ontario.

Argumentation écrite seulement par *J. L. McDougall*, *c.r.*, et *Michael D. Schafler*, pour l'intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny* et *Susan Kushneryk*, pour l'intervenante Union Gas Limited.

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

BASTARACHE J. —

1. Introduction

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

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

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d'un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l'organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l'investissement étranger, l'assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l'élaboration des politiques des organismes administratifs, mais son étendue varie d'un organisme à l'autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l'exercice de son pouvoir discrétionnaire, l'organisme créé par voie législative doit s'en tenir à son domaine de compétence : il ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l'énergie et des services publics n'y échappe pas. En l'espèce, l'intimée est un service public albertain de distribution de gaz naturel. Il ne s'agit en fait que d'une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l'émission d'actions et d'obligations; ses ressources, ses terrains et ses autres biens lui

sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficience de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

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

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

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

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

1.1 *Overview of the Facts*

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

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was

1.1 *Aperçu des faits*

8 ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

9 Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

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

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

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

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

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

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*) : [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « *formule TransAlta* » :

> [TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

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

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

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

[TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

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

12

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit :

The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

[TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.

Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

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

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

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

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

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

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

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

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

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

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

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

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

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

16 La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

17 Elle a décidé de répartir le produit brut de la vente (6 550 000 $) comme suit : 465 000 $ à ATCO pour les frais d'aliénation (265 000 $) et la dépollution (200 000 $), 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients. Un montant de 225 245 $ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 $ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 $ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

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

2. Analysis

2.1 *Issues*

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

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

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's

Commission, lui enjoignant d'attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d'attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d'appel, qui n'a pas eu tort de statuer que la Commission n'avait pas le pouvoir d'attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d'un pourvoi et d'un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu'a estimé la Cour d'appel, la Commission avait le pouvoir d'attribuer aux clients une partie du gain net résultant de la vente d'un bien affecté au service public même si elle avait conclu, au moment d'autoriser la vente, qu'aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d'attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n'a pas le pouvoir de leur attribuer l'équivalent de l'amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l'espèce à décider si la Commission a le pouvoir d'attribuer le gain net tiré de la vente d'un bien d'une entreprise de services publics.

Vu la conclusion à laquelle j'arrive, point n'est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l'exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l'origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l'organisme qui l'a rendue. S'exprimant au nom de la Cour d'appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l'application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n'y a pas lieu de faire preuve de

decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

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

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

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

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

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

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

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

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

22 Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

23 Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

24 Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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

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

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

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

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

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

28 Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

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

29 La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d)(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

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

30 Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

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

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d) de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction"

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) et la

(*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

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

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

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

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

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

> . . . plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

33 La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

34 Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

35 Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been

[TRADUCTION] « s'en tenir à son domaine de compétence et ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu'elle avait le pouvoir d'attribuer le produit de la vente des biens d'un service public, je dois interpréter le cadre législatif à l'origine de ses attributions et de ses actes.

2.3.1 Principes généraux d'interprétation législative

Depuis un certain nombre d'années, notre Cour fait sienne l'approche moderne d'E. A. Driedger en matière d'interprétation des lois (*Construction of Statutes* (2e éd. 1983), p. 87) :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l'octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d'autoriser la vente des biens d'un

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

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and

service public englobe — implicitement et explicitement — celui de décider de l'attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n'est pas expressément prévu par la loi, mais qu'on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Je suis d'accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

40 La Ville soutient à titre préliminaire qu'en lui demandant d'autoriser la vente des biens *et* l'attribution du produit de l'opération, ATCO a reconnu le pouvoir de la Commission d'imposer, comme condition de l'autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l'argument ne tient pas. D'abord, la demande d'autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d'attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu'ATCO lui a demandé d'autoriser l'attribution du produit de la vente pour le cas où elle rejetterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d'autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d'attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 L'analyse exige au départ qu'on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l'al. 15(3)d) de l'AEUBA et l'art. 37 de la

s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

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

. . .

(d) without the approval of the Board,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . .

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . .

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . .

PUBA

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

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

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

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

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

42 Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d)(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

43 Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

44 Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

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

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

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

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

2.3.3 Implicit Powers: Entire Context

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

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

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

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l'analyse car on peut néanmoins soutenir que les dispositions sont jusqu'à un certain point ambiguës et incohérentes.

48 Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d'une disposition n'est pas déterminant et ne met pas fin à l'analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l'objet et l'esprit des lois habilitantes, l'intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

49 Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d'un cadre législatif plus large dont on ne peut faire abstraction :

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d'un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L'objectif ultime consiste à dégager l'intention manifeste du législateur et l'objet véritable de la loi tout en préservant l'harmonie, la cohérence et l'uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l'*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l'annexe). « L'interprétation législative est [. . .] l'art de découvrir l'esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

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

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

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

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

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

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

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

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

2.3.3.1 *Historical Background and Broader Context*

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

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

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

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

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

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

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

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

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

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

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

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

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

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

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

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

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

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

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

2.3.3.2 *Rate Setting*

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

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

> [TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

> [TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

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

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

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

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

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

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

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

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

(b) to necessary working capital.

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

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

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

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

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

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

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

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

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

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

2.3.3.3 *The Power to Attach Conditions*

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

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

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

* [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
* [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
* [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

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

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

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

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

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

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

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

3. It specifically seeks to prevent favoritism toward investors.

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

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

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

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

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

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

2.4 *Other Considerations*

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

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

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

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

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

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

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

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

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

(Decision 2002-037, at para. 54)

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

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

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

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

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

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

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

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

I. Analysis

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

In the absence of any property right or interest and of any harm to the customers arising from the

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

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

A. *The Board's Statutory Authority*

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

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

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

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

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

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

(Respondent's factum, at para. 38)

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

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

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

B. *The Board's Decision*

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

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

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

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *La décision de la Commission*

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

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

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

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

(Decision 2002-037, at para. 13)

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

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

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

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

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

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

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

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

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

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

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

C. *Standard of Review*

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

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

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

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

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

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

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

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

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

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

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

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

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

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

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

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

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

109 "Patent unreasonableness" is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

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

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

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

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

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

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

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

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

and investors is a common preoccupation of comparable boards and agencies:

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

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

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

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

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

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

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

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

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

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

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

> [TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

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

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

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

> [TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

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

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

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

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

(P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

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

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

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

Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

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

F. *ATCO's Arguments*

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

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

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

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

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

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

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

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

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

1. La question de l'effet confiscatoire

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

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

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

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

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

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

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

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

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

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

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

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

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

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

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

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

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

> [TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

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

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

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

> [TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

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

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce*.

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

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

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

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

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

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

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

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

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

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

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

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

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

that there is a corresponding reduction of the rate base and resulting return. [p. 864]

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

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

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

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

3. Land as a Non-Depreciable Asset

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

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

138 Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit :

> [TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

139 Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce.

3. Le terrain en tant que bien non amortissable

140 La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $.

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

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

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

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

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

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

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

4. Lack of Reciprocity

4. L'absence de réciprocité

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

ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

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

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

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

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

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

Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

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

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

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

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

II. Conclusion

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

III. Disposition

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

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

APPENDIX

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

Jurisdiction

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

Powers of the Board

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

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

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

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

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

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

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

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

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

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

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

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

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

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

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

. . .

Exclusion of prerogative writs

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

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

Supervision

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

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

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

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

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

Investigation of gas utility

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

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Designated gas utilities

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

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

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Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

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Prohibited share transactions

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

. . .

Powers of Board

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

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

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

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

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

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Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

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Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

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

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

Rate base

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

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

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

(b) to necessary working capital.

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

Excess revenues or losses

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

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

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

fixing of rates, tolls or charges, or schedules of them,

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

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

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

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

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

(d) the Board shall by order approve

(i) the method by which, and

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

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

General powers of Board

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

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

Jurisdiction and powers

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

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

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

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

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

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

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

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

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

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

General power

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

Investigation of utilities and rates

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

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

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

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

Supervision by Board

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

. . .

Investigation of public utility

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

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

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

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

Fixing of rates

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

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

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

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

(d) repealed;

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

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Determining rate base

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

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

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

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

Revenue and costs considered

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

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

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

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

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

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

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

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

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

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

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

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transaction

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

. . .

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

Enactments remedial

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

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

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

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

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

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

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

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

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

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

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

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

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

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD. ..... APPELLANT;

1960
*May 4, 5, 6
Oct. 4

AND

THE PUBLIC UTILITIES COMMISSION OF BRITISH COLUMBIA, BRITISH COLUMBIA LUMBER MANUFACTURERS' ASSOCIATION, THE CORPORATION OF THE CITY OF VICTORIA, THE CORPORATION OF THE DISTRICT OF OAK BAY, THE CORPORATION OF THE DISTRICT OF SAANICH, CORPORATION OF THE TOWNSHIP OF ESQUIMALT AND CITY OF VANCOUVER ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Case stated by Public Utilities Commission—Matters to be considered by Commission in changing rates—Order of priority to be given to factors considered—The Public Utilities Act, R.S.B.C. 1948, c. 277, s. 16(1)(a) and (b).

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

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The first of a series of questions submitted for the consideration of the Court of Appeal for British Columbia, in a case stated for the opinion of the Court, asked if the Public Utilities Commission of that Province was right in deciding "that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion."

The question was answered in the affirmative. The appellant appealed from that portion of the judgment of the Court of Appeal which comprised this answer.

Held (Kerwin C.J. *dissenting*): The appeal should be allowed.

Per Locke J.: There is an absolute obligation on the part of the Commission on the application of the utility to approve rates which will produce the fair return to which the utility has been found entitled, and the obligation to have due regard to the protection of the public is also to be discharged. It is not a question of considering priorities between "the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of s. 16", but consideration of these matters is to be given by the Commission in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

Per Cartwright, Martland and Ritchie JJ.: The combined effect of the two clauses referred to is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but it must when actually setting the rate, meet the requirements specifically mentioned in clause (*b*), i.e., the rate to be imposed should be neither excessive for the service nor insufficient to provide a fair return on the rate base. These two factors should be given priority over any other matters which the Commission may consider.

Although there is no priority directed by the Act as between these two matters, there is a duty imposed on the Commission to have due regard to both of them, and accordingly there must be a balancing of the interests concerned.

Per Kerwin C.J., *dissenting*: The statute does not require that any weight be given to the matters and things referred to in the two clauses after they have been considered, and therefore the weight to be assigned is a question of fact for the Commission to decide in each instance.

APPEAL from a portion of a judgment of the Court of Appeal for British Columbia[1], comprising the answer to the first of five questions submitted to it by the Public Utilities Commission. Appeal allowed, Kerwin C.J. dissenting.

J. W. de B. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. R. Dodd*, for the appellant;

[1] (1959), 29 W.W.R. 533.

J. A. Clark, Q.C., for The Public Utilities Commission of British Columbia, respondent;

T. P. O'Grady, for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of the District of Saanich and Corporation of The Township of Esquimalt, respondents;

R. K. Baker, for City of Vancouver, respondent.

THE CHIEF JUSTICE (*dissenting*):—Pursuant to s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission stated a case for the opinion of the Court of Appeal for that Province. The case was stated in respect of five questions but we are concerned only with Question 1 as, by order of this Court, British Columbia Electric Railway Company, Limited was granted leave to appeal only from that portion of the judgment of the Court of Appeal comprising the answer given thereto. That question is as follows:

1. (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?

(*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

The Court's answer to Question 1 reads:

The Commission was right in deciding as appears in its Reasons for Decision of 14th July, 1958 that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the Public Utilities Act R.S.B.C. 1948, chapter 277 should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion.

At the conclusion of the argument the judgment of the Court of Appeal appeared to me to be correct and further consideration has confirmed me in that view. Reasons were given by Sheppard J.A. on behalf of himself and the other four members of the Court who heard the argument on the

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stated case. I adopt all that he said and would have nothing to add were it not for an argument presented on behalf of the appellant. Section 16(1)(*a*) and (*b*) read as follows:

16. (1) In fixing any rate:—

(*a*) The Commission shall consider all matters which it deems proper as affecting the rate:

(*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

Mr. Farris submitted that the Court of Appeal had not taken into consideration the words in (1)(*b*) "The Commission shall have due regard.....and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:". However, I am satisfied upon a review of the reasons of Sheppard J.A., relevant to Question 1, and particularly of the extract transcribed below, which is the substance of his reasoning upon the matter, that he did consider and apply these words. The extract reads:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16 (1) (*b*) and particularly to the "fair and reasonable return". Under Sec. 16 (1) (*b*), the Commission is required to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16 (1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16 (1) (*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16 (1) (*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

Furthermore, as Mr. Clark pointed out, the Commission when dealing with the electric rates applications, had, under heading "III.—A Fair Return", discussed that subject; and that in their reasons for decision with reference to the transit fares applications the Commission speaks "of the misunderstanding which arose from the recent decision on

electric rates"; and that later, in the same paragraph, they said: "The 6.5% rate remains the standard of the fair and reasonable return to which the Commission has due regard".

The appeal should be dismissed but there should be no costs.

LOCKE J.:—The sections of the *Public Utilities Act*, R.S.B.C. 1948, c. 277, which must be considered in deciding the first question are quoted in the reasons of my brother Martland which I have had the advantage of reading.

The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

Some assistance in interpreting the sections of the Act is to be obtained by an examination of the earlier legislation dealing with the control of rates charged for electrical power in British Columbia.

The first statutory provision dealing with the matter appears in the *Water Act Amendment Act* of 1929 which appeared as c. 67 of the statutes of that year. This Act provided for the control of such rates and imposed upon a power company producing electrical energy by water power the duty of supplying electrical energy to the public in the manner defined. Power companies were required to file schedules of their tolls with the Water Board constituted under the *Water Act*, R.S.B.C. 1924, c. 271.

"Unjust and unreasonable" as applied to tolls was declared to include injustice and unreasonableness, whether arising from the fact that the tolls were insufficient to yield fair compensation for the service rendered or from the fact that they were excessive as being more than a fair and reasonable charge for service of the nature and quality furnished.

Section 141B authorized the Board upon the complaint of any person interested that a toll charge was unjust, unreasonable or unduly discriminatory to enquire into the matter,

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to disallow any rate found to be excessive, and to fix the tolls to be charged by the power company for its service or respecting the improvement of the service in such manner as the Board considered just and reasonable.

Section 141C read:

> Every power company shall be entitled to a fair return on the value of all property acquired by it and used in providing service to the public of the nature and kind furnished by such power company or reasonably held by such power company for use in such service and the Board in determining any toll shall have due regard to that principle.

Section 141D read in part:

> In considering any complaint and making any order respecting the tolls to be charged by any power company the Board shall have due regard, among other things, to allowing the company a fair return upon the value of the property of the company referred to in Clause 141C and to the protection of the public from tolls that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the company.

These amendments to the *Water Act* appeared as ss. 138 to 157 in the Revision of the Statutes of 1936 and these sections were repealed when the first *Public Utilities Act* was passed by the Legislature, c. 47 of the statutes of 1938.

It will be seen by an examination of the *Public Utilities Act* that in large measure the language of the amendments to the *Water Act* made in 1929 was adopted. The definition of the terms "unjust" and "unreasonable", which appeared in the 1929 amendment as part of s. 2, was reproduced in s. 2 of the Act of 1938. The prohibition against levying any unjust and unreasonable, unduly discriminatory or unduly preferential rate appearing as s. 8 of the *Public Utilities Act* merely expresses in slightly different terms the prohibition contained in s. 141B. The expression "shall have due regard" which appears in s. 16(1)(*b*) of the *Public Utilities Act* was apparently taken from ss. 141C and D.

The *Public Utilities Act,* however, did not, when first enacted, and does not now contain any section which declares in express terms, as did s. 141C of the *Water Act Amendment Act,* that the power company shall be entitled to a fair return on the value of its property. Had the present Act contained such a provision it appears to me to be perfectly clear that the answer to be made to the first question should differ from that given by the Court of Appeal.

