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February 5, 2010
File No.: 240148.00657/15275

BY ELECTRONIC FILING

British Columbia Utilities Commission
6th floor, 900 Howe Street
Vancouver, B.C. V6Z 2N3

Attention: Erica M. Hamilton
Commission Secretary

Dear Sirs/Mesdames:

Re: Terasen Gas Inc.
Application for a Certificate of Public Convenience and Necessity for the Tilbury Property Purchase

We enclose on behalf of Terasen Gas Inc. its Reply Submission and a Book of Authorities with respect to the above mentioned matter.

Twenty hard copies of same will follow by courier.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by Christopher Bystrom]

Christopher Bystrom

CRB/ccm
Encl.

IN THE MATTER OF

THE UTILITIES COMMISSION ACT, R.S.B.C., 1996, CHAPTER 473

AND

AN APPLICATION BY TERASEN GAS INC.

FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR

TILBURY PROPERTY PURCHASE

REPLY SUBMISSIONS OF TERASEN GAS INC.

February 5, 2010

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REPLY SUBMISSIONS OF TERASEN GAS INC.

February 5, 2010

I. Introduction

1. Two intervenors, the Commercial Energy Consumers Association of British Columbia ("CEC") and the British Columbia Old Age Pensioners' Organization et al. ("BCOAPO"), submitted arguments with respect to TGI's Application for a CPCN for the acquisition of the former Weyerhaeuser Northwest Hardwoods Mill site (the "Property") adjacent to the Tilbury Liquefied Natural Gas ("LNG") Facility. The two intervenor submissions are similar in that they do not dispute the rationale for purchasing the Property or oppose the purchase of the Property per se, but are principally concerned with the cost-mitigation efforts to be pursued by TGI.[1]

2. These reply submissions will first respond to the submissions of CEC and then to the submissions of BCOAPO.

II. Reply to CEC

3. The CEC supports the granting of a CPCN for the purchase of the Property.[2] CEC also acknowledges that a restrictive covenant, zoning restrictions, and negotiations with neighbours "may not provide the same level of certainty over a long term that fee simple ownership of property would provide."[3] However, CEC's position is that, nonetheless, "these options may well provide sufficient certainty to be prudent risk management."[4] CEC thus proposes a condition on the CPCN that would require TGI to pursue these mechanisms and ultimately sell the Property.

4. TGI submits that the CPCN should be approved without the conditions that CEC suggests. Cost mitigation is best addressed by TGI's proposals to generate revenue through

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1 The CEC supports the purchase of the Property (CEC Final Submissions page 2). BCOAPO says (at paragraph 5 of its Submissions) that it has "some difficulty" agreeing that the proposed land acquisition is the most cost-effective manner in which CSA Z276 compliance can be assured; however, its submissions relate to ratepayer risk mitigation rather than opposing the purchase of the Property.

2 CEC Final Submissions, page 2.

3 Ibid, page 7.

4 Ibid.

opportunities such as third party storage and by pursuing subdivision and sale of the portion of the Property south of Tilbury Road. A restrictive covenant, zoning and negotiating with neighbours do not provide TGI with the required certainty with respect to controlling development on the Property. Reliance on these measures risks the need to make significant capital investments in the Tilbury LNG Facility to maintain compliance with CSA Z276.[5] Each of these alternatives – or suggested mitigation measures cited by CEC – will be addressed below. CEC's estimate of the level of mitigation achievable will also be addressed.

A. *Restrictive Covenant*

5. In its Final Submissions, TGI enumerated a number of reasons why a restrictive covenant was not a cost-effective alternative and did not provide TGI with the certainty it required with respect to controlling density and development on the Property.[6] These reasons, in brief, are as follows:

(a) A restrictive covenant would diminish the value of the Property for resale.

(b) A restrictive covenant would not provide certainty for controlling the use of the Property.

(c) A restrictive covenant would not give flexibility to TGI for future expansion of the LNG Facility.

(d) TGI would have to monitor use of the Property and may require injunctive relief from the courts to enforce the restrictive covenant, which the courts may refuse to give.

(e) Restrictive covenants are subject to challenge by property owners as being void.

6. In its submissions, CEC recognizes the last three of the issues listed above and states: "CEC acknowledges that these sorts of issue may occur with this alternative but the CEC does not believe that these issues are of sufficient import to cause the option to be an imprudent method of managing the risk."[7]

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[5] A preliminary cost estimate of a full containment tank is $90 million. Exhibit B-1, page 20.

[6] TGI Final Submissions, paragraph 32.

[7] CEC Final Submission, page 5.

7. CEC offers no support for its view that the issues TGI has identified are not of "sufficient import." Moreover, the issues identified by TGI, and which the CEC acknowledges may occur, include the possibility that the covenant could be successfully challenged in court or not provide the flexibility to adapt to future changes in safety requirements. These issues go to the very heart of the need to control density and development on the Property. TGI submits that the issues it has identified pose significant uncertainties such that the restrictive covenant option is not a prudent method of managing risk. TGI continues to rely on its Final Submissions in this regard.

8. TGI therefore submits that the CPCN should not contain a condition that TGI register a restrictive covenant and sell the Property to a third party.

B. *Zoning*

9. TGI's Final Submission explained why relying on zoning restrictions provides insufficient certainty with respect to controlling density and development on the Property and why it is not a feasible alternative.[8] CEC asserts without citing any evidence "that such by-laws could be feasible and would demonstrate a prudent approach to managing the risk of new development."[9]

10. TGI submits that in fact the evidence demonstrates that zoning will not provide TGI with long term certainty with respect to density and development on the Property.[10]

11. TGI submits that the CPCN should not contain a condition that TGI seek to establish more restrictive zoning on the Property instead of retaining the Property.

C. *Negotiating with Neighbours*

12. TGI's Final Submissions explained why negotiating with neighbours is not a feasible alternative and does not provide the certainty required to control development on the Property.[11] In response, CEC states:[12]

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[8] TGI Final Submissions, paragraphs 23 to 25.