Whether its omission affects the matter is to be determined.

As it has been pointed out, the utility in the present matter is required by the Act to maintain its property in such condition as to enable it to supply an adequate service to the public and to furnish that service to all persons who may be reasonably entitled thereto without discrimination and without delay. It may not discontinue its operations without the permission of the Public Utilities Commission. The utility has, so far as we are informed, a monopoly on the sale of electrical energy in the Cities of Vancouver and Victoria and in my opinion at common law the duty thus cast upon it by statute would have entitled it to be paid fair and reasonable charges for the services rendered in the absence of any statutory provision for such payment.

I consider that, in this respect, the position of such a 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 transport at fair and reasonable rates. This has been so from very early times. In *Bastard v. Bastard*[1], in an action against a common carrier in the Court of King's Bench for the loss of a box delivered to him for carriage, in delivering judgment for the plaintiff it was said that, while there was no particular agreement as to the amount to be paid for the carriage, "then the carrier might have a *quantum meruit* for his hire".

In *Great Western Railway v. Sutton*[2], Blackburn J. said in part:

> The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing.

The result of the authorities appears to me to be correctly summarized in Browne's Law of Carriers, at p. 42, where it is said:

> We have already seen that the law imposes very onerous duties, and very considerable risks, upon a person who is designated a common carrier. As to his duty, he is bound by law to undertake the carriage of goods. Another man is free from any such duty until he has entered into a special agreement; but the law holds that the common carrier, by the very fact of his trade and business, has, on his side, entered into an agreement with the public to carry goods, which becomes at once a complete and binding contract when any person brings him the goods,

[1] (1679), 2 Show. 81, 89 E.R. 807.
[2] (1869), L.R. 4 H.L. 226 at 237, 38 L.J Ex. 177.

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and makes the request that he should carry them to a certain person or place. To make such a contract binding upon him as a common carrier, it is not necessary that a specific sum of money should be promised or agreed upon; but where that is not the case, there is an implied undertaking upon the part of the bailor that the remuneration shall be reasonable.

The *Water Act Amendment Act* of 1929 appears to have followed closely the form of public utilities legislation in certain of the United States. There had been statutes of this nature in force in various parts of the Union for a considerable time prior to the year 1929.

I do not find that the American statutes generally declared in terms as did s. 141C of the *Water Act Amendment Act* that a power company providing service to the public should be entitled to a fair return on the value of all property acquired by it and used in providing service to the public. This method, however, of establishing a fair and reasonable rate would appear to have been followed universally.

The authorities in the American cases are to be found summarized in Nichols—Ruling Principles of Utility Regulation, at p. 49—where a passage from the judgment of the Supreme Court of the United States in *Bluefield Water Works & Improvement Co. v. West Virginia Public Service Commission*[1] is quoted reading:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary.

In *New Jersey Public Utility Commissioners v. New York Telephone Company*[2], Butler J. said:

> The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for public service. And rates not sufficient to yield that return are confiscatory.

While without the provision made in s. 141C of the *Water Act Amendment Act* a power company compelled by the amendment to furnish electrical service on demand

[1] (1923), 262 U.S. 679.

[2] (1925), 271 U.S. 23 at 31.

upon the conditions prescribed would in my opinion have been entitled to a fair and reasonable payment for such service, the Legislature, by s. 141C, defined the manner in which fair and reasonable rates should be established.

As I have said, the *Public Utilities Act* does not contain any provision which in terms declares the right of the utility to a fair return on the value of its property. It does, however, by the definition of the terms "unjust" and "unreasonable" adopted from the *Water Act Amendment Act* declare that these expressions include rates that are insufficient to yield fair compensation for the service rendered, and the Public Utilities Commission in the present matter have interpreted this in its context as indicating the yardstick to be used in determining the fair and reasonable return to which the appellant was entitled.

Under the powers given to the Commission by s. 45 of the Act the value of the property of the appellant used, or prudently or reasonably acquired to enable the company to furnish its services was determined as at December 31st, 1942, and since then has been kept up to date. On September 11th, 1952, the Commission, after public hearings, decided that until some change in the financial and market circumstances convinced the Commission that a different rate should be applied, the Commission would apply the rate of 6.5 per cent. on the rate base as a fair and reasonable rate of return for the company.

That decision remains unchanged and is not questioned by anyone in these proceedings.

In interpreting the statute, the position at common law of the utility after the repeal of the sections of the *Water Act* must be considered. Had the statute imposed upon the appellant the obligation to furnish service of the natures defined upon demand, without more, it would have been entitled as a matter of law to recover from a person demanding service reasonable and fair compensation. It will not in my opinion be presumed that it was the intention of the Legislature to deprive a utility of that common law right.

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In *Colonial Sugar Refining Company v. Melbourne Harbour Trust Commissioners*[1], the Judicial Committee said:

> In considering the construction and effect of this Act the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation, unless the intention to do so is expressed in clear and unambiguous terms.

In Maxwell on Statutes, 10th ed., at p. 286, the authorities are thus summarized:

> Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt.

Subsection 6 of s. 23 of the *Interpretation Act*, R.S.B.C. 1948, c. 1, directs that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

The appellant in addition to the sale of electrical energy operates a public transportation system and sells gas and by an Order-in-Council made under the provisions of s. 15(1)(*c*) of the Statutes of 1938 it was directed that these three categories of service should be considered as one unit in fixing the rates. In the reasons delivered by the Commission upon the application to increase the rates for electricity, it is said that the appellant has never earned the approved rate of return and that the rates proposed by it, and which were not approved, would not enable it to do so even in respect of the electrical system alone.

[1] [1927] A.C. 343 at 359, 96 L.J.P.C. 74.

Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute.

The fair compensation referred to in s. 2 of the *Water Act Amendment Act* of 1929 referred, and could only refer, to an aggregate produced by tolls sufficient to yield to the power company the fair return on the value of its property to which s. 141C declared it was entitled. The fair compensation referred to in s. 2 of the *Public Utilities Act* is in its context, in my opinion, to be construed in the same manner. The Order of the Commission of September 11th, 1952, determined what that compensation should be. The rates to be put into force to yield such fair compensation, which, at least in the case of electricity, vary in accordance with the use to which it is put and the quantities purchased, are matters to be determined by the Commission. The direction to the Commission in s. 16(1)(*b*) to have due regard to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for the services requires it, in my opinion, to approve rates which are in its judgment fair and reasonable having in mind the purpose for which the electricity is used, the quantities purchased and such other matters as it considers justify the approval of rates which differ for different users.

I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or

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to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required.

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. As the reasons delivered by the Commission show, the present appellant did not ask the approval of rates which would yield a return of 6.5 per cent. to which it was entitled under the Order of the Board.

I do not consider that Question (1) can be answered by a simple affirmative or negative. The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute, which does not mean that the obligation of the Commission to have due regard to the protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

In my opinion the answer to be made to Question (1)(*a*) is that the Commission was wrong in deciding that it was not required to approve rates which in the aggregate would produce for the utility the fair return which by its order of September 11, 1952, the Commission found it to be entitled or such lower rates as the utility might submit for approval. The duty of the Commission to have due regard to the protection of the public from excessive rates referred to in the first four lines of s. 16(1)(*b*) refers to the approval of rates according to the use to be made by and the quantities supplied to those to whom the service is rendered.

The second part of Question (1) reads:

> If the answer to (1)(*a*) is "No", what decision should the Commission have reached on the point?

As to this I agree with the answer proposed by my brother Martland.

I would allow this appeal but make no order as to costs.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:

> (1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?
>
> (*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

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The relevant circumstances involved are contained in the case stated by the Public Utilities Commission and are as follows:

The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.

The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act*.

By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".

By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.

On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.

The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act,* to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.

Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.

Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:

> The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.
>
> The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user.

At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

During the hearings it was contended by counsel for the Company that, the Commission, having determined on a fair and reasonable return to the Company, namely, 6.5%, the Commission should authorize rates which would yield that return, or whatever lesser return the Company's application requested for the time being. The Commission did not accept this contention and the rates which were approved by the Commission would yield approximately $750,000 less per annum than those applied for by the Company would yield. The rates for which the Company sought approval themselves would not have yielded to the Company the full allowed rate of return of 6.5%.

The relevant portions of s. 16(1) of the *Public Utilities Act* provide as follows:

> 16. (1) In fixing any rate:—

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(*a*) The Commission shall consider all matters which it deems proper as affecting the rate:

(*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

(*c*) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate:

In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:

With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion.

The Court of Appeal concurred in this view. The judgment of the Court[1], delivered by Sheppard J.A., refers to this question in the following words:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the "fair and reasonable return". Under Sec. 16(1)(*b*), the Commission is required

[1] (1959), 29 W.W.R. 533 at 538.

to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16(1)(*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

From this decision the present appeal is brought.

To determine the intent and meaning of clauses (*a*) and (*b*) of s. 16(1) of the Act it is necessary to consider them in relation to the other provisions of the Act, with which they must be read.

Section 5 imposes upon a public utility the duty to maintain its property and equipment in such condition as to enable it to furnish, and to furnish, service to the public in all respects adequate, safe, efficient, just and reasonable. Section 7 prevents a public utility which has been granted a certificate of public convenience and necessity or a franchise from ceasing its operations or any part of them without first obtaining the permission of the Commission.

Section 6 requires every public utility, upon reasonable notice, to furnish to all persons who may apply therefor, and be reasonably entitled thereto, suitable service without discrimination and without delay.

Sections 38, 42 and 43 contain provisions whereby, in the circumstances therein defined, a public utility may be ordered by the Commission to extend its existing services.

These four sections last mentioned involve a statutory obligation on the part of a public utility to make capital outlays for extensions of its service. A public utility which operates in a rapidly expanding community may be required to make substantial expenditures of that nature in order to keep pace with increasing demands. It must, if it is to fulfil those obligations, be able to obtain the necessary

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capital which is required, which it can only do if it is obtaining a fair rate of return upon its rate base. The meaning of a fair return was defined by Lamont J. in *Northwestern Utilities, Limited v. City of Edmonton*[1]:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) 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.

The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words "unjust" and "unreasonable" in s. 2(1), which is as follows:

> "Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:

The word "service", which appears in this definition, is defined in the Act to include:

> the use and accommodation afforded consumers or patrons, and any product or commodity furnished 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 any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which the public utility is engaged and to the use and accommodation of the public:

These defined words appear in two sections of the Act which relate to the rates to be charged by a public utility.

Section 8, which is among a group of sections dealing with the duties and restrictions imposed on public utilities, provides:

> 8. (1) No public utility shall make demand or receive any unjust, unreasonable, unduly discriminatory, or unduly preferential rate for any service furnished by it within the Province, or any rate otherwise in violation of law; and no public utility shall, as to rates or service, subject any person or locality, or any particular descripiton of traffic, to any undue prejudice or disadvantage, or extend to any person any form of agreement, or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons under substantially similar circumstances and conditions in respect of service of the same description, and the Commission may by regulations declare what constitute substantially similar circumstances and conditions.

[1] [1929] S.C.R. 186 at 193, 2 D.L.R. 4.

(2) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, or whether service is offered or furnished under substantially similar circumstances and conditions. 1938, c. 47, s. 8; 1939, c 46, s. 5.

Section 20, which empowers the Commission to determine rates, reads as follows:

20. The Commission may upon its own motion or upon complaint that the existing rates in effect and collected or any rates charged or attempted to be charged by any public utility for any service are unjust, unreasonable, insufficient, or discriminatory, or in anywise in violation of law, after a hearing, determine the just, reasonable, and sufficient rates to be thereafter observed and in force, and shall fix the same by order. The public utility affected shall thereupon amend its schedules in conformity with the order and file amended schedules with the Commission.

It will be noted that this section, in addition to the use of the words "unjust" and "unreasonable", also uses the terms "insufficient" and "sufficient" in relation to rates.

Both of these sections contemplate a system of rates which would be fair to the consumer on the one hand and which will yield fair compensation to the public utility on the other hand.

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

(i) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and

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(ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss. 8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.

In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.

The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*) and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).

Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as

between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

In my view the appeal should be allowed, but no costs should be payable.

Appeal allowed, Kerwin C.J. *dissenting.*

Solicitor for the appellant: A. Bruce Robertson, Vancouver.

Solicitors for The Public Utilities Commission of British Columbia, respondent: Clark, Wilson, Clark, White & Maguire, Vancouver.

Solicitors for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of The District of Saanich and Corporation of The Township of Esquimalt, respondents: Straith, O'Grady, Buchan, Smith & Whitley, Victoria.

Solicitor for City of Vancouver, respondent: R. K. Baker, Vancouver.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Princeton Light & Power Co. Ltd. v. MacDonald,***
2005 BCCA 296

Date: 20050530
Docket: CA031473

Between:

Princeton Light & Power Co. Ltd.

Appellant
(Plaintiff)

And

Randy MacDonald

Cross-Appellant/Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Hall

T.R. Berger Q.C. and M.D. Vanderkruyk	Counsel for the Appellant
J.M. Prodor and B.P. Trainor	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 11 March 2005
Place and Date of Judgment:	Vancouver, British Columbia 30 May 2005

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal raises two interesting issues. The first is whether the British Columbia Utilities Commission has exclusive jurisdiction to decide whether a public utility has complied with the applicable Electric Tariff in back-billing a customer for unauthorized use of electric power. The second is whether the appellant public utility can be held liable for damages for breach of a duty of good faith and fair dealing to its customer, the respondent.

[2] On the view I have reached, I am persuaded the Commission does not have exclusive jurisdiction to determine whether Princeton Light properly back-billed the respondent, and, in the absence of any submission to the contrary, that a duty of good faith and fair dealing is implied in the utility's standard form service agreement. I conclude that Princeton Light breached its contract with the respondent when it back-billed him for 36 months and did so in such a manner as to justify the jury's award of punitive damages. I would dismiss the cross-appeal for an increase in the award of punitive damages.

Evidence

[3] In March 1996, Mr. MacDonald bought a retirement property near Princeton, British Columbia for which he paid $185,000. He rented it the same month to John Judge, with utilities included. On 19 April 1996, he signed a service agreement with Princeton Light in which he agreed, "to pay the rates and charges for [electrical] service on the basis of Tariff 'B.C.U.C. No. 4' together with any amendments thereto" and "to notify [Princeton Light] and to obtain consent before increasing my

connected load substantially". Thereafter, the respondent was billed bi-monthly on the basis of meter readings of consumption varying from 1512 kwh to 4632 kwh until the appellant cut off the power supply on 25 June 1999 after discovering the presence of a marijuana grow-operation ("grow-op") and a power bypass. In July 1999, Mr. MacDonald's wife learned of the cut off and the presence of the grow-op when she called Princeton Light during her husband's absence to enquire why they had not received the usual electricity bill.

[4] Meter readers for Princeton Light testified they smelled "growing marijuana" at the property from time to time between 1996 and 1999. Princeton Light's records include two notes by a meter reader: "pot smell horrendous" in February 1998 and "pot smell" in February 1999. Suspecting a grow-op on the property as a result of a meter reader's complaint, on 8 May 1997, Graham Gould, the general manager of Princeton Light at the time, ordered the removal and replacement of the meter and an inspection for a bypass on the property. No evidence of a bypass was found. Mr. MacDonald testified he did not smell marijuana on many visits to the property while Mr. Judge was a tenant there. Mr. Judge's daughter admitted to smoking medical marijuana for her fibromyalgia occasionally.

[5] Some time in March 1999, Mr. Judge gave notice he would vacate the premises at the expiry of his lease on 15 April 1999. Mr. Judge testified he gave one month's notice and left "sometime in April" when "there was still snow on the ground". Mr. MacDonald testified Mr. Judge told him he would leave the key at the premises when he left, and that Mr. Verrier, who responded to an ad he placed in the local newspaper, paid him rent for May and June 1999.

[6] On 5 May 1999, Princeton Light installed a Flagship Monitor on the transformer pole outside the property to record the power consumption. It remained there until 25 June 1999, when the RCMP executed a search warrant on the property and found a grow-op and a power bypass located ahead of the meter in the main service to the house. Princeton Light disconnected electrical service.

[7] Police officers arrested Mr. Verrier and charged him with the cultivation of marijuana. The RCMP gave a copy of their Continuation Report to Princeton Light. The Report noted: Mr. Verrier was the tenant from 25 March 1999 to 25 June 1999; the plants were, at most, three to five months old; and the house was unusually clean for a marijuana grow-op, indicating a short-term use. At trial, Constable Pederson confirmed the information contained in the Report.

[8] Mr. Gould concluded from Princeton Light's records of meter readings that the grow-op had started shortly after the application date (19 April 1996) because the June 1996 reading of 4632 kwh was a "drastic change" from the previous owner's usage of 2322 to 2877 kwh/month from December 1995 to April 1996. On cross-examination, he agreed the previous residents' Customer Bill History included readings of 4480 kwh for June 1992 and 3860 kwh for August 1992. He knew the previous residents personally and acknowledged he never suspected them of running a grow-op despite these relatively high bills. If the jury were to compare the previous residents' power usage from January 1990 to April 1996 with that of Mr. MacDonald's tenants from June 1996 to April 1999, it would have found little, if any, overall difference. The same can be said of Mr. Gould. He testified he did not see the RCMP Report until October 2003.

[9] Nevertheless, by registered letter dated 11 August 1999, Princeton Light advised Mr. MacDonald it had cut off the power and would not reconnect it until the sum of $18,546.01 was paid and the electrical wiring met B.C. Electrical Code standards as "passed by a qualified electrical contractor". Mr. Gould calculated the back-bill by projecting backwards three months of stolen power (15,566 kwh between 5 May 1999 and 25 June 1999) to 19 June 1996.

[10] Without a power supply, Mr. MacDonald was unable to rent his premises. Without income from the property, he was unable to pay the back-bill. He could not post a letter of credit. Princeton Light continued to insist on immediate full payment before it would reconnect the electrical service. On 16 November 1999, with the onset of colder weather and no heat, Mr. MacDonald petitioned the Supreme Court for an order "that power services be reconnected to the property" pursuant to s. 44 of the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473 (the "***Act***"), s. 39(1) of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253, and Rule 45 of the ***Rules of Court***. On 7 December 1999, at the suggestion of the solicitor for Princeton Light, Mr. MacDonald's solicitor wrote to the Commission seeking an order for re-connection pending resolution of the dispute over the back-billing, promising to continue "good faith negotiations" with Princeton Light.

[11] The Commission rejected Mr. MacDonald's application, explaining by letter to his solicitor dated 13 December 1999, "The Commission finds that [Princeton Light] has acted in accordance with its filed Electric Tariff and that if your interpretation is contrary to that finding, you may wish to pursue the matter through the courts". This was a reference, Princeton Light suggests, to an appeal to this Court permitted with

leave by s. 101 of the ***Act***, because the Commission was exercising its "exclusive jurisdiction to adjudicate the question of Tariff compliance". It is not disputed that the Commission had exclusive jurisdiction to order the reconnection of power to Mr. MacDonald's property. That was the conclusion of Justice Singh when he heard and dismissed the petition on 16 February 2000.

[12] Meanwhile, on 21 December 1999, Princeton Light had filed a writ and statement of claim seeking judgment for $18,546.01 and interest at 1.5 per cent a month (19.56 per cent compounded annually) on the basis of the service agreement.

[13] To justify its back-billing, Princeton Light relied on paragraph 6.7(4) of the Electric Tariff. It reads:

> 6.7 Generic Back-billing Tariff (Cont'd)
>
> 4 If there are reasonable grounds to believe that the customer has tampered with or otherwise used the utility's service in an unauthorized way, or evidence of fraud, theft or other criminal act exists, then the extent of back-billing will be for the duration of the unauthorized use, subject to the applicable limitation period provided by law, and the provisions of items 7, 8, 9 and 10 below do not apply. In addition, the customer is liable for the direct (unburdened) administrative costs incurred by the utility in the investigation of any incident of tampering, including the direct cost of repair, or replacement of equipment. Under billing resulting from circumstances described above will bear interest at the rate normally charged by the utility on unpaid accounts from the date of the original under billed invoice until the amount billed is paid in full.
>
> [Emphasis added.]

[14] Mr. MacDonald's counterclaim is founded on a breach of this provision and Princeton Light's ensuing conduct. The exclusion of items 7, 8, 9 and 10 permitted back-billing for three years and the discontinuance of power until the back-bill was paid, even where there was a legitimate dispute about the duration of the under billing. Paragraph 8.2 of the Tariff permitted the suspension order:

> 8.2 Suspension of Supply
>
> The Company shall have the right to suspend service at any time without notice whenever the Customer has breached any agreement with the Company, or failed to pay arrears within specified time, fraudulently used the service, tampered with the Company's equipment or committed similar actions. … Suspension of service by the Company shall not operate as a cancellation of any contract with the Company, and shall not relieve any Customer of its obligations under these Terms and Conditions or the applicable Rate Schedule.
>
> [Emphasis added.]

[15] Paragraph 2 of the Tariff defines "customer" to include a person "who consumes electricity at one premises, or whose application for service is accepted by the Company". It is not now disputed Mr. MacDonald was a customer by reason of his application, who "by taking service" had agreed "to abide by the provisions of these Terms and Conditions" that included paragraph 6.7(4) of the Tariff. At trial, Mr. MacDonald disputed the duration of the period of the bypass and argued he owed nothing, having paid $1,200 for the period he accepted the bypass was probably on the property unbeknownst to him. The jury agreed with him, finding no amount owing to Princeton Light.

[16] By counterclaim, Mr. MacDonald sought damages for Princeton Light's breach of a duty to deal with its customers fairly and in good faith. He alleged Princeton Light had no reasonable grounds to believe he had stolen power, or that he had done so for three years. He claimed that Princeton Light opposed vigorously his attempts to have power reconnected and offered no reasonable terms for repaying the back-bill. He sought punitive damages on the basis that Princeton Light had acted in bad faith and conducted itself reprehensibly with a wilful and conscious disregard for him, subjecting him to cruel and unusual hardship. In defence, Princeton Light pleaded its right to suspend service under paragraph 8.2 of the Tariff.

[17] When Singh J. dismissed Mr. MacDonald's petition, he suggested a compromise for the parties' consideration. On 18 February 2000, Mr. MacDonald's solicitor advised Princeton Light the electrical wiring had been brought back to the Code standards and offered to deposit $400/month if power were restored. On 7 March 2000, Princeton Light offered to reconnect power to the property if the repairs were inspected and passed by an electrical contractor, and the full amount owing on the back-billing was put in trust on sale of the property. Mr. MacDonald accepted the offer a few days later.

[18] The repairs passed the necessary inspection on 11 July 2000. Princeton Light reconnected power the next day. Unfortunately, by then, Mr. MacDonald was unable to rent the property and make the mortgage and tax payments. In January 2001, the Provincial Government threatened forfeiture of the property for unpaid

property taxes. On 27 February 2001, Valley First Credit Union brought foreclosure proceedings. On 13 June 2001, Mr. MacDonald sold the property for $140,000.

[19] On 6 October 2003, Mr. MacDonald paid $904.41 plus interest for a total of $1,200 for three months of stolen power. His solicitor wrote to Princeton Light, "We do not dispute that approximately three months of power was stolen – but certainly not three and one half years", and noted his intention to rely on the letter at trial. Included was this statement of Mr. MacDonald's position:

> However, we strongly believe that Princeton Light & Power could have arrived at that figure had it diligently pursued the facts and employed a proper Accountant rather than arbitrarily and wrongly picking a start-up date in its' [*sic*] calculations.

[20] This allegedly arbitrary back-billing and continuing refusal to review its account for five years founded the respondent's counterclaim for damages.

The Proceedings

[21] The trial began on 24 November 2003 and continued until 9 December 2003 when Ralph J. gave judgment in accordance with the verdict of the jury dismissing Princeton Light's action and awarding Mr. MacDonald $19,672.61 as compensatory damages and $62,000.00 as punitive damages on his counterclaim.

[22] At the conclusion of Princeton Light's case, Ralph J. dismissed Princeton Light's application for a directed verdict on the counterclaim. He ruled, however, that Princeton Light was entitled to disconnect the service, to bill Mr. MacDonald for stolen power, and to refuse to reconnect power until the bill was paid. Not only did the trial judge agree with the Commission's interpretation of the Tariff, but he also

held the Commission's interpretation was binding on the court under s. 79 of the ***Act***. Mr. MacDonald does not appeal this ruling. Princeton Light appeals the order dismissing its application for a directed verdict, submitting that an action for breach of contract is a matter within the exclusive jurisdiction of the Commission and that Ralph J. erred when he decided otherwise.

[23] At para. 16 of his reasons for the impugned ruling [2003 BCSC 2010], Ralph J. described Mr. MacDonald's claim this way:

> Before this Court, Mr. MacDonald seeks to prove that on an objective standard, Princeton Light had no objectively reasonable basis on which to calculate three years worth of back-billing when its own evidence showed only 51 days of potential power theft. He says further that Princeton Light had no reasonable basis on which to deny reconnecting power to Mr. MacDonald's property and Mr. MacDonald suffered damages as a result.

[24] At para. 18, the trial judge explained why the Supreme Court has jurisdiction to hear and resolve the dispute:

> … the essential nature of the dispute … arises out of the manner in which the plaintiff made its decision to back-bill Mr. MacDonald $18,500.00 and to cut off power to the property until the amount was paid. It does not essentially call for a detailed consideration of the tariff, but for a consideration of the circumstances which caused the plaintiff to apply the tariff in this particular case. Essential to this determination, it seems to me, is whether power was stolen for approximately three months or approximately three years. This is the underlying dispute.

Consequently he concluded the dispute did not come within the exclusive jurisdiction of the Commission under s. 105 of the ***Act***, as a matter over which jurisdiction is conferred on it by s. 72(1) of the ***Act***, as Princeton Light had argued.

[25] In reaching this conclusion, Ralph J. applied the reasoning of Macaulay J. in ***Strata Plan LMS 1816 v. British Columbia Hydro and Power Authority***, [2002] B.C.J. No. 673, 2002 BCSC 485. The Commission's jurisdiction is determined by analyzing the essential nature of the dispute, and then determining if the ***Act*** provides a means of resolving the dispute such that the objectives of the ***Act*** would be undermined if the action proceeded in court.

[26] The trial judge did not address directly Princeton Light's submission that any award of "damages for bad faith" required Mr. MacDonald to prove the utility breached its contract by failing to reconnect service. I infer from his refusal to direct a verdict of dismissal and his directions to the jury that the trial judge was persuaded compensatory and punitive damages could flow from a breach of a duty of good faith and fair dealing, whether that duty derived from contract or tort. Unreasonable back-billing was the underlying wrong. The jury apparently agreed, because its award of compensatory damages suggests they held Princeton Light liable only for the loss caused to Mr. MacDonald by its conduct before the agreement to reconnect upon repair was made in March 2000.

The Jurisdiction Issue

[27] The first issue on this appeal is whether the Commission's decision not to require a utility to reconnect power protects Princeton Light from any defence to its action for debt, and from a counterclaim for damages for breach of contract.

[28] Princeton Light submits the trial judge's ruling on jurisdiction was unsound. It seeks a new trial of its claim and an order dismissing the counterclaim. It argues the

Commission determined the propriety of its decision to suspend power and issue a back-bill when it found that the utility had complied with the Tariff provisions. If the Commission had agreed with Mr. MacDonald's application for reconnection in December 1999, it could have ordered reconnection then. But it did not, and Mr. MacDonald could not bring a collateral action in court to reverse that ruling.

[29] In Princeton Light's view, ss. 72(2) and 73 of the ***Act*** give the Commission the power not only to order reconnection, but also the exclusive power to find a utility in breach of a statutory or contractual duty. Thus, in its view, Mr. MacDonald, as a customer, was obliged to seek a declaration from the Commission that Princeton Light had breached a statutory or contractual duty before he could seek an award of damages from a court. Conversely, Princeton Light was obliged to sue its customers in court for breach of contract because the ***Act*** granted no remedial powers to the Commission over its customers. In such an action, the Commission's ruling on tariff compliance would be binding on the court.

[30] It follows logically from this submission that Princeton Light takes the view that only the Commission can determine the amount of stolen power; that a customer is obliged to seek a declaration of the amount owing on a contract from the Commission; and a customer's only defence to a utility's action in debt is payment. However, Princeton Light accepts that a customer may defend a debt action by establishing error on the part of a utility in its billing or records. This comes to an acceptance that a dispute over the amount of a bill must be resolved in court, not by the Commission. It also reflects what happened in this case.

[31] Princeton Light did not apply to have the counterclaim dismissed for want of jurisdiction. Nor did Mr. MacDonald or Princeton Light ask the Commission to resolve the dispute over the amount of Mr. MacDonald's debt. When Mr. MacDonald sought an order for reconnection, he was asking the Commission to remedy what he saw as a failure of Princeton Light to fulfil its statutory duty to provide power to his property. He questioned an interpretation of the Tariff that permitted both the suspension of power and back-billing when a tenant, without the landlord's knowledge, stole electrical power.

[32] The dispute in this case was over the amount of the bill, the duration of the unauthorized use, and more particularly, whether Princeton Light had reasonable grounds to believe that stolen power was used to benefit Mr. MacDonald's property from June 1996 to April 1999. None of these issues were before the Commission, but even if they were, the Commission did not have the jurisdiction to determine them.

[33] The ***Act*** provides for the general regulation and supervision of public utilities and gives the Commission power to see that a utility fulfils its statutory duties (ss. 23 to 26, 29, 30, and 38). Section 31 gives the Commission power to make and change the conditions to be included in service agreements. Sections 72 and 73 give the Commission authority to deal with applications like those of Mr. MacDonald in these words:

> 72 (1) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating or controlling a public utility service or charged with a duty or

> power relating to that service has done, is doing, or has failed to do anything required by this Act or another general or special Act, or by a regulation, order, bylaw, or direction made under any of them.
>
> (2) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, requesting the commission to
>
> (a) give a direction or approval which by law it may give or
>
> (b) approve, prohibit or require anything to which by any general or special Act, the commission's jurisdiction extends.
>
> 73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.
>
> (2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, to which the commission's jurisdiction extends.

[34] Thus, the Commission has the jurisdiction to inquire into and determine whether a utility is permitted to suspend service and issue a back-bill. These are questions about the interpretation of the Electric Tariff. But I can find nothing in the ***Act*** giving the Commission jurisdiction to resolve a factual dispute about the liability of a customer under a service agreement. Not a word is said in the Electric Tariff or the service agreement to suggest a Commission decision about a customer's liability binds the customer and the court when a utility sues to enforce payment. We are not asked to infer that power in the absence of an express provision to that effect. If the Legislature intended to give the Commission power to resolve disputes about the amount of a bill, I would have expected a specific provision to that effect,

accompanied by a suitable enforcement mechanism. Moreover, the ***Act*** does not contemplate or make any provision for the adjudication or enforcement of contractual claims by a customer against a utility.