[9] CEC Final Submission, page 6.

[10] Exhibit B-2, CEC IR 1.5.1. TGI Final Submissions, paragraphs 27 to 30.

[11] TGI Final Submissions, paragraphs 23 to 26.

[12] CEC Final Submissions, page 6.

> The CEC does not agree with TGI's conclusion that negotiation with neighbours would not provide the certainty required. The CEC submits that the arrangements TGI has made with one of its neighbours have worked to manage risk and are going to continue to work to manage the risk. The CEC submits that it was prudent for TGI to put such arrangements in place and that they provide sufficient certainty with regard to the risk.

13. The only support CEC offers for its view is that TGI has been successful in the past in negotiating with one of its neighbours. As TGI stated in its Final Submissions,[13] TGI's success to date is largely due to the fact that the operations of its neighbours has remained unchanged and restrictions sought by TGI have been consistent with the existing use of the Property. TGI's success to date is to have convinced Canadian Pacific to change its planned location for an administrative building. Canadian Pacific had to be compensated for the inconvenience. TGI initially tried to purchase the land east of the Tilbury LNG Facility before it was sold to Canadian Pacific, but was unable to do so.[14] Negotiation was therefore the only option that the Company had at that time.

14. TGI has yet to face an owner who has purchased a neighbouring property with the intention of developing and using the entire property in a manner inherently inconsistent with operating the Tilbury LNG Facility in compliance with CSA Z276. TGI does not believe the approach of negotiating with neighbours would work in this case. Further, TGI would be in the unfavourable position of having to enter into discussions with the owner in circumstances where the owner knows TGI is facing a potential capital expense of more than $90 million if the owner's agreement cannot be secured. Any concession will thus reflect the owner's lost opportunity to develop *and* TGI's significant savings on its investment.

15. The CEC suggests that TGI has "arrangements in place" with its neighbours that "provide sufficient certainty with regard to the risk". [15] There is no evidence in this proceeding to that effect. TGI can confirm that it has no arrangements in place with its neighbours, including the Canadian Pacific land to the east now owned by Seaspan, that would restrict its neighbours' ability to develop their land.

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[13] Paragraph 24.

[14] Exhibit B-1, page 17.

[15] CEC Final Submissions, page 6.

16. Based on the above and its Final Submissions on this issue, TGI submits that the CPCN should not include a condition that TGI pursue negotiations with neighbours instead of retaining the Property.

D. *Cost Mitigation*

17. CEC submits on page 2 of its Final Submission that the Commission should make it clear that TGI's recovery of costs is conditional upon, among other things, TGI prudently carrying out mitigation of costs through development of revenues from the Property. TGI submits that it would be unnecessary for there to be any condition on a CPCN for the purchase of the Property. The amount of cost mitigation and the assessment of TGI's steps to mitigate would be considered in the ordinary course of the rate setting process. At this time, TGI has only done a preliminary investigation of cost mitigation and cannot forecast what success it will have.[16] There is insufficient evidence at this time to set expectations on TGI's level of success in achieving such cost mitigation.

18. With respect to TGI's estimated quantum of cost mitigation, CEC states that TGI has identified at best $0.3 million per year in offsetting revenue and that CEC estimates that the sale of the portion TGI proposes to sell may offset another $0.3 million per year. This estimate of cost mitigation is incorrect. On page 31 of its Application, TGI describes the two cost mitigation opportunities of subdividing the portion of the Property south of Tilbury Road and earning revenue from low impact activities on the Property. TGI states that: "Preliminary evaluation of these opportunities indicates that it could reduce the cost of service by $200,000 to $300,000 per annum". TGI can confirm that this estimate was for the total of *both* cost mitigation opportunities. (In paragraph 42 of TGI's Final Submissions, the $200,000 to $300,000 was incorrectly attributed to the rental income alone.)

19. More detailed information on TGI's estimate of its cost-mitigation proposals is provided in the updated confidential Appendix 9 to the Application,[17] where TGI provides details of its estimate for both rental income and the sale of the portion of the Property south of Tilbury Road. The Financial Summary Table on page 3 of the updated confidential Appendix 9 provides details on the estimated revenue requirement and rate impact in each case. These estimates are based on the market assessment from CBRE regarding the potential for renting the Property

[16] Exhibit B-2, BCUC IR 1.8.2 and 1.10.1

[17] Exhibit B-4-1, Attachment to BCUC Confidential IR 2.5.1, Updated Confidential Appendix 9.

for third party storage in confidential Appendix 10 and the broker opinion of value for the portion of the Property south of Tilbury Road on page 11 of confidential Appendix 8.[18]

E. *Conclusion Regarding CEC Submissions*

20. TGI submits that the evidence in this proceeding shows that retaining the Property is the most cost effective solution, when one considers the significant cost of a potential upgrade. The options of TGI selling the Property with a restrictive covenant or relying on zoning restrictions, or negotiations with neighbours, are not prudent means of managing the risk of development on the Property. TGI therefore submits that the CPCN should not contain the conditions requested by CEC.

III. Reply to BCOAPO

21. BCOAPO "acknowledges the prudency of adhering to safety standards, and the important role that the Tilbury LNG facility plays in TGI's operations to reduce peak supply costs among other things."[19] BCOAPO does not appear to contest TGI's evidence that the acquisition of the Property will ensure that compliance of the Tilbury LNG Facility is not jeopardized by development on the Property. Although BCOAPO is unsure that the purchase of the Property is the most cost-effective manner in which compliance with CSA Z276 can be assured,[20] the reasons underlying BCOAPO's uncertainty are based on conjecture and misunderstanding of the evidence. Each of BCOAPO's arguments is addressed, in turn, below.