[35] The authorities considering such a claim are all contrary to the appellant's submission. In ***Crestbrook Pulp and Paper Co. v. Columbia Natural Gas Ltd.*** (1978), 87 D.L.R. (3d) 248 (B.C.C.A.), Crestbrook alleged it had been overcharged by the utility for gas supplied to it under a contract approved by the British Columbia Energy Commission. The utility argued that Crestbrook's claim was an impermissible collateral attack on the Commission's rate schedule. Robertson J.A., writing for the majority, disagreed. He found the essence of Crestbrook's claim was for money paid under a mistake of fact, or for damages for breach of contract. Crestbrook did not need to rely on the ***Energy Act***, S.B.C. 1973, c. 29, to make out its claim. The fact that the contract was filed and approved as part of a rate schedule by the Commission did not mean that it thereby lost its identity as a contract. The utility could not enlarge the jurisdiction of the Commission and escape judicial scrutiny by characterizing the matter between the parties as a "rate dispute". Likewise, in the case at bar, Princeton Light cannot characterize the dispute as a matter of "Tariff compliance" to avoid Mr. MacDonald's defence of its action in debt or as a defence against his counterclaim.

[36] To similar effect is the recent decision in ***Garland v. Consumer Gas Co.***, [2004] 1 S.C.R. 629. In an earlier decision [[1998] 3 S.C.R. 112], the Supreme Court held that the utility's late penalty payments amounted to a criminal rate of interest under s. 347 of the ***Criminal Code***. They remitted the claim to the trial court for

further consideration. At trial [(2000), 185 D.L.R. (4th) 536], Winkler J. found the plaintiff's action to be an impermissible collateral attack on the Ontario Energy Board's rate order. McMurtry C.J.O. for the Court of Appeal [(2001), 208 D.L.R. (4th) 494] disagreed. In that court's view, the plaintiff was not challenging the merits or legality of the Board's order or attempting to raise a matter already dealt with by the Board. Rather, the proposed action raised issues over which the Board had no jurisdiction.

[37] So here, the Commission has no jurisdiction over the issues raised in the counterclaim. When Mr. MacDonald's claim went to the jury, he was no longer challenging the Commission's order denying power reconnection to his property or its interpretation of the Electric Tariff, but the reasonableness of Princeton Light's belief that he had tampered with the power supply personally, and that the unauthorized use had begun before March 1999. There is no concern here that Mr. MacDonald is seeking to avoid the Commission order by defending the debt action or bringing a counterclaim.

[38] In my view, Ralph J. correctly considered and applied the authorities. He determined the jurisdiction issue by, "analyzing the essential nature of the dispute as opposed to the causes of action that may arise from it". He correctly found the "essential nature of the dispute" to be a private law matter arising from the service agreement. The court's jurisdiction over the dispute is not excluded by s. 105 of the ***Act***.

Breach of Contract

[39] The jury was not asked to find whether Princeton Light breached the service agreement, or to identify a breach of a specific contractual provision. The verdict leaves no doubt the jury found Princeton Light had no reasonable grounds to believe the unauthorized use of power had begun before March 1999, and that it treated Mr. MacDonald in bad faith when he challenged that belief until Justice Singh's proposal of a compromise led to an agreement in February 2000. The jury's award of punitive damages necessarily implies it found Princeton Light's conduct to be a "marked departure from ordinary standards of decent behaviour" deserving of punishment beyond that provided by the compensatory damage award.

[40] The two questions left with the jury regarding Princeton Light's claim, with the jury's answers, are these:

> 1. Was there electrical power supplied to the property of the Defendant, Mr. MacDonald, which was stolen from Princeton Light & Power Co. Ltd.? **YES**
>
> 2. If the answer to Question 1 is "Yes", what amount is owed by Mr. MacDonald to Princeton Light and Power? **$ 0**

Consequently, the trial judge dismissed the action to enforce a debt.

[41] The questions regarding the counterclaim with the answers are these:

> 3. Was there a failure by Princeton Light & Power to deal fairly and in good faith with Mr. MacDonald? **YES**
>
> 4. If the answer to Question 3 is "Yes", did Mr. MacDonald suffer losses arising from Princeton Light & Power's failure to deal fairly and in good faith in any of the following matters:
>
> a. Loss of rental income **YES**
> b. Loss of appliances **NO**

c.	Property damage (glass, frozen pipes)	**NO**
d.	Loss of equity in his property	**NO**
e.	The cost of electrical work	**NO**
f.	Legal expenses for house sale	**YES**
g.	Legal expenses for seeking to have power reconnected	**YES**
h.	Trips to Princeton for house repairs	**NO**
i.	Cost of real estate commission	**YES**

5. For any items in Question 4 answered "Yes" what is the amount of the loss for that item?

Loss of rental income	$ 7,500.00
Legal expenses for house sale	$ 722.99
Legal expenses for seeking to have power reconnected	$ 2,675.62
Cost of real estate commission	$ 8,774.00
Total:	**$19,672.61**

6. Should punitive damages be awarded against Princeton Light & Power? **YES**

7. If so, in what amount? **$62,000.00**

The trial judge entered judgment in accordance with the verdict for those amounts.

[42] The second question on this appeal is whether that order can be upheld.

[43] Princeton Light sees the counterclaim as founded on a stand alone duty of good faith in the performance and enforcement of a contract. I agree that Canadian courts have not recognized a stand alone duty of good faith independent from the express terms of a contract or from the objectives that emerge from such terms: see, ***Transamerica Life Canada Inc. v. ING Canada Inc***. (2003), 68 O.R. (3d) 457 (C.A.), and ***Shelanu Inc. v. Print Three Franchising Corp.*** (2003), 64 O.R. (3d) 533 (C.A.). I also agree with counsel for the respondent that jurisprudence from Quebec and other civil law jurisdictions and from the United States and other common law jurisdictions has moved or is moving toward a unified principled

approach to a good faith and fair dealing obligation in contract. In Canada, the Law Reform Commission of Ontario in its *Report on Amendment of the Law of Contract* (Ottawa: Ministry of the Attorney General, 1987) c. 9, has recommended legislative action in this regard. I also recognize that the British Columbia Legislature expressly recognizes the concept of good faith and a test of commercial reasonableness for security arrangements in the ***Personal Property Security Act***, R.S.B.C. 1996, c. 359, s. 68(2). However, on the view I take of this matter, I need not enter that debate.

[44] In my view, when the counterclaim is stripped to its essentials, it is a claim for damages flowing from the breach of an express provision of the contract the parties made on 19 April 1996. The contract consists of the application and the Electric Tariff, as amended from time to time with the approval of the Commission. The breach alleged is that Princeton Light had no "reasonable grounds to believe" Mr. MacDonald or his tenant(s) had "tampered with or otherwise used [its] service in an unauthorized way" before 25 March 1999. That conclusion seems beyond argument on the evidence and the jury found so by its answer to Question 2. The jury effectively found that a fair and reasonable estimate of the value of the stolen power with interest was no more than the $1,200 Mr. MacDonald had paid before the trial.

[45] Thus, the issue on the counterclaim becomes whether Mr. MacDonald is entitled to damages consequential to that breach of contract in the amount the jury awarded. They did so in response to this instruction of the trial judge:

> Mr. MacDonald seeks damages from Princeton Light & Power for its failure to deal fairly and in good faith with him. Because of this failure

or breach of an obligation, Mr. MacDonald claims he has suffered damages. Your responsibility is to decide whether Princeton Light & Power did fail to deal fairly and in good faith with Mr. MacDonald, and, if so, to determine what damages he has suffered.

Princeton Light & Power as a public utility has an obligation to provide service which is "just and reasonable". In providing its service, it must conduct itself in a fair and reasonable manner. The burden of proving that Princeton Light & Power has failed to so conduct itself is on Mr. MacDonald.

Mr. MacDonald must prove on a balance of probabilities that a reasonable person examining all the circumstances would find that Princeton Light failed to deal with him fairly and in good faith. It is also necessary that Mr. MacDonald prove that the alleged failure to deal with him fairly and in good faith was the cause of his losses. If Mr. MacDonald does not meet that burden of proof, his counterclaim must be dismissed. If he does meet that burden of proof, you should go on to decide what amount of damages you should award him. The goal of an award of damages is to put Mr. MacDonald in the same position as if he had been dealt with fairly and in good faith by Princeton Light & Power.

So in summary, you should look at all of the circumstances surrounding the cutting off of power to Mr. MacDonald's property in June 1999, and the events which followed, to determine whether Princeton Light & Power failed to deal with Mr. MacDonald fairly and in good faith.

As I understand it, it is the position of Mr. MacDonald that Princeton Light failed in that duty in that, first of all, it failed to fairly and reasonably investigate the matter; second, it calculated the under-billing as extending over a period of three years based on insufficient information and speculation; third, that Princeton Light & Power failed to assist Mr. MacDonald with a prompt and reasonable resolution; fourth, that it withheld a reconnection while recognizing that a genuine dispute existed; fifth, that it knew that the defendant wished to rent out the property and was unable to do so without power and that he would suffer damage and expense if the electricity were not reconnected; sixth, that Princeton Light had no reasonable ground to believe that Mr. MacDonald had tampered with the power or used it in an unauthorized way; and, seventh, that even if the calculation of $18,546 was correct, it never offered Mr. MacDonald reasonable terms of repayment and insisted on repayment of the full amount before the power would be reconnected.

[46] The obligation on a public utility to "provide service which is 'just and reasonable' is found in s. 38 of the ***Act***:

> 38 A public utility must
>
> (a) provide . . . a service that the Commission considers in all respects adequate, safe, efficient, just and reasonable.

[47] That provision, together with s. 39 (as did ss. 23 and 26 of the predecessor ***Energy Act***, S.B.C. 1973, c. 29), affirms the common law obligation of a body "having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public . . . to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers": ***Chastain et al. v. British Columbia Hydro and Power Authority*** (1972), 32 D.L.R. (3d) 443, (B.C.S.C.) *per* McIntyre J. at 454.

[48] Arguably, this statutory provision responded to Justice McIntyre's decision in ***Chastain***, *supra*, and brought a public utility's billing conduct within the scope of the Commission's exclusive jurisdiction. While the reasoning in ***Crestbrook****, supra*, contradicts that submission, it leaves open the possibility that a customer could complain about the unfairness of a utility's back-billing policy under s. 72 and seek a remedial order under s. 73. However, for the reasons I expressed on the first issue, I do not accept that a customer could seek a remedy for breach of contract under the ***Act***. Conversely, Princeton Light did not suggest that an order for payment of damages is available from the Commission for a customer's breach.

[49] It might have been more appropriate for the trial judge to have adopted the language from the contractual provision authorizing back-billing in his jury instructions, but no objection was taken to the charge in this regard and the result would have been the same in any event.

[50] In the counterclaim, Mr. MacDonald stated his allegation justifying an award of damages for breach of contract and punitive damages this way:

> 13. On or about June, or July of 1999, the Plaintiff disconnected the electrical service to the property and erroneously, without any basis in fact, calculated that the Defendant owed the Plaintiff the sum of $18,546.01, being electricity supposedly diverted from June 19, 1996 to June 25, 1999, which calculation was without any, or any [*sic*] factual foundation.
>
> 14. By letter dated September 13, 1999, and on other occasions, the Defendant, personally and through his agents, formally advised the Plaintiff that the Defendant wished to rent out the property, and was unable so to do without electrical power to the property, and that the Defendant would suffer damage, loss and expense, should the electricity not be reconnected.
>
> 15. At no time did the Plaintiff have any reasonable ground to believe that the Defendant had tampered with or otherwise used the utility's service in an unauthorized way, nor did the Plaintiff have any evidence of the duration of any unauthorized use, and certainly not for a period in excess of three (3) years.
>
> 16. Even if the calculation of $18,546.01 was correct, (which is specifically denied), at no time did the Plaintiff offer to the Defendant reasonable terms of repayment, but insisted on repayment of the entire sum of $18,546.01, and vigorously opposed any attempts by the Defendant to obtain relief from the Courts, or elsewhere, to have the power reconnected.
>
> 17. The Plaintiff has acted arbitrarily and capriciously, has breached the contract, has acted in bad faith, and acted wantonly toward the Defendant . . .

[51] In response, as noted earlier, Princeton Light pleaded a general denial of the allegations and paragraph 8.2 of the Electric Tariff. The trial judge agreed with the utility's position that, as a matter of law, the utility had the power to bill Mr. MacDonald for stolen power and to refuse reconnection until the company was paid. But he saw the question of the amount or value of the power stolen as an issue for the jury.

[52] As I also noted earlier, Princeton Light does not take issue with that ruling, but submits the trial judge erred when, in his charge, he treated Mr. MacDonald's complaints about its back-billing and refusal to reconnect as complaints open to the jury to accept or reject. In its submission, the trial judge was obliged to tell the jury that Princeton Light was entitled to disconnect the power, back-bill its customer for stolen power, and could not restore service to the property until the wiring had been brought up to the Code standards and payment was made.

[53] With respect, I find no material error in the trial judge's charge. In the context of counsel's addresses, the jury would have understood from the charge that Princeton Light had the right to suspend service, and to not restore it until the wiring passed the necessary inspections and the amount owing was paid. Its verdict reflects that understanding – the award of damages included the loss of rental income only until the April 2000 agreement. I am reinforced in this view by the absence of any objection by trial counsel for Princeton Light to what is now seen by its appellate counsel as a fundamental error undermining the jury's verdicts in both the claim and the counterclaim.

[54] The emphasis throughout the charge was on the fairness and reasonableness of the back-billing. Princeton Light was under a common law and contractual duty to act reasonably in billing its customers. Its duty under s. 38 of the ***Act*** to provide service the Commission considers "in all respects . . . just and reasonable" was exemplified by paragraph 6.7(4) of the Electric Tariff, the conditions of which were approved by the Commission to be part of the service agreement.

[55] It seems incontrovertible that Princeton Light acted unreasonably, not only in back-billing Mr. MacDonald for three years, but also in refusing to review its bill when challenged, and in insisting on payment before reconnection.

[56] While its appellate counsel now suggests the jury if properly instructed might have chosen some other commencement date, Princeton Light's trial counsel suggested only two possible dates to the jury, April 1996 and April 1999. The only evidence Princeton Light had to justify its belief that the bypass and power theft had begun in April 1996 was the meter readers' verbal information about the smell of marijuana and notes they recorded on two occasions. By its verdict, the jury determined that evidence was did not justify the back-billing to a date earlier than 25 March 1999. It follows I would not interfere with the order dismissing Princeton Light's action in debt or find in this alleged error reason to interfere with the award of compensatory or punitive damages.

[57] The pecuniary damage to Mr. MacDonald that flowed from Mr. Gould's unreasonable belief and the decision he made on that basis was what the jury found

and assessed. The jury's award of compensatory damages was eminently reasonable. I would uphold the order implementing it.

Punitive Damages

[58] By its verdict, the jury also determined Princeton Light's conduct deserved punishment. The difficult question is whether the award of punitive damages can be upheld.

[59] Throughout, Princeton Light relied on the Tariff and the Commission's decision of 13 December 1999 to defend its unreasonable back-billing and to withhold power until Justice Singh suggested a compromise. Further, Princeton Light continued to trial claiming a debt that a reasonable electric power supplier would have reviewed and revised when it was first questioned in August 1999. In aid of its claim and defence at trial, Princeton Light persisted in alleging Mr. MacDonald and several members of the Judge family were liars and criminals, either operating or knowingly covering up a marijuana grow-op. It is against this background of unreasonable and unjustifiable conduct that the jury's award of punitive damages is to be considered.

[60] The jury's award of punitive damages responded to unremarkable directions by the trial judge, about which no complaint is made. The ground of appeal is that the trial judge erred in leaving the question of punitive damages with the jury. The submission is that the jury was not asked if there had been a breach of contract, but was asked only to determine whether there had been a failure by Princeton Light to deal fairly and in good faith with the customer. In Princeton Light's view, there can

be no breach of duty of good faith without a breach of contract. Thus, a claim for breach of any duty of good faith, whether in tort or by reason of an implied or express covenant, must be tied to bad faith performance of a specific provision of the contract.

[61] This submission necessarily sees the "supply of power" as the only "primary contractual obligation" of Princeton Light. It fails to recognize the significance of the duty on Princeton Light to bill its customers reasonably. In this case, Princeton Light's entitlement to suspend service depended on it having "reasonable grounds to believe" that Mr. MacDonald or a tenant had tampered with the electrical service in an unauthorized or criminal way. Its right to bill was confined to the "duration of the unauthorized use". Princeton Light had no reasonable grounds for concluding the unauthorized use had begun before March 1999. So the jury found as a fact. When Princeton Light over-billed, it breached its contract with Mr. MacDonald.

[62] Although no authority was cited for the proposition that a public utility owes a duty of good faith and fair dealing in the execution of its contractual obligations, Princeton Light does not dispute that such a duty may be owed in a contract such as this if there is a bad faith breach of the contract. In this case, the unreasonable back-billing amounted to a breach of contractual obligations. The essence of the additional breach was the subsequent intransigent and callous conduct by Princeton Light in refusing to review the bill, grossly unreasonable on the evidence available to it.

[63] The leading authority on punitive damages is ***Whiten v. Pilot Insurance Co***., [2002] 1 S.C.R. 595. At para. 100, Binnie J., writing for a unanimous court, affirmed the rationality test for review of a trial court's award of punitive damages developed by Cory J. in ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[64] At para. 108, Binnie J. was clear that the focus of the appellate review of a punitive damage award is to be on, "whether the court's sense of reason is offended rather than on whether its conscience is shocked".

[65] Because juries are not required to give reasons for their decisions, we cannot know the reasoning of the eight members of the public who brought their collective experience and judgment to their decision to require Princeton Light to pay punitive damages for the manner in which it breached the contract with Mr. MacDonald and its subsequent mistreatment of him. But I am not willing to accede to Princeton Light's submission that the award served "no rational purpose".

[66] The underlying purpose of a punitive damage award is to penalize conduct that departs to a marked degree from ordinary standards of decent behaviour. Jurors are particularly well-suited to judge whether a public utility's behaviour towards a residential customer meets that test. Jurors are also better equipped than most courts to appreciate the effect of gross over-billing on a customer. When that

over-billing is accompanied by unfounded allegations of participation in or covering up of criminal behaviour, the effect on the customer is compounded. When reasonable requests for a review of the bill are ignored and applications for restoration of power are defended by strict reliance on one employee's erroneous assessment of the evidence, I consider a jury is entitled to give that utility a wake-up call, asking it, in effect, to treat its customers with respect, to respond reasonably to their requests, and to consider their employee may have made a mistake.

[67] Customers of utilities are vulnerable to arbitrary management decisions. A stable and uninterrupted flow of electricity is an essential consumer service. Few among us have the resources to pay a bill 18 times more than it should have been. In this case, Mr. Gould knew Mr. MacDonald was renting out the premises, and that without electricity and heat, there would be no tenant and no flow of income to pay the mortgage and taxes. He must have known that without heat, tenant and income, the property would deteriorate. He should have known Mr. MacDonald was the victim of a third party's criminal behaviour, and that the record supported a back-bill of no more than $1,200. But he never reviewed the account, nor did anyone else at Princeton Light.

[68] When a utility's conduct goes well beyond an employee's bad judgment or carelessness in the performance of his job, and becomes oppressive, it is conduct a judge or jury may denounce with an award of punitive damages. The award of punitive damages here, while substantial and possibly on the high side, can be viewed as justified because of what I view as arbitrary, callous and oppressive conduct by a monopolistic public utility providing an essential service in a regulated

industry. I agree that a concern about industry-wide practices and general deterrence have little place in this analysis. The trial judge did not suggest they did. What was at issue here was Princeton Light's conduct toward one vulnerable customer after its employee made a serious mistake in assessing information available to the company. Princeton Light could have corrected this mistake with little effort and little loss to Mr. MacDonald by the end of September 1999, had the utility honoured its obligation to treat its customer fairly.

[69] For these reasons, I would not interfere with the jury's award of punitive damages.

I would dismiss the appeal with costs and the cross-appeal without costs.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Hall"

J.M.H. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions *Intervener*

Indexed as: R. *v.* J.M.H.

2011 SCC 45

File No.: 33667.

2011: May 19; 2011: October 6.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Appeals — Powers of Court of Appeal — Evidence — Assessment — Accused charged with two counts of sexual assault — Complainant not disclosing events at time of occurrences but posting poem on line — Trial judge acquitting accused — Court of Appeal overturning acquittals and ordering new trial — Whether trial judge failed to consider evidence as a whole thereby committing error of law — Whether trial judge's allegedly flawed assessment of evidence constitutes error of law allowing appellate review of acquittal — Criminal Code, R.S.C. 1985, c. C-46, s. 676(1)(a).

H was acquitted at trial of two counts of sexual assault on his 17-year-old cousin. A alleged that on two occasions in 2006, H had non-consensual sexual intercourse with her while she was sleeping with him in his bed. A testified that she told H to "stop" both times but that he eventually had intercourse with her. On both occasions, she spent the rest of the night with H in his bed. A did not tell anyone about the occurrences but posted a poem online very soon after the first incident as "an outlet", and this led to the incidents coming to light. At trial, H denied any sexual contact with A. The trial judge had "absolutely no doubt" that sexual intercourse had taken place between H and A but was not satisfied that A was sexually assaulted without

J.M.H. *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Directeur des poursuites pénales *Intervenant*

Répertorié : R. *c.* J.M.H.

2011 CSC 45

N° du greffe : 33667.

2011 : 19 mai; 2011 : 6 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Appels — Pouvoirs de la Cour d'appel — Preuve — Appréciation — Accusé inculpé de deux chefs d'agression sexuelle — Affichage d'un poème en ligne par la plaignante, qui n'a pas signalé les incidents après qu'ils se soient produits — Acquittement de l'accusé par le juge du procès — Acquittements annulés et nouveau procès ordonné par la Cour d'appel — Le juge du procès a-t-il commis une erreur de droit en omettant de prendre en considération l'ensemble de la preuve? — L'appréciation prétendument viciée de la preuve par le juge du procès constitue-t-elle une erreur de droit permettant la révision d'un acquittement par la Cour d'appel? — Code criminel, L.R.C. 1985, ch. C-46, art. 676(1)a).

À son procès, H a été acquitté relativement à deux chefs d'agression sexuelle à l'endroit de sa cousine de 17 ans. A prétend que, à deux reprises en 2006, H a eu des rapports sexuels avec elle sans son consentement alors qu'elle était couchée avec lui dans le lit de ce dernier. A a témoigné que, les deux fois, elle lui a dit « arrête », mais qu'il a eu ensuite des rapports sexuels avec elle. Lors des deux événements, elle a passé le reste de la nuit avec H dans son lit. A n'a pas parlé des incidents à qui que ce soit, mais elle a affiché un poème en ligne très peu de temps après le premier incident « en tant qu'exutoire », entraînant ainsi la révélation des incidents. Au procès, H a nié avoir eu quelque contact sexuel que ce soit avec A. Le juge du procès n'avait « absolument aucun doute » que

her consent. The Court of appeal concluded that the trial judge erred in law in mishandling the evidence by taking a "piecemeal" approach incompatible with his obligation to consider the cumulative effect of all relevant evidence.

Held: The appeal should be allowed and the acquittals restored.

While it is an error of law for a trial judge to assess the evidence piecemeal, the trial judge's reasons here did not disclose any such error. The Court of Appeal misapprehended the record when it faulted the judge for not referring to A's testimony on the issue of consent, as he did so on at least three occasions. Moreover, the trial judge did not have to "reject" A's evidence in order to be left with a reasonable doubt arising from the whole of the evidence. In fact, he gave extensive reasons as to why he was left with a reasonable doubt on consent. There was also no basis for concluding that the trial judge used small excerpts from the poem out of context. He quoted the poem as a whole and then drew attention to language that raised concerns in his mind. Finally, the Court of Appeal erred in concluding that a couple of brief excerpts from the poem had "tipped" the balance in favour of acquittal. The trial judge's concerns regarding consent were based on the evidence of the relationship between H and A, the testimony of A's sister about how many times she had been in H's bed, and the fact that A had returned both times to the same bed in which she had been violated. The judge's references to the poem excerpts were in the context of his references to other aspects of the evidence, and he explicitly stated that he was taking account of all the circumstances of the case in reaching his conclusion.

The Crown's right of appeal from an acquittal of an indictable offence is limited to "any ground of appeal that involves a question of law alone". The jurisprudence currently recognizes at least four types of cases in which alleged mishandling of the evidence may constitute an error of law alone giving rise to a Crown appeal of an acquittal; this may not be an exhaustive list. First, it is an error of law to make a finding of fact for which there is no evidence. However, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Second, the legal effect of findings of fact or of undisputed facts may raise a question of law. Third, an assessment of the

H et A avaient eu des relations sexuelles, mais il n'était pas convaincu que A avait été agressée sexuellement sans son consentement. La Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en traitant la preuve de façon inadéquate, à savoir en procédant à une analyse « fragmentaire » incompatible avec son obligation de prendre en considération l'effet cumulatif de tous les éléments de preuve pertinents.

Arrêt : Le pourvoi est accueilli et les acquittements sont rétablis.

Bien que le juge présidant un procès commette une erreur de droit en analysant la preuve de façon fragmentaire, les motifs du juge du procès en l'espèce ne révèlent aucune erreur de ce genre. La Cour d'appel a mal interprété le dossier en reprochant au juge de ne pas faire allusion au témoignage de A sur la question du consentement, car il l'a évoqué au moins trois fois. De plus, le juge du procès n'avait pas à « rejeter » le témoignage de A pour qu'il subsiste dans son esprit un doute raisonnable soulevé par l'ensemble de la preuve. En fait, il a motivé abondamment le doute raisonnable qui subsistait dans son esprit quant au consentement. En outre, il n'y avait aucune raison de conclure que le juge du procès avait utilisé hors contexte de courts extraits du poème. Il a cité le poème dans son intégralité avant de souligner les mots qui suscitaient des doutes dans son esprit. Enfin, la Cour d'appel a eu tort de conclure que quelques courts extraits du poème avaient « fait pencher » la balance en faveur de l'acquittement. Les réserves du juge du procès à l'égard du consentement étaient fondées sur la preuve de la relation entre H et A, sur le témoignage de la sœur de A quant au nombre de fois que A avait couché dans le lit de H et sur le fait que A était retournée se coucher lors des deux incidents dans le lit où elle avait été violée. Le juge a mentionné des extraits du poème dans le contexte des autres éléments de preuve dont il a parlé, et il a expressément dit tenir compte de toutes les circonstances de l'espèce pour arriver à sa conclusion.

Le ministère public ne peut interjeter appel de l'acquittement d'une infraction punissable par mise en accusation que « pour tout motif d'appel qui comporte une question de droit seulement ». La jurisprudence fait actuellement état d'au moins quatre types de situations où le traitement prétendument inadéquat de la preuve peut constituer une erreur de droit seulement permettant au ministère public d'interjeter appel d'un acquittement; cette liste n'est peut-être pas exhaustive. Premièrement, une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit. Par contre, pour l'application de cette règle, la conclusion que le juge des faits entretient

evidence based on a wrong legal principle is an error of law. Fourth, the trial judge's failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law, but this error will be found to have been committed only if the reasons demonstrate that this was not done. The trial judge's reasonable doubt did not have to be based on the evidence; it could arise from the absence of evidence or a simple failure of the evidence to persuade him to the requisite level of beyond reasonable doubt. It is only where that reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

Cases Cited

Considered: *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Morin*, [1988] 2 S.C.R. 345; **referred to:** *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *Wild v. The Queen*, [1971] S.C.R. 101.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 676(1)(*a*).

Authors Cited

Canadian Judicial Council. Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence, February 2004 (online: http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_NCJI-Jury-Instruction-Final-2004-02_en.asp#_Toc290368699).

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Rouleau and Watt JJ.A.), 2009 ONCA 834, 256 O.A.C. 246, 99 O.R. (3d) 761, 249 C.C.C. (3d) 140, 72 C.R. (6th) 154, [2009] O.J. No. 4963 (QL), 2009 CarswellOnt 7362, setting aside the accused's acquittals entered by Stong J., [2009] O.J. No. 6377 (QL), 2009 CarswellOnt 8844, and ordering a new trial. Appeal allowed.

Christopher D. Hicks and *Misha Feldmann*, for the appellant.

Christine Bartlett-Hughes, for the respondent.

un doute raisonnable n'est pas une conclusion de fait. Deuxièmement, l'effet juridique des conclusions de fait ou des faits incontestés peut soulever une question de droit. Troisièmement, une appréciation de la preuve fondée sur un mauvais principe juridique constitue une erreur de droit. Quatrièmement, le juge du procès commet une erreur de droit s'il ne tient pas compte de toute la preuve qui se rapporte à la question ultime de la culpabilité ou de l'innocence, mais on ne conclura à la présence d'une telle erreur que si les motifs démontrent que cela n'a pas été fait. Le doute raisonnable du juge du procès n'avait pas à reposer sur la preuve; il pouvait découler de l'absence de preuve ou du simple fait que la preuve n'était pas parvenue à le convaincre hors de tout doute raisonnable, soit la norme à atteindre. Ce n'est que lorsqu'un doute raisonnable est vicié par une erreur de droit que l'on peut réviser en appel un acquittement.

Jurisprudence

Arrêts examinés : *R. c. B. (G.)*, [1990] 2 R.C.S. 57; *R. c. Walker*, 2008 CSC 34, [2008] 2 R.C.S. 245; *R. c. Morin*, [1992] 3 R.C.S. 286; *R. c. Morin*, [1988] 2 R.C.S. 345; **arrêts mentionnés :** *Schuldt c. La Reine*, [1985] 2 R.C.S. 592; *R. c. Lifchus*, [1997] 3 R.C.S. 320; *R. c. Biniaris*, 2000 CSC 15, [2000] 1 R.C.S. 381; *Wild c. La Reine*, [1971] R.C.S. 101.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 676(1)*a*).

Doctrine citée

Conseil canadien de la magistrature. Modèles de directives au jury, partie III, Directives finales, 9.4 Évaluation de la preuve, février 2004 (en ligne : http://www.cjc-ccm.gc.ca/french/lawyers_fr.asp?selMenu=lawyers%5FNCJI%2DJury%2DInstruction%2DFinal%2D2004%2D02%5Ffr%2Easp#_Toc187642363).

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Simmons, Rouleau et Watt), 2009 ONCA 834, 256 O.A.C. 246, 99 O.R. (3d) 761, 249 C.C.C. (3d) 140, 72 C.R. (6th) 154, [2009] O.J. No. 4963 (QL), 2009 CarswellOnt 7362, qui a annulé les acquittements inscrits par le juge Stong, [2009] O.J. No. 6377 (QL), 2009 CarswellOnt 8844, et qui a ordonné un nouveau procès. Pourvoi accueilli.

Christopher D. Hicks et *Misha Feldmann*, pour l'appelant.

Christine Bartlett-Hughes, pour l'intimée.

James D. Sutton and *Ann Marie Simmons*, for the intervener.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The appellant was acquitted at trial of two counts of sexual assault on his 17-year-old cousin. The Court of Appeal set aside the acquittals and ordered a new trial on the basis that the trial judge had erred in law by failing to consider all of the evidence in reaching his conclusion. The appellant's appeal to this Court raises both narrow and broader questions. The narrow question is whether the trial judge, in fact, failed to consider the whole of the evidence as the Court of Appeal concluded that he had; the broader question is under what circumstances a trial judge's alleged mishandling of the evidence gives rise to an error of law alone which justifies appellate intervention on a Crown appeal from an acquittal. Turning first to the narrow question, the trial judge, in my respectful view, did not make the error identified by the Court of Appeal. I would therefore allow the appeal and restore the acquittals entered at trial. However, it will be helpful to address the parties' and intervener's submissions on the broader issue concerning when, in a Crown appeal of an acquittal, alleged shortcomings in a trial judge's assessment of the evidence constitute an error of law alone justifying appellate intervention.