A. *TGI's Incentive to Pursue Cost-Mitigation*

22. In paragraphs 7 to 10 of its Submissions, BCOAPO makes an argument based on the proposition that TGI is acquiring "surplus land" and has an incentive "not to pursue or maximize mitigation."[21] In fact, the evidence in this proceeding demonstrates that the entire Property had to be acquired to address the potential for development. Moreover, TGI's interest in pursuing cost mitigation is aligned with ratepayers.

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[18] Exhibit B-1-1.

[19] Submissions of BCOAPO, paragraph 4.

[20] Ibid, paragraph 5.

[21] Paragraph 9.

(a) Necessary to Purchase Whole Property

23. BCOAPO's assertion that "TGI is acquiring surplus land in order to be in compliance with CSA Z276"[22] ignores the commercial reality that Weyerhaeuser Company Ltd. ("Weyerhaeuser" or the "Vendor") was only willing to sell the whole Property.[23] As only the entire parcel was for sale, the acquisition of the entire Property was required to control density and development in order to facilitate compliance with CSA Z276. Once purchased, the Property would be incorporated into the operation of the Tilbury LNG Facility and be used to provide service to TGI's customers.[24] TGI has recognized that that the portion of the Property south of Tilbury Road is not required for ongoing compliance with CSA Z276 and does not provide any other benefits to justify retaining it, in particular as it is physically separated from the rest of the Property and TGI's existing Tilbury lands by a major roadway. Accordingly, TGI has proposed appropriate means of addressing this.

(b) Interests Aligned

24. TGI is motivated to pursue cost mitigation in the form of subdivision and sale and revenue generation as it is interested in providing service to customers in a cost-effective manner. TGI's interests are aligned with customers in this regard. This alignment of interests has been recognized by the courts. For instance, in the Alberta Court of Appeal decision of *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* 2005 ABCA 122, the Court states at page 14, paragraph 72:

> However, in the context of rate setting, the starting point for scrutinizing management decisions is the presumption that it is in the utility's interest to make prudent decisions which also reflect the interests of its customers, by avoiding needless expenditures.[25]

25. TGI's interest in avoiding needless expenditures is reflected in the fact that TGI proactively came forward with its proposals for cost mitigation for the benefit of ratepayers. It would also be contrary to TGI's interests with respect to its ongoing relationship with the Commission and intervenors not to follow through on its proposals to mitigate costs.

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[22] Submissions of BCOAPO, paragraph 7.

[23] Exhibit B-2, BCUC IR 1.9.4.

[24] Ibid.

[25] This presumption is reflected in the Supreme Court of Canada's Decision in *ATCO Gas & Pipelines v. Energy & Utilities Board*, 2006 SCC 4, at paragraph 84, where Bastarache J. writing for the majority states: "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."

26. TGI proposed, on its own initiative, to subdivide the portion of the Property south of Tilbury Road not required to achieve the objectives of risk mitigation.[26] As stated in the Application: "TGI is proposing that any net proceeds from the sale of this parcel of land would be used to reduce rate base and therefore to reduce the overall rate impact of the Property acquisition."[27] TGI provided in its Application a preliminary analysis of the costs and benefits of doing so.[28] TGI has been consistent that its preference is to subdivide this portion of the Property should that prove to be cost effective.[29]

27. TGI also proposed to pursue revenue generating opportunities such as third-party container storage in its Application and provided evidence on the potential revenue to be gained from such activities.[30] This revenue would be used to reduce the cost of service for ratepayers. TGI has in other circumstances taken opportunities to mitigate costs in this fashion.[31] This cost-mitigation revenue would be transparent in future revenue requirement proceedings.

28. TGI has also been clear that it has only done a preliminary analysis and would still need to do further investigation once the Property purchase is completed to be able to forecast how much savings it will be able to achieve.[32] It is for this reason that TGI would not commit to a binding obligation to offset ratepayers cost of service by a fixed amount.[33] Furthermore, the idea of a binding agreement to offset cost of service would have the same effect as approving only a portion of the purchase price as BCOAPO has suggested. TGI believes this violates the regulatory compact as addressed in paragraphs 40 to 43 below. BCOAPO appears to have interpreted TGI's refusal to enter into a binding agreement to suggest that TGI is somehow not motivated to carry out the subdivision.[34] There is no evidence to substantiate that interpretation.

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[26] Exhibit B-1, page 31.

[27] Ibid.

[28] Exhibit B-1, page 30; Exhibit B1-1, Confidential Appendices 8 and 9.

[29] E.g., Exhibit B-4, BCUC IR 2.14.5.

[30] Exhibit B-1, pages 30-32; Exhibit B1-1, Confidential Appendices 9 and 10.

[31] Exhibit B-2, BCUC IR 1.9.2.

[32] Exhibit B-1, pages 30-31; Exhibit B-2, BCUC IR 1.7.2 and BCUC IR 1.10.1; Exhibit B-4, BCUC IR 2.14.5. TGI has committed to reporting back to the Commission on the status of the subdivision and sale of the portion of the Property south of Tilbury Road.

[33] Exhibit B-2, BCUC IR 1.8.1.

[34] Submissions of BCOAPO, paragraph 8.

29. BCOAPO's suggestion that TGI "does not believe that mitigation affects ratepayer interest"[35] has no merit. Although TGI believes that the acquisition of the Property is in the interest of customers, regardless of the success of cost mitigation efforts,[36] TGI has proposed cost mitigation measures for the benefit of ratepayers.[37] BCOAPO itself states that it "appreciates the representations that TGI has made about mitigating the cost of the project…."[38]

30. The evidence in the proceeding shows that TGI will diligently pursue cost mitigation activities as it has proposed.

B. *Subdivision and Sale of Property North of Tilbury Road and Outside Heat Flux Zone*

31. In paragraph 11 of their submissions, BCOAPO suggests that cost mitigation efforts should include consideration of the subdivision and sale of the part of the Property north of Tilbury Road but outside the current heat flux zone. The basis of this suggestion appears to be their view that "any expansion of a buffer zone may not apply to the Tilbury facility as currently configured."[39] BCOAPO's view is incorrect. As set out in TGI's Final Submissions, there are several important reasons, including possible expansion of the buffer zone, why retention of the portion of the Property north of Tilbury Road as a contiguous parcel is necessary and prudent.