II. Overview of Facts and Proceedings

[2] The complainant alleged that on two occasions the appellant had non-consensual sexual intercourse with her while she was sleeping with him in his bed. She was 17 at the time of both incidents; he was 22 at the time of the first and 23 at

James D. Sutton et *Ann Marie Simmons*, pour l'intervenant.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] L'appelant a été acquitté à son procès relativement à deux chefs d'agression sexuelle à l'endroit de sa cousine de 17 ans. La Cour d'appel a annulé les acquittements et ordonné la tenue d'un nouveau procès parce que le juge du procès avait commis une erreur de droit en ne tenant pas compte de toute la preuve pour tirer sa conclusion. Le pourvoi de l'appelant devant notre Cour soulève à la fois une question précise et une question générale. La question précise est de savoir si, comme l'a conclu la Cour d'appel, le juge du procès a effectivement omis de tenir compte de toute la preuve; la question générale est de savoir dans quelles circonstances le traitement prétendument inadéquat de la preuve par le juge du procès soulève une erreur de droit seulement justifiant l'intervention de la juridiction d'appel lorsque le ministère public fait appel d'un acquittement. Pour ce qui est de la question précise d'abord, j'estime que le juge du procès n'a pas commis l'erreur que lui reproche la Cour d'appel. Je suis donc d'avis d'accueillir le pourvoi et de rétablir les acquittements prononcés au procès. Il est toutefois utile d'examiner les observations des parties et de l'intervenant sur la question plus générale relative aux circonstances dans lesquelles, lors de l'appel d'un acquittement par le ministère public, les erreurs qu'aurait commises le juge du procès dans son appréciation de la preuve constituent une erreur de droit seulement justifiant l'intervention de la juridiction d'appel.

II. Aperçu des faits et des procédures

[2] La plaignante prétend que l'appelant a eu des rapports sexuels avec elle sans son consentement à deux reprises alors qu'elle était couchée avec lui dans le lit de ce dernier. Elle avait 17 ans au moment des deux incidents; il avait 22 ans lors du

the time of the second. The trial judge found that the two incidents described by the complainant had occurred. The main issue, in his view, was whether the sexual activity had been proved to be without the complainant's consent ([2009] O.J. No. 6377 (QL)).

[3] The judge found that the appellant had "adopted a lifestyle" that included regular parties at his home and providing young women — including the complainant and her 15-year-old sister — with alcohol (para. 27).

[4] The first incident described by the complainant occurred in February 2006. The complainant and appellant were socializing in his apartment, including drinking alcohol that he had provided. The complainant's younger sister as well as the appellant's roommate and another friend were also present, but the friend left before the others went to sleep. At the end of the evening, the complainant's sister went to sleep on the couch, the roommate went to sleep in his room and the appellant and complainant went to sleep in the appellant's bed. The complainant testified her sleeping in the appellant's bed had not been discussed beforehand.

[5] The complainant testified that in the early hours of the morning, the appellant moved closer to her and began grabbing and touching her. She testified that she said "stop" but that he eventually had unprotected intercourse with her. She got up, cleaned herself off, walked around the house and returned to bed with the appellant, although she did not sleep. Later in the morning, she got up, woke up her sister and they left. She did not mention the incident, and her sister testified that nothing seemed amiss. The complainant's sister, however, testified that when she woke up on this occasion, the complainant was in the appellant's bedroom. When questioned about this apparent inconsistency between her evidence and that of the complainant, her sister responded that she could be confusing it with a different time when they were at the appellant's house.

premier incident et 23 ans lors du second. Selon le juge du procès, les deux incidents relatés par la plaignante ont eu lieu. À son sens, la question principale est de savoir si l'on a établi que l'activité sexuelle s'était déroulée sans le consentement de la plaignante ([2009] O.J. No. 6377 (QL)).

[3] Selon le juge, l'appelant a [TRADUCTION] « adopté un style de vie » comprenant des fêtes chez lui sur une base régulière et la fourniture d'alcool à de jeunes femmes, y compris la plaignante et sa sœur de 15 ans (par. 27).

[4] Le premier incident que relate la plaignante est survenu en février 2006. La plaignante et l'appelant bavardaient dans l'appartement de ce dernier et buvaient de l'alcool qu'il avait servi. La sœur cadette de la plaignante, le colocataire de l'appelant ainsi qu'un autre ami étaient là également, mais l'ami est parti avant que les autres n'aillent se coucher. À la fin de la soirée, la sœur de la plaignante est allée se coucher sur le sofa, le colocataire a fait de même dans sa chambre, et l'appelant ainsi que la plaignante se sont couchés dans le lit de ce dernier. Selon le témoignage de la plaignante, ils n'avaient pas discuté au préalable du fait qu'elle couche dans le lit de l'appelant.

[5] La plaignante a affirmé qu'aux petites heures du matin, l'appelant s'est rapproché d'elle et a commencé à la saisir et à la toucher. Selon son témoignage, elle a dit [TRADUCTION] « arrête », mais il a eu ensuite des rapports sexuels non protégés avec elle. Elle s'est levée, s'est lavée, a fait le tour de la maison, puis est retournée se coucher avec l'appelant, mais elle ne s'est pas endormie. Plus tard ce matin-là, elle s'est levée, a réveillé sa sœur et elles sont parties ensemble. La plaignante n'a pas mentionné l'incident, et sa sœur a affirmé que rien ne paraissait anormal. La sœur de la plaignante a cependant témoigné que, lorsqu'elle s'est réveillée ce matin-là, la plaignante se trouvait dans la chambre à coucher de l'appelant. Interrogée à propos de cette contradiction apparente entre son témoignage et celui de la plaignante, sa sœur a répondu qu'elle avait peut-être confondu le matin en question et un autre moment où elles étaient chez l'appelant.

[6] The second incident reported by the complainant occurred in May 2006. She again found herself at the appellant's apartment, after they both had participated in a long day of moving. She testified that she did not know how she ended up staying the night again. This time, they were alone. After watching movies, they retired to his bed. Once again, she testified that he began touching and kissing her, and that she said "no" before they had unprotected intercourse. Afterwards, she was "too on edge" to leave the apartment, despite having a car, so she returned to the same bed and went to sleep. She left the next day and did not tell anyone about the occurrence.

[6] Le deuxième incident signalé par la plaignante a eu lieu en mai 2006. Elle se trouvait à nouveau dans l'appartement de l'appelant après qu'ils eurent tous deux participé à une longue journée de déménagement. Elle a affirmé ne pas savoir comment elle avait fini par y passer une autre nuit. Ils étaient seuls à cette occasion. Après avoir regardé des films, ils se sont couchés dans son lit. Elle a témoigné qu'il a encore une fois commencé à la toucher et à l'embrasser, et qu'elle a dit [TRADUCTION] « non » avant qu'ils n'aient des rapports sexuels non protégés. Plus tard, elle était « trop énervée » pour quitter l'appartement même si elle avait une voiture. Elle est donc retournée se coucher dans le même lit et s'est endormie. Elle est partie le lendemain et n'a pas parlé de l'incident à qui que ce soit.

[7] The complainant posted a poem online. The judge found that it had been written very soon after the February 2006 incident "as an outlet" (para. 29). Her sister saw the poem on the Internet and the incidents came to light when she began to discuss it with the complainant. The complainant filed a police report, and the appellant was charged with two counts of sexual assault. At trial, the appellant testified and denied any sexual contact with the complainant.

[7] La plaignante a affiché un poème en ligne. De l'avis du juge, elle l'a écrit très peu de temps après l'incident de février 2006 [TRADUCTION] « en tant qu'exutoire » (par. 29). Sa sœur a vu le poème sur Internet, et les incidents ont été révélés lorsqu'elle a commencé à en parler avec la plaignante. La plaignante a déposé un rapport au poste de police, et l'appelant a été accusé de deux chefs d'agression sexuelle. L'appelant a témoigné au procès et a nié avoir eu quelque contact sexuel que ce soit avec la plaignante.

[8] The trial judge acquitted the appellant on both counts. After summarizing virtually all of the evidence the trial judge found that he had "absolutely no doubt" (para. 26) that sexual intercourse had taken place between the appellant and complainant; he specifically rejected the appellant's denials in this regard (para. 36).

[8] Le juge du procès a acquitté l'appelant relativement aux deux chefs d'accusation. Après avoir résumé presque toute la preuve, le juge du procès a dit n'avoir [TRADUCTION] « absolument aucun doute » (par. 26) que l'appelant et la plaignante avaient eu des relations sexuelles; il a rejeté explicitement les dénis de l'appelant à cet égard (par. 36).

[9] However, the trial judge acknowledged that he also had to be convinced beyond a reasonable doubt that the sexual activity had occurred without the complainant's consent. He noted some "concerns" in this regard. He referred to the sister's evidence that she might have been confused between the times that she saw the complainant in the appellant's bed. The judge said that this caused him to wonder how many times the complainant had ended up in the appellant's bed. He asked himself

[9] Le juge du procès a toutefois indiqué qu'il devait aussi être convaincu hors de tout doute raisonnable que l'activité sexuelle s'était déroulée sans le consentement de la plaignante. Il a dit avoir quelques « réserves » à ce sujet. Il a fait allusion au témoignage de la sœur selon lequel elle avait peut-être confondu les moments où elle avait aperçu la plaignante dans le lit de l'appelant. Le juge a dit que ce témoignage l'avait amené à se demander combien de fois la plaignante s'était retrouvée dans

"why did [the complainant] insist in going back to the same bed that she had been violated in?" (para. 34). The judge then noted that he suspected "very strongly" that the complainant was confused and that she "wrestled" with going into the accused's bedroom. He returned to the fact that "[s]he said she went to the bed on her own and it wasn't even discussed. Why?" (para. 35).

[10] The trial judge referred to the poem the complainant had written, entitled "Black Dark", and quoted it in its entirety in his oral reasons. As noted, he accepted both that it was written very shortly after the February incident, and that it had been written as an outlet. He then stated, "[w]hen I read [the complainant's] description of the incidents on February 11th, concerns are raised" (para. 31). He noted that the words "bittersweet" and "regret" which she had used in the poem were "[h]ardly the words that describe a rape" (para. 33). The trial judge then concluded that "[i]n all of the circumstances of this case, notwithstanding that I do not believe the accused, notwithstanding that I am satisfied that sexual intercourse did occur on both of these occasions, I cannot be satisfied that [the complainant] was sexually assaulted without her consent" (para. 36).

[11] The Crown appealed successfully to the Court of Appeal, which set aside the acquittals and ordered a new trial on both counts of the indictment (2009 ONCA 834, 256 O.A.C. 246). The court concluded that the trial judge erred in law in his approach to the evidence. Specifically, it found that he failed to consider some lines of the poem in the context of the others, and that he failed to consider the poem in the context of the complainant's testimony on consent. This, according to Watt J.A., was a "piecemeal" approach which was incompatible with the trial judge's obligations to consider the cumulative effect of all relevant evidence (para. 64) and constituted an error of law as set out in this Court's decision in *R. v. B. (G.)*, [1990] 2 S.C.R. 57.

le lit de l'appelant. Il s'est demandé [TRADUCTION] « pourquoi [la plaignante] tenait à retourner se coucher dans le lit où elle avait été violée? » (par. 34). Le juge a ensuite dit soupçonner « très fortement » que la plaignante était confuse et « hésitait » à entrer dans la chambre à coucher de l'accusé. Il est revenu sur le fait que « [s]elon les dires de la plaignante, elle est allée au lit de son plein gré et cela n'avait même pas fait l'objet de discussions. Pourquoi? » (par. 35).

[10] Le juge du procès a parlé du poème de la plaignante qui s'intitule *Black Dark*, et l'a cité intégralement dans les motifs qu'il a exposés de vive voix. Comme je l'ai déjà dit, il a retenu la thèse que ce poème avait été écrit en tant qu'exutoire très peu de temps après l'incident de février. Il a ajouté : [TRADUCTION] « [l]a lecture de l'exposé que fait [la plaignante] des incidents du 11 février suscite des doutes dans mon esprit » (par. 31). Le juge a signalé que les mots « aigre-doux » et « regret » qui figuraient dans le poème ne « décrivaient guère un viol » (par. 33). Le juge du procès a ensuite conclu en ces termes : « Vu les circonstances de l'espèce, et même si je ne crois pas l'accusé et je suis convaincu qu'il y a eu une relation sexuelle lors de ces deux incidents, je ne puis être convaincu que [la plaignante] a été agressée sexuellement sans son consentement » (par. 36).

[11] Le ministère public a eu gain de cause devant la Cour d'appel, qui a annulé les acquittements et ordonné un nouveau procès relativement aux deux chefs d'accusation (2009 ONCA 834, 256 O.A.C. 246). D'après la Cour d'appel, le juge du procès a commis une erreur de droit dans son examen de la preuve. Elle a conclu plus particulièrement qu'il n'avait pas examiné certaines lignes du poème à la lumière du reste du poème, et qu'il n'avait pas analysé le poème dans le contexte du témoignage de la plaignante sur le consentement. Il s'agissait, selon le juge Watt, d'une analyse [TRADUCTION] « fragmentaire », incompatible avec l'obligation du juge du procès de prendre en considération l'effet cumulatif de tous les éléments de preuve pertinents (par. 64), ce qui constituait une erreur de droit, comme l'explique notre Cour dans l'arrêt *R. c. B. (G.)*, [1990] 2 R.C.S. 57.

[12] The appellant argues that the trial judge did not approach the evidence in a "piecemeal" fashion. The appellant further argues that even if the trial judge did err as the Court of Appeal suggested, the Court of Appeal was without jurisdiction to entertain a Crown appeal because any error was an error of fact and not an error of law alone as is required by s. 676(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. The respondent Crown argues that, as held by the Court of Appeal, the trial judge did err in law by considering the evidence in a piecemeal fashion.

III. Issues

[13] There are two issues:

1. Did the trial judge fail to consider the evidence as a whole?

2. Under what circumstances does a trial judge's allegedly flawed assessment of the evidence constitute an error of law and thereby allow appellate review of an acquittal?

IV. Analysis

A. *Did the Trial Judge Fail to Consider the Evidence as a Whole?*

[14] As noted, the Court of Appeal found that the trial judge had failed to put particular passages in the complainant's poem in the context of the poem as a whole and of her sworn testimony. The court stated that

> [t]he trial judge had accepted [the complainant's] evidence that sexual intercourse had taken place, but never mentioned her testimony on the consent/non-consent issue, or said why he rejected it, apart from his reference to various isolated words in the poem on which [the complainant] was never questioned. [para. 62]

. . .

[12] Selon l'appelant, le juge du procès n'a pas analysé la preuve de manière « fragmentaire ». L'appelant prétend en outre que, même si le juge du procès avait bel et bien commis une erreur, tel que l'a affirmé la Cour d'appel, cette dernière n'avait pas compétence pour instruire un appel formé par le ministère public parce que, s'il y a eu erreur, ce ne pouvait être qu'une erreur de fait et non une erreur de droit seulement, comme l'exige l'al. 676(1)*a*) du *Code criminel*, L.R.C. 1985, ch. C-46. Pour sa part, le ministère public intimé prétend que, comme l'a conclu la Cour d'appel, le juge du procès a effectivement commis une erreur de droit en examinant la preuve de façon fragmentaire.