32. The principle reason to retain all of the Property north of Tilbury Road is that there indeed may be an expansion of a "buffer zone" that applies to the Tilbury LNG Facility. Although the Tilbury LNG Facility is "grandfathered" from many of the prescriptive requirements of CSA Z276 through clause 4.2.2,[40] the heat flux zones required by CSA Z276 are still relevant to the risk assessments required to demonstrate that the Tilbury LNG Facility "does not constitute a significant risk to life or adjoining property" as required by clause 4.2.2. As identified by the risk assessments, the most likely cause of failure for the Tilbury LNG Facility is a seismic event.[41] The most significant consequences relate to vapour dispersion and radiant heat

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[35] Ibid, paragraph 9.
[36] Submissions of BCOAPO, paragraph 8; Exhibit B-1, BCUC IR 1.8.2.
[37] Exhibit B-1, pages 30-32.
[38] Submissions of BCOAPO, paragraph 17.
[39] Ibid, paragraph 11.
[40] Exhibit B-1, page 12 to 13.
[41] Exhibit B-1, page 13; Exhibit B1-1, Confidential Appendix 6, page 7-2.

resulting from the ignition of an LNG spill.[42] When considering consequences related to radiant heat, the prescriptive requirements of CSA Z276 are taken into account.[43] Appendix G of the 1999 Risk Assessment, for instance, describes the approach used for thermal radiation modelling and indicates that the CSA Z276 standard is relevant.[44] While the Tilbury LNG Facility might not have to demonstrate compliance with all of the prescriptive heat flux zones in CSA Z276, it still has to be demonstrated that the heat flux within these zones does not constitute a "significant risk to life or adjoining property." [45]

33. Further, the conditions relating to risk assessments could change, which could lead to a need to consider the risk to life or property within a wider area than the current heat flux zone. The conditions relating to a risk assessment that could change include seismic ground motion levels, thermal radiation modeling techniques, as well as changes to CSA Z276 and the public's perception of acceptable risk levels.[46] These conditions (including changes to CSA Z276) relate to a risk assessment to demonstrate the Tilbury LNG Facility's continued compliance with Clause 4.2 of CSA Z276. These conditions could change such that development outside the *current* heat flux zones required by CSA Z276 could impact the Tilbury LNG's Facility's compliance with CSA Z276. All of the Property north of Tilbury Road should therefore be retained to guard against this possibility.

34. TGI has provided other important reasons as to why the portion of the Property north of Tilbury Road and outside the current heat flux zones should be retained, including use of the property for emergency response and to meet expectations and requirements relating to public safety and security.[47]

35. A secondary benefit of the purchase of the Property is the potential for using it to site future LNG facilities or buffer storage for LNG as a transportation fuel.[48] It should be noted

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[42] Ibid.

[43] Exhibit B-1-1, Confidential Appendix 6 (see, e.g., pages 6-2 and G-1).

[44] Exhibit B-1-1, Confidential Appendix 6. The heat flux zones referenced by BCOAPO were provided in response to BCUC IR 1.1.4 (Exhibit B-2-2) and, as indicated in that response, the heat flux zones were based on the analysis done in the 1999 Risk Assessment. See Exhibit B1-1, Confidential Appendix 6, Figure G-5.

[45] Exhibit B-1-1, Confidential Appendix 6, page 6-2.

[46] Exhibit B-6, BCUC Confidential IR 2.6.1.

[47] TGI Final Submissions, paragraphs 46 and 47.

[48] Exhibit B-1, pages 22-24.

that the value of the Property for these potential uses is greatly diminished if the portion of the Property north of Tilbury Road and outside the current heat flux zones is subdivided and sold.[49]

36. On a general level, TGI submits that given the value and nature of the Tilbury LNG Facility, as well as the significant cost to customers to upgrade it to maintain CSA Z276 compliance, a 'bare minimum' approach to risk-mitigation is not appropriate. The fact that the Property north of Tilbury Road is larger than the absolute minimum amount of land to ensure compliance at this moment in time is a benefit to customers. It will provide TGI with flexibility in managing risk and compliance with safety and security standards now and in the future.

C. *Risk of Decommissioning the LNG Facility*

37. In paragraphs 12 to 14 of its submissions, BCOAPO raises the scenario that TGI will, for some reason, cease operating the Tilbury LNG Facility, sell the Property for the net proceeds and then have ratepayers fund a new replacement facility. BCOAPO thus suggests that ratepayers bear all the risk for the purchase of the Property, whereas the shareholder bears none.[50] There are two key reasons why the Commission should give no weight to these concerns.

38. First, the scenario identified by BCOAPO is unlikely to materialize. The unequivocal evidence in this proceeding is that TGI plans to use the Tilbury LNG Facility for the long term. The evidence is summarized as follows:

(a) In TGI's response to BCUC IR 1.5.1,[51] TGI discussed its long-term storage capacity and expansion plans within the next 10, 20 and 30 years. As stated in that response, "TGI considers both Tilbury and Mt. Hayes as long term peaking storage resources in its portfolio."

(b) In TGI's response to BCUC IR 1.5.5,[52] TGI commented further on the potential for additional peaking supply to be sourced from the Pacific North West ("PNW") and how this might impact the need for the Tilbury LNG Facility. As stated in that response and discussed in the response to BCUC IR 1.5.1, the potential for

[49] Exhibit B-2, BCUC 1.5.4
[50] Submissions of BCOAPO, page 14.
[51] Exhibit B-2.
[52] Ibid.

additional cost-effective peaking supply and redelivery to Terasen's market from the PNW is limited and, in any case, would not provide the same level of benefits as the Tilbury LNG Facility. It is unlikely that the development of additional peaking supply sourced from the PNW will replace the need for the Tilbury LNG Facility.

(c) In response to CEC IRs 1.4.1 and 1.4.2,[53] TGI indicated that while the remaining composite life of the Tilbury LNG Facility is in the order of 20 years, TGI is maintaining the facility such that its expected life is indefinite. As stated in the response to CEC IR 1.4.2: "TGI intends to maintain the Tilbury LNG Facility in a manner which maximizes its life and value to TGI's customers."

(d) Throughout all of the above-mentioned responses, TGI emphasized the value of the Tilbury LNG Facility. TGI is important as a peaking service in the TGI gas supply portfolio, an on-system capacity resource for the Coastal Transmission System and a facility that provides a range of benefits that contribute to security of supply, reliability and operational flexibility.[54]

39. The "commitment" to use the Tilbury LNG Facility in the long term that BCOAPO appears to desire from TGI is both unrealistic and contrary to the interest of ratepayers. What is in the interest of ratepayers is for TGI to pursue cost-effective storage capacity and expansion plans. The clear evidence now is that this includes the Tilbury LNG Facility for the long-term. If events in the future unfold in dramatically unforeseeable ways, it may be in the best interest of ratepayers to stop using the Tilbury LNG Facility. Having said that, TGI stresses that indeed it plans on using the Tilbury LNG Facility in the long-term and the evidence in this proceeding supports that this provides the best value to ratepayers.

40. Second, TGI submits that the purchase of the Property poses no real risk to ratepayers. In fact, the Property acquisition mitigates the risk exposure to ratepayers. The evidence in this respect is as follows:

(a) The price to purchase the Property is fixed and is known with certainty.

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[53] Ibid.

[54] TGI Final Submissions, paragraph 6.

(b) The full cost of the Property purchase is justified (with or without mitigation initiatives) by the fact that it will eliminate the risk of the Tilbury LNG Facility potentially being out of compliance with CSA Z276 due to development on the Property by a third party, which would potentially trigger a capital cost of over $90 million to upgrade the LNG facility.

(c) TGI plans to use the Tilbury LNG Facility in the long term. Further, if for some reason the Tilbury LNG Facility were no longer considered fit for continued service, TGI would likely seek to replace it with expanded LNG storage, liquefaction and sendout capabilities on the same site.[55] Therefore, there is no reason at this time to think that there will be decommissioning of the Tilbury LNG Facility and a sale of the Property anytime within the planning horizon of the Company.

(d) Any disposition of the LNG facility and the Property would require Commission approval, which would protect ratepayer interests.

41. Third, BCOAPO's contention that the shareholder is in a "win-win" situation disregards the fact that the shareholder earns an approved rate of return on the equity portion of the additional ratebase to compensate the shareholder for having its capital tied up for as long as the Property remains part of rate base. Customers are the beneficiaries of this investment. If the Property were to be sold at some future date, customers benefit by having the cost of the Property removed from rate base. Thus, there is a balance of risk and benefit in this case as between customer and shareholder. This reflects the nature of the regulatory compact and the law as determined by the Supreme Court of Canada in *ATCO Gas & Pipelines v. Energy & Utilities Board*, 2006 SCC 4.[56]

D. *The Shareholder Purchase Option*

42. In paragraph 15, BCOAPO suggests an option whereby TGI's shareholder would purchase the Property, while at the same time BCOAPO acknowledges that the Commission is not able to order TGI's shareholder to purchase the Property. The purchase of the Property is

[55] TGI Final Submissions, paragraph 15; Exhibit B-2, CEC IR 1.4.2.

[56] See, e.g., paragraph 67.

for public utility purposes (used and useful) and is properly recovered in rates under the regulatory compact.[57] TGI's shareholder would accordingly not agree to any such proposal.

E. *Approval of Portion of the Purchase Price*

43. In paragraph 16, BCOAPO suggests that the Commission should consider only approving a portion of the purchase price.[58] TGI submits that this option is not within the jurisdiction of the Commission and should not be considered.

44. The option of approving only a portion of the purchase price is merely a derivative of the option of having the shareholder purchase the Property. As has been noted before, the Vendor was not willing to consider subdividing and selling only a portion of the Property. Therefore, the only option is to purchase the whole Property. If the Commission were to approve the Property purchase with the condition that only a portion of the costs be recovered in rates, this would mean that TGI's shareholder would have to pay those costs, which are legitimate costs of providing utility service. This would effectively require the shareholder to subsidize the purchase of the Property thereby reducing its return on its investment in the utility. TGI would not purchase the Property under those conditions as it is fundamentally unfair to the shareholder.

45. While the Commission has broad jurisdiction to impose conditions on a CPCN, the Supreme Court of Canada's decision in *ATCO*[59] made it clear that seemingly broad powers to impose conditions cannot be interpreted so as to (1) deprive the shareholder of its legislated right to an opportunity to earn a fair return or (2) require the shareholder to pay for what are properly considered to be costs of providing service to customers. TGI submits that a condition on a CPCN effectively requiring the shareholder to subsidize the purchase of the Property would be contrary to the regulatory compact as explained by the Courts and is therefore beyond the jurisdiction of the Commission.[60]

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[57] ATCO Gas & Pipelines v. Energy & Utilities Board, 2006 SCC 4.

[58] It appears from paragraph 6 of its submissions that BCOAPO believes that it can determine the portion of the total sale price that the portion of the Property north of Tilbury Road and outside the heat flux zone represents. There is, however, no evidence about the potential value from a sale of this portion of the Property north of Tilbury Road. One would also have to deduct the transaction costs, including costs for subdivision, to estimate the potential value of such a sale.

[59] *ATCO Gas & Pipelines v. Energy & Utilities Board*, 2006 SCC 4, at paragraphs 74-80.

[60] *ATCO Gas & Pipelines v. Energy & Utilities Board*, 2006 SCC 4.