III. Questions en litige

[13] Deux questions se posent en l'espèce :

1. Le juge du procès a-t-il omis de prendre en considération l'ensemble de la preuve?

2. Dans quelles circonstances l'appréciation prétendument viciée de la preuve par le juge du procès constitue-t-elle une erreur de droit permettant la révision d'un acquittement par la cour d'appel?

IV. Analyse

A. *Le juge du procès a-t-il omis de prendre en considération l'ensemble de la preuve?*

[14] Comme je l'ai déjà dit, la Cour d'appel a conclu que le juge du procès n'avait pas examiné des passages précis du poème de la plaignante en tenant compte du reste du poème et de son témoignage sous serment. La Cour d'appel a mentionné que :

> [TRADUCTION] Le juge du procès avait accepté le témoignage de [la plaignante] selon lequel il y avait eu des relations sexuelles, mais [qu'il] n'avait jamais fait allusion à son témoignage sur la question du consentement ou de l'absence de consentement, ni dit pourquoi il a rejeté ce témoignage, mis à part sa mention de différents mots du poème pris isolément sur lesquels [la plaignante] n'avait jamais été interrogée. [par. 62]

. . .

. . . His piecemeal approach to isolated words in the poem was incompatible with his obligation to consider the poem as a whole, and together with the rest of the evidence on the issue. [para. 64]

While acknowledging that the trial judge considered other aspects of the complainant's conduct in his discussion of the consent/non-consent issue, the Court of Appeal concluded that "it was the isolated passages in the poem . . . that tilted the balance in favour of acquittal" (para. 70). The Court of Appeal also expressed concern that the trial judge had wrongly used the poem written in relation to the first incident in his consideration of the second.

[15] Respectfully, I cannot accept this characterization of the trial judge's decision for four reasons.

[16] First, the Court of Appeal erred when it stated that "[t]he reasons of the trial judge make *no* reference to the sworn testimony of [the complainant] given at trial" (para. 56 (emphasis in original)) and that he "had . . . never mentioned her testimony on the consent/non-consent issue, or said why he rejected it, apart from his reference to various isolated words in the poem on which [the complainant] was never questioned" (para. 62). In fact, the first eight pages of the transcription of the trial judge's oral reasons summarize the complainant's evidence, and her testimony that she did not consent is specifically referred to. The trial judge noted that, in connection with the February incident, the complainant had pushed the appellant away saying "stop" and that she pulled away, at no time consenting to the contact. In relation to the May incident, the trial judge noted that she had said "no" and pushed him away when the appellant started coming closer to her and kissing her, and that she testified that she had never consented to the incidents.

[17] Respectfully, the Court of Appeal misapprehended the record when it faulted the judge for not referring to the complainant's evidence about the

. . . Son analyse fragmentaire de mots du poème pris isolément était incompatible avec son obligation d'examiner l'ensemble du poème en tenant compte des autres éléments de preuve à cet égard. [par. 64]

Tout en reconnaissant que le juge du procès a pris en considération d'autres éléments de la conduite de la plaignante dans son analyse de la question du consentement, la Cour d'appel a conclu que [TRADUCTION] « ce sont les passages du poème pris isolément [. . .] qui ont fait pencher la balance en faveur de l'acquittement » (par. 70). La Cour d'appel s'est aussi dite préoccupée du fait que le juge du procès avait utilisé à tort le poème relatif au premier incident dans son examen du second incident.

[15] En toute déférence, je ne puis accepter cette façon de caractériser la décision du juge du procès pour quatre raisons.

[16] Premièrement, la Cour d'appel a affirmé à tort que [TRADUCTION] « [l]e juge du procès *ne* mentionne *pas* dans ses motifs le témoignage rendu sous serment par [la plaignante] au procès » (par. 56 (en italique dans l'original)) et qu'il « n'avait [. . .] jamais fait allusion à son témoignage sur la question du consentement ou de l'absence de consentement, ni dit pourquoi il a rejeté ce témoignage, mis à part sa mention de différents mots du poème pris isolément sur lesquels [la plaignante] n'avait jamais été interrogée » (par. 62). En fait, les huit premières pages de la transcription des motifs exposés de vive voix par le juge du procès résument le témoignage de la plaignante, et le passage de son témoignage quant à son absence de consentement y est explicitement mentionné. Le juge du procès a fait remarquer au sujet de l'incident de février que la plaignante avait repoussé l'appelant en disant [TRADUCTION] « arrête », et qu'elle s'était éloignée et n'avait jamais consenti au contact. Quant à l'incident de mai, le juge du procès a signalé que la plaignante avait dit « non » et avait repoussé l'appelant au moment où il s'est rapproché d'elle et l'a embrassée, et qu'elle avait affirmé n'avoir jamais consenti aux rapports sexuels.

[17] Avec égards, la Cour d'appel a mal interprété le dossier en reprochant au juge de ne pas avoir fait allusion au témoignage de la plaignante sur son

fact that she did not consent to the sexual activity. The trial judge referred to her evidence that she had not consented on at least three occasions in his reasons (paras. 7, 11 and 15).

[18] Second, the Court of Appeal's statement that the trial judge gave no reasons for rejecting the complainant's evidence is problematic for two reasons: the trial judge did not have to "reject" the complainant's evidence in order to be left with a reasonable doubt arising from the whole of the evidence, and the trial judge, as we shall see, gave extensive reasons as to why he was left with a reasonable doubt on the issue of consent.

[19] Third, there is no basis in the trial judge's reasons to conclude, as did the Court of Appeal, that he used small excerpts from the poem out of context. The judge quoted the poem as a whole and then drew attention to language that raised concerns in his mind, in the context of the rest of the evidence which he had heard.

[20] Finally, the Court of Appeal erred in concluding that it was a couple of brief excerpts from the poem that had "tilted" the balance in favour of acquittal and that the judge had improperly considered the poem in relation to the second incident. Respectfully, these conclusions are not based on a fair reading of the trial judge's reasons.

[21] The trial judge noted that he had to be satisfied beyond a reasonable doubt that the incidents occurred without the complainant's consent. He expressed his concern, based on the evidence of the relationship between the accused and the complainant and on the testimony of the complainant's sister, about how many times the complainant had been at the accused's home and ended up in his bed. He noted that the relationship between the appellant and the complainant was "strong but perverse" (para. 30). After referring to an excerpt from the poem and expressing concern arising from the complainant's use of the word "regret" in relation to the first incident, the trial judge asked "why did she insist in going back to the same bed that she

absence de consentement à l'activité sexuelle. Le juge du procès a évoqué ce témoignage au moins trois fois dans ses motifs (par. 7, 11 et 15).

[18] Deuxièmement, l'affirmation de la Cour d'appel selon laquelle le juge du procès n'a pas motivé le « rejet » du témoignage de la plaignante pose problème à deux égards : le juge du procès n'avait pas à « rejeter » le témoignage de la plaignante pour qu'il subsiste dans son esprit un doute raisonnable soulevé par l'ensemble de la preuve et, comme nous le verrons, il a motivé abondamment le doute raisonnable qui subsistait dans son esprit quant au consentement.

[19] Troisièmement, les motifs du juge du procès ne donnent aucunement matière à conclure, comme l'a fait la Cour d'appel, qu'il a utilisé hors contexte de courts extraits du poème. Le juge a cité le poème dans son intégralité avant de souligner les mots qui suscitaient des doutes dans son esprit eu égard aux autres éléments de preuve qui lui ont été présentés.

[20] Enfin, la Cour d'appel a eu tort de conclure que ce sont quelques courts extraits du poème qui avaient [TRADUCTION] « fait pencher » la balance en faveur de l'acquittement et que le juge avait eu tort d'examiner le poème relativement au deuxième incident. En toute déférence, ces conclusions ne procèdent pas d'une interprétation juste des motifs du juge du procès.

[21] Ce dernier a signalé qu'il devait être convaincu hors de tout doute raisonnable que les incidents étaient survenus sans le consentement de la plaignante. Il a exprimé sa réserve — fondée sur la preuve de la relation entre l'accusé et la plaignante et sur le témoignage de la sœur de la plaignante — quant au nombre de fois que la plaignante s'était trouvée chez l'accusé et avait couché dans son lit. Il a relevé que l'appelant et la plaignante entretenaient une relation [TRADUCTION] « solide mais perverse » (par. 30). Après avoir mentionné un extrait du poème et exprimé sa réserve au sujet de l'emploi, par la plaignante, du mot « regret » pour parler du premier incident, le juge du procès s'est demandé « pourquoi [elle tenait] à retourner

had been violated in?" (para. 34). This comment, of course, had nothing to do with the language of the poem but was based on the other evidence that he had heard in relation to both incidents.

[22] After referring to some further language in the poem — "First taste So bittersweet" — the judge said that he suspected very strongly when he read the poem that the complainant had been confused and that she had wrestled with going into that room. He then referred to her evidence about how she had gone to the bed on her own without discussion; the trial judge asked "[w]hy?" He then concluded that "[i]n all of the circumstances of this case" he could not be satisfied that the complainant had not consented to the sexual activity. In short, the judge's references to the poem excerpts were in the context of his references to other aspects of the evidence, and he explicitly stated that he was taking into account all of the circumstances of the case in reaching his conclusion.

[23] Respectfully, the Court of Appeal erred in its conclusion that the trial judge had taken a "piecemeal" approach to the evidence, and that his use of the poem had been out of context and had "tilted the balance" in his decision to acquit. Further, I do not agree that "[t]he trial judge appears to have used the poem about the events of February 11, 2006, to support his finding on the consent/non-consent issue in connection with the allegation of May 20, 2006" (para. 63). As set out above, a fair reading of the trial judge's reasons discloses that he had reasonable doubt based on his consideration of all the evidence.

B. *Under What Circumstances Do Alleged Shortcomings in a Trial Judge's Assessment of the Evidence Constitute an Error of Law and Thereby Allow Appellate Review of an Acquittal?*

[24] The Crown's right of appeal from an acquittal of an indictable offence is limited to "any

se coucher dans le lit où elle avait été violée » (par. 34). Bien entendu, ce commentaire n'avait rien à voir avec le texte du poème; il reposait plutôt sur les autres éléments de preuve qui lui avaient été présentés à l'égard des deux incidents.

[22] Après avoir évoqué quelques autres passages du poème — [TRADUCTION] « Première impression si aigre-douce » —, le juge a dit soupçonner très fortement, à la lecture du poème, que la plaignante était confuse et avait hésité à entrer dans cette chambre. Il a ensuite parlé de son témoignage selon lequel elle était allée au lit de son plein gré sans en avoir discuté au préalable; le juge du procès s'est demandé « [p]ourquoi? ». Il a ensuite conclu que, « [v]u les circonstances de l'espèce », il ne pouvait se convaincre que la plaignante n'avait pas consenti à l'activité sexuelle. Bref, le juge a mentionné des extraits du poème dans le contexte des autres éléments de preuve dont il a parlé, et il a expressément dit tenir compte de toutes les circonstances de l'espèce pour arriver à sa conclusion.

[23] Avec égards, la Cour d'appel a conclu à tort que le juge du procès avait analysé la preuve de façon [TRADUCTION] « fragmentaire » et que son utilisation hors contexte du poème avait « fait pencher la balance » dans sa décision d'acquitter l'appelant. De plus, j'estime qu'elle a eu tort de dire que « [l]e juge du procès semble avoir utilisé le poème relatif à l'incident survenu le 11 février 2006 pour étayer sa conclusion quant à la question du consentement ou de l'absence de consentement à l'égard de l'incident qui serait survenu le 20 mai 2006 » (par. 63). Comme je l'ai indiqué précédemment, il ressort d'une interprétation juste des motifs du juge du procès qu'il entretenait un doute raisonnable après avoir examiné toute la preuve.

B. *Dans quelles circonstances les lacunes dont souffrirait l'appréciation de la preuve par le juge du procès constituent-elles une erreur de droit et donnent-elles ouverture, pour cette raison, à la révision d'un acquittement par la cour d'appel?*

[24] Le ministère public ne peut interjeter appel de l'acquittement d'une infraction punissable par

ground of appeal that involves a question of law alone": *Criminal Code*, s. 676(1)(*a*). This limited right of appeal engages the vexed question of what constitutes, for jurisdictional purposes, an error of law alone. This appeal raises once again the issue of when the trial judge's alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal. The jurisprudence currently recognizes four such situations. While this may not be an exhaustive list, it will be helpful to review these four situations briefly.

(1) It Is an Error of Law to Make a Finding of Fact for Which There Is No Evidence — However, a Conclusion That the Trier of Fact Has a Reasonable Doubt Is Not a Finding of Fact for the Purposes of This Rule

[25] It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604. It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met. Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, a reasonable doubt is logically derived from the evidence or absence of evidence. Juries are properly so instructed and told that they may accept some, all or none of a witness's evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence (online).

[26] The principle that it is an error of law to make a finding of fact for which there is no supporting

voie de mise en accusation que « pour tout motif d'appel qui comporte une question de droit seulement » : *Code criminel*, al. 676(1)*a*). Ce droit d'appel limité fait intervenir la question épineuse de savoir en quoi consiste une erreur de droit seulement. Le présent pourvoi soulève de nouveau la question de savoir quand les lacunes dont souffrirait l'appréciation de la preuve par le juge du procès constituent une erreur de droit qui permet au ministère public d'interjeter appel d'un acquittement. La jurisprudence fait actuellement état de quatre situations de ce genre. Cette liste n'est peut-être pas exhaustive, mais il sera utile de réviser brièvement ces quatre situations.

(1) Une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit — Par contre, pour l'application de cette règle, la conclusion que le juge des faits entretient un doute raisonnable n'est pas une conclusion de fait

[25] Il est reconnu depuis longtemps qu'une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit : *Schuldt c. La Reine*, [1985] 2 R.C.S. 592, p. 604. Il ne découle toutefois pas de ce principe qu'un acquittement peut être annulé parce qu'il n'est pas appuyé par la preuve. En l'absence de quelque fait ou élément à l'égard duquel le fardeau de preuve incombe à l'accusé, un acquittement est non pas une conclusion de fait, mais une conclusion qu'il n'a pas été satisfait à la norme de persuasion hors de tout doute raisonnable. Qui plus est, comme l'a souligné la Cour dans *R. c. Lifchus*, [1997] 3 R.C.S. 320, au par. 39, un doute raisonnable doit logiquement découler de la preuve ou de l'absence de preuve. Le juge en avise à juste titre les jurés et leur dit qu'ils peuvent accepter une partie ou l'ensemble de la déposition d'un témoin ou la rejeter entièrement : *Lifchus*, par. 30 et 36; Conseil canadien de la magistrature, Modèles de directives au jury, partie III, Directives finales, 9.4 Évaluation de la preuve (en ligne).

[26] La règle selon laquelle une conclusion de fait qui n'est appuyée par aucun élément de preuve

evidence does not, in general, apply to a decision to acquit based on a reasonable doubt. As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22:

> A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. . . . [W]hereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]

[27] The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33: ". . . as a matter of law, the concept of 'unreasonable acquittal' is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt."

(2) The Legal Effect of Findings of Fact or of Undisputed Facts Raises a Question of Law

[28] *R. v. Morin*, [1992] 3 S.C.R. 286, lists this as one category of cases in which the trial judge's assessment of the evidence may give rise to an error of law. As Sopinka J. put it, at p. 294:

> If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute.

In short, the appellate court can simply apply the trial judge's findings of fact to the proper legal principles; the trial judge's error, if there is one, may safely be traced to a question of law rather

constitue une erreur de droit ne s'applique généralement pas à l'acquittement fondé sur un doute raisonnable. Comme l'a dit le juge Binnie au par. 22 de l'arrêt *R. c. Walker*, 2008 CSC 34, [2008] 2 R.C.S. 245 :

> La différence majeure entre la position du ministère public et celle de l'accusé dans un procès criminel tient à ce que, bien sûr, l'accusé jouit de la présomption d'innocence. [. . .] [T]andis que l'accusé ne peut être déclaré coupable que si la poursuite établit chacun des éléments factuels de l'infraction au-delà de tout doute raisonnable, cette exigence ne s'applique pas à un acquittement qui, contrairement à une condamnation, peut reposer simplement sur l'absence de preuve. [Italiques omis.]