F. *Conclusion Regarding BCOAPO Submissions*

46. TGI has demonstrated its commitment to pursue options to mitigate cost of service once the Property is acquired. Further, the evidence in this proceeding establishes that TGI plans to use the Tilbury LNG Facility for the long term. Therefore, TGI submits that there is no basis in the evidence for the concerns expressed by BCOAPO in its submissions and the CPCN should be approved as requested in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

[Original signed by]

_____
Matthew T. Ghikas

[Original signed by]

_____
Christopher Bystrom

Counsel for Terasen Gas Inc.

IN THE MATTER OF

THE UTILITIES COMMISSION ACT, R.S.B.C., 1996, CHAPTER 473

AND

AN APPLICATION BY TERASEN GAS INC.

FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR

TILBURY PROPERTY PURCHASE

BOOK OF AUTHORITIES OF TERASEN GAS INC.

February 5, 2010

INDEX

TAB

Indexed as:

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

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

[2006] 1 S.C.R. 140

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

2006 SCC 4

File No.: 30247.

Supreme Court of Canada

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

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

(149 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Administrative law -- Boards and tribunals -- Regulatory boards -- Jurisdiction -- Doctrine of jurisdiction by necessary implication -- Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas -- Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility -- Whether Board had explicit or implicit jurisdiction to allocate proceeds of

sale -- If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable -- Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) -- Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 -- Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law -- Judicial review -- Standard of review -- Alberta Energy and Utilities Board -- Standard [page141] of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers -- Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale -- Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) -- Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 -- Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Summary:

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

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

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

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of [page142] review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [paras. 21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [para. 7] [para. 41] [para. 43] [para. 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, [page143] 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. [paras. 54-69]

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

confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [para. 39] [paras. 77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded [page144] that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [paras. 82-85]

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

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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 man-

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

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By Bastarache J.

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tional 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 [page147]; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167.

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History and Disposition:

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

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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.

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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 [page151] sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

4 As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell [page152] 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.

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1.1 *Overview of the Facts*

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

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

9 In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed . The Board was of the view that the test had been satisfied. It was [page154] 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 [page155] net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

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

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

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

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

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

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

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

formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

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

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

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

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

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

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The [page158] 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 [page159] decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

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

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

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

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

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

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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.

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

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

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

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

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" [page163] (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

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

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

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

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

35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they [page164] 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 [page165] that has been conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and [page166] 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;
>
> ...

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PUBA

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

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

43 There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property out-

side of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" [page168] 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 [page169] proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

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

2.3.3 Implicit Powers: Entire Context

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

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

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

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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.

[page171]

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

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

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

2.3.3.1 *Historical Background and Broader Context*

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

55 Pursuant to *The Public Utilities Act*, the first public utility board was established as a [page172] 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)).

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 [page174] 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 [page175] compact", which ensures that all customers have access to the utility at a fair price --

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

[page173]

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

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

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

60 Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these

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

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

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

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to [page176] 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: [page177] MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

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

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

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

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

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the [page178] 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 <u>they have paid only for the use of those assets</u>. [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, [page179] the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

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

2.3.3.3 *The Power to Attach Conditions*

72 As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It [page180] 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 [page181] purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

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

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

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

3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in [page182] 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 [page183] legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

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

2.4 *Other Considerations*

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

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

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether [page184] 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 [page185] or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

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

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no

legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude [page186] 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 [page187] profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire

profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

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

I. Analysis

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

> In the absence of any property right or interest and of any harm to the customers arising from the [page188] 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. [page189] In the Board's view it also follows that

> the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> (Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

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

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

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

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

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

93 ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate [page190] 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 [page191] issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

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

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

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding*. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.] (Decision 2002-037, at para. 13)

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

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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 [page193] of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

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

C. *Standard of Review*

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

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

103 I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA). [page194] 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.)

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

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

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

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

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

[page196]

> ... 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 [page197] time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

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

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

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

114 Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers [page198] 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:

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> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

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

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

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

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

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.* [page200] 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 [page201] on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.
>
> (P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

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

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

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

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.
>
> The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at [page202] 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.

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

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

1. The Confiscation Issue

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

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

> over time through depreciation [page204] accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

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

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

> We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis sometimes articulated, sometimes implicit that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful [page205] 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 [page206] current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

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

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

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

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

[page207]

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

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

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

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

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

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly [page208] and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

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

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

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

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

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so [page209] that there is a corresponding reduction of the rate base and resulting return. [p. 864]

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

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

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

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

3. Land as a Non-Depreciable Asset

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

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

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

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

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

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

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

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the [page211] Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. Lack of Reciprocity

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

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

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

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

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

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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".

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.

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* * * * *

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 [page214] 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.

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Investigation of gas utility

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

...

Designated gas utilities

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

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

(a) issue any

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

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

(b) capitalize

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

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

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

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and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale,

lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

...

Prohibited share transactions

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

...

Powers of Board

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

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

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

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

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in [page217] 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 [page218] 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

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(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 [page220] 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.

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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 ex-

isting facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

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

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

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to [page222] 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 re-

spect 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

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(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,

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

...

Prohibited share transaction

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

...

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

Enactments remedial

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

Solicitors:

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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.

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

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

cp/e/qw/qllls

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2005 ABCA 122

Date: 20050329
Docket: 0201-0015-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant (Applicant)

- and -

Alberta Energy and Utilities Board

Respondent (Respondent)

The Court:

The Honourable Mr. Justice Willis O'Leary
The Honourable Madam Justice Anne Russell
The Honourable Mr. Justice Neil Wittmann

Reasons for Judgment Reserved of The Honourable Madam Justice Russell
Concurred in by The Honourable Mr. Justice O'Leary
Concurred in by The Honourable Mr. Justice Wittmann

Appeal from the Decision of the
Alberta Energy and Utilities Board
Dated the 13th day of December, 2001

Reasons for Judgment of
The Honourable Madam Justice Russell

[1] On December 13, 2001, following a Deferred Gas Account Reconciliation Hearing, the Alberta Energy and Utilities Board (the "Board"), in its Decision 2001-110, found the appellant ATCO Gas and Pipelines Ltd. ("ATCO") acted imprudently in managing its gas supplies for the winter of 2000/2001. As a result the Board ordered ATCO to pay $4 million to its customers to compensate them for missed cost savings. In ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2003 ABCA 188, ATCO was granted leave to appeal that decision pursuant to s. 26 of the ***Alberta Energy and Utilities Board Act***, R.S.A. 2000, c. A-17 and section 70 of the ***Public Utilities Board Act***, R.S.A. 2000, c. P-45, on the following issue:

> Did the Board err in law in determining the appropriate standard to be applied with respect to the prudence and reasonableness of the decision of the Applicant utility in the context of this case?

[2] The chambers judge expressly denied leave on the calculation of the $4 million refund.

[3] The City of Calgary ("Calgary") opposed ATCO's application at the Reconciliation Hearing before the Board and was permitted to make submissions on this appeal.

INTRODUCTION

[4] ATCO is a gas distribution utility. It is governed by legislation which authorizes the Board to regulate public utilities and to "ensure that the public pays a fair and reasonable rate for the gas and the owner of the gas obtains a fair and reasonable return on its investment": ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*** (2004), 339 A.R. 250, 2004 ABCA 3 at para. 36 ("***Atco Gas***"). Customers of ATCO are charged the actual cost ATCO incurs for the gas it supplies.

[5] The Board has statutory authority to set just and reasonable rates: ***Gas Utilities Act***, R.S.A. 1980, c. G-4, s. 28; ***Public Utilities Board Act***, R.S.A. 1980, c. P-37, s. 81. Gas utility rates, or Gas Cost Recovery Rates (GCRRs) are meant to reflect the market price a utility pays to purchase natural gas. Gas utilities generally apply semi-annually to have GCRRs set by the Board. At the end of a rate period, the Board sets the upcoming rate period's GCRR through a process of reconciling the forecast costs with the actual costs incurred. To account for the risks of fluctuating costs, utilities are allowed to accumulate variances between forecast costs and actual costs: ***ATCO Electric Limited v. Alberta (Energy and Utilities Board)***, 2004 ABCA 215 at para. 26 ("***ATCO Electric***"). That variance is accumulated in a Deferred Gas Account (DGA).

[6] GCRRs are based on forecasts of future prices and costs, as well as any revenue surplus or deficiency incurred from the previous season as a result of the variance between actual costs and

forecast costs. GCRRs are intended to ensure any surplus will be distributed to customers, or to allow the utility to recover any deficiency, depending on the DGA balance. GCRRs are also intended to minimize future variance between actual costs and forecast costs.

[7] Where there is a significant change in gas supply costs between regular applications, a utility is encouraged to apply to the Board for approval of an adjustment to the GCRR in order to minimize the DGA balance: AEUB Order U2000 308. ATCO made such an application in January 2001.

[8] This appeal relates to the reconciliation of ATCO's DGA for the 2000/2001 winter season, and the test applied by the Board in assessing the prudence demonstrated by ATCO in managing its gas supplies during that period.

BACKGROUND

[9] ATCO owns a natural gas storage facility near Carbon, Alberta (the "Carbon facility") which is capable of storing enormous quantities of gas. A certain amount of the gas in storage is needed to provide the minimum pressure required to meet minimum design deliverability. That gas is called 'base gas', or 'cushion gas', and is a rate base asset.

[10] ATCO's practice was to purchase gas and inject it into storage at the Carbon facility during the summer months when demand was low, and to withdraw the stored gas during the winter when demand was high. The gas injected and withdrawn on a cyclical basis is called 'working gas', and is essentially gas inventory.

[11] Because the demand for gas corresponds with price, the practice of injecting and withdrawing working gas can have a favourable effect on prices, referred to as a "physical hedge."

[12] Although ATCO acknowledges the potential cost benefit to customers, it denies engaging in the practice of injecting and withdrawing gas from storage for the purpose of managing gas prices. Rather, ATCO argues its use of storage from the Carbon facility was to meet the operational requirements of the pipeline system, withdrawing gas at variable rates in order to manage fluctuations in demand.

[13] Commencing in the winter of 2000/2001, ATCO decided the Carbon facility was no longer needed for operational purposes. ATCO says its decision was based in part on previous decisions of the Board, which ATCO interpreted as not permitting it to engage in financial hedging because it would be costly over time and adversely affect retail gas market development. Other factors which led ATCO to discontinue use of the Carbon facility for operational purposes were deregulation in the gas utility industry and an abundance of gas supply in the open market in this province. ATCO claims it had no assurance of a market for its gas supply as a result of those factors. However, the Board found that the proposed deregulation of Carbon was not relevant to ATCO's use of gas storage during the 2000/2001 winter season, when the Carbon facility was still in use.

[14] Prior to the 2000/2001 winter season, ATCO had used a flexible withdrawal strategy, dependent on seasonal fluctuations in demand. During the winter of 2000/2001, ATCO changed to a flat withdrawal strategy, meaning that ATCO withdrew gas from the Carbon facility at set monthly flat rates. ATCO claims that as a result of its withdrawal strategy during that season of unprecedented high gas prices, it generated savings to its customers of about $60 million. However, Calgary contends that savings realized from the sale of gas purchased during the summer months when gas prices were low, does not exonerate ATCO from abandoning a flexible withdrawal strategy during the winter, which would have achieved additional savings. Calgary also notes that ATCO's own expert admitted that flexibility has value in a competitive market.

[15] ATCO says its flat withdrawal strategy was designed to avoid speculation as to future prices in the day-to-day management of gas in storage, in keeping with the Board's cautions against engaging in trading.