[27] Notre Cour l'a dit très clairement dans *R. c. Biniaris*, 2000 CSC 15, [2000] 1 R.C.S. 381, par. 33 : « . . . la notion d'"acquittement déraisonnable" est incompatible, en droit, avec la présomption d'innocence et l'obligation qu'a la poursuite de présenter une preuve hors de tout doute raisonnable. »

(2) L'effet juridique des conclusions de fait ou des faits incontestés soulève une question de droit

[28] Il s'agit d'un type de situations énumérées dans l'arrêt *R. c. Morin*, [1992] 3 R.C.S. 286, où l'appréciation de la preuve par le juge du procès peut donner lieu à une erreur de droit. Comme l'a dit le juge Sopinka à la p. 294 :

> Si un juge du procès conclut à l'existence de tous les faits nécessaires pour tirer une conclusion en droit et que, pour tirer cette conclusion, ces faits peuvent simplement être tenus pour avérés, une cour d'appel peut ne pas partager la conclusion tirée sans empiéter sur la fonction de recherche des faits conférée au juge du procès. Le désaccord porte sur le droit et non sur les faits ni sur les conclusions à tirer de ceux-ci. Le même raisonnement s'applique si les faits sont acceptés ou incontestés.

En bref, la cour d'appel n'a qu'à appliquer les bons principes juridiques aux conclusions de fait du juge du procès; on peut établir en toute sûreté un lien entre l'erreur du juge, s'il en est, et une question

than to any question about how to weigh the evidence.

(3) An Assessment of the Evidence Based on a Wrong Legal Principle Is an Error of Law

[29] This is another category mentioned in *Morin*. In that case, Sopinka J. stated at p. 295, "Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle." In *B. (G.)*, Wilson J. added important cautionary words concerning this basis for appellate intervention:

> . . . it will be more difficult in an appeal from an acquittal to establish with certainty that the error committed by the trial judge raised a question of law alone because of the burden of proof on the Crown in all criminal prosecutions and the increased importance of examining critically all evidence that may raise a reasonable doubt. [p. 75]

[30] This proposition was said by Lamer J. (as he then was) in *Schuldt* to constitute the proper basis for the Court's decision in *Wild v. The Queen*, [1971] S.C.R. 101. In *Schuldt*, at p. 610, it was affirmed that except in the rare cases in which a statutory provision places an onus upon the accused, it can sometimes be said as a matter of law that there is no evidence on which the court can convict, but never that there is no evidence on which it can acquit as there is always the rebuttable presumption of innocence. This approach was also adopted in *B. (G.)* by Wilson J., at pp. 69-70, and the point was further underlined in the concurring reasons of McLachlin J. (as she then was), at p. 79, where she wrote: "In the absence of . . . misdirection the law is clear that doubts about the reasonableness of the trial judge's assessment of the evidence [in the context of a Crown appeal of an acquittal] do not constitute questions of law alone . . . ."

de droit plutôt qu'une question de pondération adéquate de la preuve.

(3) Une appréciation de la preuve fondée sur un mauvais principe juridique constitue une erreur de droit

[29] Il s'agit d'un autre type de situations énoncé dans *Morin*. Comme l'a dit le juge Sopinka à la p. 295 de cet arrêt, « [l]'omission d'apprécier les éléments de preuve ne saurait constituer une erreur de droit que si elle résulte d'une mauvaise compréhension d'un principe juridique. » La juge Wilson a fait une importante mise en garde au sujet de ce moyen d'intervention en appel dans l'arrêt *B. (G.)* :

> Il sera [. . .] plus difficile dans l'appel d'un acquittement d'établir avec certitude que l'erreur commise par le juge du procès soulevait une question de droit seulement en raison du fardeau de preuve qui incombe au ministère public dans toutes les poursuites criminelles et de l'importance accrue de l'examen critique de tous les éléments de preuve susceptibles de soulever un doute raisonnable. [p. 75]

[30] Le juge Lamer, plus tard Juge en chef, a affirmé dans *Schuldt* que cette proposition constitue le véritable fondement de l'arrêt de la Cour *Wild c. La Reine*, [1971] R.C.S. 101. Le juge Lamer a mentionné dans *Schuldt*, à la p. 610, que, sauf dans les rares cas où une disposition législative impose le fardeau de la preuve à l'accusé, on peut parfois dire en droit qu'il y a absence de preuve qui puisse permettre au tribunal de déclarer le prévenu coupable, mais on ne peut jamais dire qu'il y a absence de preuve qui lui permette de l'acquitter, car il y a toujours la présomption d'innocence qui doit être réfutée. La juge Wilson a elle aussi fait sienne cette approche aux p. 69 et 70 de l'arrêt *B. (G.)*, et la juge McLachlin (maintenant Juge en chef) a également souligné ce point comme suit dans ses motifs concordants, à la p. 79 : « En l'absence d'une [. . .] erreur, la loi prévoit clairement que les doutes sur le caractère raisonnable de l'appréciation de la preuve par le juge du procès [dans le cas d'un appel formé par le ministère public à l'encontre d'un acquittement] ne constituent pas uniquement une question de droit . . . »

(4) The Trial Judge's Failure to Consider All of the Evidence in Relation to the Ultimate Issue of Guilt or Innocence Is an Error of Law

[31] This was Sopinka J.'s last category in *Morin* (pp. 295-96). The underlying legal principle is set out in another decision called *R. v. Morin*, [1988] 2 S.C.R. 345. The principle is that it is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt; the evidence must be looked at as a whole: see, e.g., *B. (G.)*, at pp. 75-77 and 79. However, Sopinka J. sounded an important warning about how this error may be identified. It is a misapplication of the *Morin* principle to apply it whenever a trial judge fails to deal with each piece of evidence or record each piece of evidence and his or her assessment of it. As noted in *Morin* (1992), at p. 296, "A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect." This was the basis of intervention relied on by the Court of Appeal, but as noted earlier, a fair reading of the trial judge's reasons does not support this finding of legal error.

[32] A trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed. As Binnie J. pointed out in *Walker*, "Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue" (para. 20). *Walker* also clearly holds that the adequacy of a trial judge's reasons is informed by the limited grounds for Crown rights of appeal from acquittals (paras. 2 and 22). As Binnie J. succinctly put it, "Caution must be taken to avoid seizing on perceived deficiencies in a trial judge's reasons for acquittal to

(4) Le juge du procès commet une erreur de droit s'il ne tient pas compte de toute la preuve qui se rapporte à la question ultime de la culpabilité ou de l'innocence

[31] C'est le dernier type de situations énumérées par le juge Sopinka dans *Morin* (p. 295 et 296). Un autre arrêt portant le même intitulé, *R. c. Morin*, [1988] 2 R.C.S. 345, en énonce le principe juridique sous-jacent. Selon ce principe, c'est une erreur de droit que d'assujettir des éléments de preuve individuels à la norme de preuve hors de tout doute raisonnable; il faut examiner l'ensemble de la preuve : voir, notamment, *B. (G.)*, p. 75-77 et 79. Le juge Sopinka a toutefois servi une importante mise en garde à propos de la manière dont on peut relever l'erreur en question. Il est erroné d'appliquer le principe établi dans *Morin* chaque fois que le juge du procès ne traite pas de chacun des éléments de preuve ou ne consigne pas chacun d'eux et l'appréciation qu'il en a faite. Comme le juge Sopinka l'a souligné à la p. 296 de l'arrêt *Morin* (1992) : « Le juge du procès doit examiner tous les éléments de preuve qui se rapportent à la question ultime à trancher, mais à moins que les motifs démontrent que cela n'a pas été fait, l'omission de consigner que cet examen a été fait ne permet pas de conclure qu'une erreur de droit a été commise à cet égard. » C'est le motif sur lequel s'est fondée la Cour d'appel pour intervenir, mais, comme je l'ai déjà dit, une interprétation juste des motifs du juge du procès n'étaie pas ce constat d'erreur de droit.

[32] Le juge du procès n'est pas tenu de mentionner chacun des éléments de preuve qu'il a examinés ou d'expliquer en détail l'appréciation qu'il a faite de chacun d'eux. Comme l'a souligné le juge Binnie dans *Walker*, « [l]es motifs sont suffisants s'ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l'abstrait, mais d'après la réponse qu'ils apportent aux éléments essentiels du litige » (par. 20). L'arrêt *Walker* établit aussi clairement que le caractère suffisant des motifs du juge du procès est fonction des moyens limités permettant au ministère public de faire appel d'un acquittement (par. 2 et 22). Comme l'a dit succinctement

create a ground of 'unreasonable acquittal' which is not open to the court under the provisions of the *Criminal Code*" (para. 2).

[33] Having reviewed four types of cases in which an alleged mishandling of the evidence may constitute an error of law alone, I return to the appellant's submissions. He argues that on a Crown appeal from an acquittal, where the error of law is alleged to be a defect in the trial judge's assessment of the evidence, a reviewable error arises only where four conditions are met: (a) an error of law has been committed; (b) the misapprehension of the evidence is not properly characterized as either an unreasonable verdict or a miscarriage of justice; (c) the Crown can show with a high degree of certainty that the error affected the verdict; and (d) there has been a shift in a legal burden to the accused. For reasons I will develop, I cannot accept this submission.

[34] The appellant's first condition — that an error of law has been committed — simply restates the question. The question is under what circumstances may an alleged mishandling of the evidence by the trial judge constitute an error of law alone giving the Crown a right of appeal from an acquittal. I have reviewed four types of situations, which may not be an exhaustive list, in which this may be the case.

[35] The appellant's second condition, relating to whether the alleged misapprehension of the evidence is "not properly characterized" as an unreasonable verdict or a miscarriage of justice, is not a helpful way of approaching the issue. Unreasonable verdict and miscarriage of justice are bases for appellate intervention in the case of conviction appeals; reference to them does not help identify errors of law alone for the purposes of Crown appeals from acquittals.

le juge Binnie, « [i]l faut prendre garde de ne pas s'arrêter aux lacunes apparentes des motifs formulés par le juge du procès lors de l'acquittement pour créer un motif d'"acquittement déraisonnable", verdict que le tribunal ne peut prononcer en vertu du *Code criminel* » (par. 2).

[33] Après avoir examiné quatre types de situations dans lesquelles un traitement prétendument inadéquat de la preuve peut constituer une erreur de droit seulement, je reviens aux observations de l'appelant. Selon lui, lorsque le ministère public interjette appel d'un acquittement et prétend qu'une faille dans l'appréciation de la preuve par le juge du procès constitue une erreur de droit, cette erreur n'est susceptible de révision que si quatre conditions sont réunies : a) une erreur de droit a été commise; b) la mauvaise interprétation de la preuve n'est pas en réalité un verdict déraisonnable ou une erreur judiciaire; c) le ministère public est à même de démontrer avec un degré de certitude élevé que l'erreur a influé sur le verdict; et d) il y a eu déplacement vers l'accusé d'un fardeau imposé par la loi. Pour les motifs exposés plus loin, je ne puis accepter cette observation.

[34] La première condition énoncée par l'appelant — une erreur de droit a été commise — ne fait que reformuler la question, qui est de savoir dans quelles circonstances un traitement prétendument inadéquat de la preuve par le juge du procès peut constituer une erreur de droit seulement qui permet au ministère public de faire appel d'un acquittement. J'ai étudié quatre types de situations — et il y en a peut-être d'autres — où cela peut se produire.

[35] La deuxième condition énoncée par l'appelant, qui a trait au point de savoir si la mauvaise interprétation de la preuve « n'est pas en réalité » un verdict déraisonnable ou une erreur judiciaire, n'est pas un moyen utile d'aborder la question. Le verdict déraisonnable et l'erreur judiciaire sont des moyens de révision en appel d'une déclaration de culpabilité; le fait de les mentionner n'aide pas à identifier les erreurs de droit seulement lorsque le ministère public fait appel d'un acquittement.

[36] The appellant's third condition, that the Crown can show a high degree of certainty that the error affected the verdict, similarly does not assist in identifying a question of law alone. This condition relates not to whether an error is one of law, but to when, in the presence of an error of law, appellate intervention is justified.

[37] The appellant's fourth point is that a trial judge's treatment of the evidence can never constitute an error of law for the purposes of permitting a Crown appeal unless there has been a shifting of the burden of proof. He bases this position on a statement by Lamer J. in *Schuldt*, at p. 604:

> . . . a finding of fact that is made in the absence of any supportive evidence is an error of law. I must say, however, that that will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact.

[38] The appellant contends that the Court's decision in *Wild* should now be considered to have been wrongly decided.

[39] Respectfully, I do not accept either of these submissions. As I explained earlier, the principle set out in *Schuldt* (and many other cases) is that a reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt. The Court has twice, in *Schuldt* and *B. (G.)*, explained the proper basis of the decision in *Wild*. It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

C. *Application to This Case*

[40] As noted, while it is an error of law for a trial judge to assess the evidence piecemeal, the trial judge's reasons in this case do not, in my view, disclose any such error.

[36] La troisième condition qu'énonce l'appelant — le ministère public est à même de démontrer avec un degré de certitude élevé que l'erreur a influé sur le verdict — n'aide pas non plus à reconnaître une question de droit seulement. Cette condition se rapporte non pas à la question de savoir si l'erreur en est une de droit, mais à celle de savoir quand la juridiction d'appel peut intervenir en cas d'erreur de droit.

[37] Selon le quatrième argument de l'appelant, le traitement de la preuve par le juge du procès peut seulement constituer une erreur de droit donnant ouverture à un appel du ministère public s'il y a eu déplacement du fardeau de preuve. L'appelant fonde cette position sur des propos tenus par le juge Lamer dans *Schuldt*, à la p. 604 :

> . . . une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit. Cela dit, je m'empresse d'ajouter que, dans le cas d'un acquittement, cela ne se produira que si la loi a transféré à l'accusé l'obligation de prouver un fait donné.

[38] L'appelant prétend qu'il faut désormais considérer comme mal fondé l'arrêt de la Cour *Wild*.

[39] Avec égards, je n'accepte aucune de ces observations. Comme je l'ai expliqué précédemment, l'arrêt *Schuldt* (et bien d'autres décisions) énonce le principe qu'un doute raisonnable n'a pas à reposer sur la preuve; le doute peut découler d'une absence de preuve ou du simple fait que la preuve ne parvient pas à convaincre le juge des faits hors de tout doute raisonnable, soit la norme à atteindre. La Cour a expliqué à deux reprises, dans *Schuldt* et *B. (G.)*, le fondement sur lequel repose l'arrêt *Wild*. Ce n'est que lorsqu'un doute raisonnable est vicié par une erreur de droit que l'on peut réviser en appel un acquittement.

C. *Application aux faits de l'espèce*

[40] Comme je l'ai déjà dit, bien que le juge présidant un procès commette une erreur de droit en analysant la preuve de façon fragmentaire, les motifs du juge du procès en l'espèce ne révèlent, à mon avis, aucune erreur de ce genre.

V. Disposition

[41] I would allow the appeal and restore the acquittals entered at trial.

Appeal allowed.

Solicitors for the appellant: Hicks Adams, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener: Public Prosecution Service of Canada, Gatineau.

V. Dispositif

[41] Je suis d'avis d'accueillir le pourvoi et de rétablir les acquittements prononcés au procès.

Pourvoi accueilli.

Procureurs de l'appelant : Hicks Adams, Toronto.

Procureur de l'intimée : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant : Service des poursuites pénales du Canada, Gatineau.