[16] In Order U2000-161, the Board determined that the use of financial hedging had not previously been used as a method of gas portfolio management (AB VIII, E7). It rejected arguments that ATCO had acted inappropriately by failing to engage in the purchase of gas for storage and simultaneous sale of it on the forward market for later withdrawal. The Board did so on the basis that such activity would be tantamount to trading, for which it had not given any approval (AB VIII, E-8). However, in that Order, the Board recommended that:

> [ATCO] revisit the issue of using financial hedging to help manage its gas portfolio and provide. . . a comprehensive cost/benefit analysis for its use prior to applying for a winter period Gas Cost Recovery Rate (GCRR) effective November 1, 2000, in order to determine if there is a general consensus among its sales customers for implementation of this form of risk management. (AB VIII, E8-E9)

[17] In a subsequent Order, U2000-183, the Board approved a storage strategy for the April 1, 2000 - March 31, 2001 storage season. That strategy allowed ATCO to buy blocks of fixed price physical gas in the summer and sell blocks of fixed price physical gas for the winter. Order U2000-183 states:

> In . . . Order [U2000-161] the EUB agreed that ATCO GS acted appropriately in the circumstances at that particular time by following the DGA procedures in place, which did not include the use of forward markets or other forms of financial hedging as a method of gas portfolio management. The EUB recommended however that ATCO GS revisit the issue of using financial hedging to help manage its gas portfolio.

[18] Orders U2000-161 and 183 do not support ATCO's position that it was prohibited by the

Board from engaging in financial hedging.

[19] ATCO claims its decision to switch withdrawal strategies reflected the fact that the historical need to vary withdrawals in response to operational requirements for the pipeline system no longer existed. ATCO relies in part on expert reports recommending the best solutions for fluctuations in gas prices. Two of those reports are dated March 16 and April 2, 2001. But since ATCO's decision was made prior to the winter of 2000/2001, those reports could not possibly have influenced it. A third report, dated January 14, 2000 may be applicable, but does not expressly support ATCO's decision to cease using flexible withdrawal; it merely outlines the value and risks inherent in using various strategies.

[20] At ATCO's DGA Reconciliation Hearing in 2001, Calgary introduced a report, prepared by its expert VanderSchee, which concluded that had ATCO withdrawn gas at flexible rates in response to price fluctuations during the winter of 2000/2001 rather than withdrawing at a flat rate, it could have saved customers an additional $8.9 million. According to VanderSchee, such a strategy avoids the need to purchase gas at elevated prices by providing a utility with some flexibility to withdraw variable amounts of gas from storage in response to fluctuations in market prices.

[21] ATCO counters that VanderSchee's report was based on hindsight, and that the recommended strategy would have required ATCO to engage in trading.

Board Decision

[22] The Board ruled that ATCO's decision to implement flat withdrawal in the context of the winter period for 2000/2001 was imprudent. In its decision, the Board applied the following test of prudence:

> . . . [T]he utility would be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information that the owner of the utility knew or ought to have known at the time the decision was made. In making a decision, a utility must take into account the best interests of its customers, while still being entitled to a fair return.

[23] The Board noted that both before and during the winter period 2000/2001, gas forecasts predicted higher gas prices. While the Board recognized that ATCO did not have the benefit of the computer program used by VanderSchee, and could not have predicted the actual price fluctuations so as to realize the optimal savings calculated with the benefit of hindsight, in the Board's view, ATCO ought to have employed a strategy similar to that described by VanderSchee. The Board accepted that VanderSchee's method was not a trading strategy.

[24] The Board held that ATCO ought to have done something to mitigate the high gas prices over the 2000/2001 winter season. The Board found that some of the options available to ATCO at the

time included: continued withdrawal of gas on a flexible basis depending on market conditions, as had been done in the past; use of the excess deliverability on days when gas prices spiked; sale of that portion it did not intend to use; or development of other strategies to deal with the forecast high gas prices.

[25] The Board estimated the total savings not realized by ATCO to be $4 million, and ordered ATCO to refund that amount to its customers through reduced rates in the future.

RELEVANT LEGISLATION

[26] Both the appellant's and respondents' facta make reference to the ***Gas Utilities Act,*** R.S.A. 2000 c. G-5, the ***Alberta Energy and Utilities Board Act,*** R.S.A. 2000, c. A-17 and the ***Public Utilities Board Act***, R.S.A. 2000, c. P-45. The gas sales in question and the decision under appeal took place prior to the coming into force of the 2000 Revised Statutes of Alberta on January 1, 2002 by proclamation O.C. 424/2001. Accordingly, although the R.S.A. 2000 statutes apply with respect to ATCO's application for leave to appeal, which occurred after the proclamation date, the matters before the Board, now under appeal, are governed by the ***Gas Utilities Act***, R.S.A. 1980, c. G-4, as amended ("***GUA***"), the ***Alberta Energy and Utilities Board Act***, S.A. 1994, c. A-19.5 ("***AEUBA***"), and the ***Public Utilities Board Act***, **R.S.A.** 1980, c. P-37, as amended ("***PUBA***"). Therefore, all references in this decision are to those Acts as amended on the relevant dates.

[27] All relevant legislation is listed in Appendix A, attached hereto.

BRIEF CONCLUSIONS

[28] The only question before this Court is one of law relating to the test for prudence set by the Board. The application of the four factors of the pragmatic and functional analysis to that question results in a standard of review of reasonableness *simpliciter*.

[29] Applying that standard, we find the Board's test for prudence reasonable and dismiss ATCO's appeal.

STANDARD OF REVIEW

[30] This is an appeal from the decision of an administrative tribunal. Therefore, this Court must determine, in light of the governing legislation, the appropriate level of scrutiny to be applied on review of that decision: ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 ("***Pushpanathan***") at para. 26; ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19 ("***Dr. Q***") at paras. 21-22; ***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, 2004 SCC 23 ("***Voice***") at para. 15.

[31] The standard of review must be determined by applying the pragmatic and functional analysis developed in ***U.E.S., Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048, which entails consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact or mixed law and fact: ***Pushpanathan***, *supra* at paras. 29-38; ***Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.***, [2001] 2 S.C.R. 100, 2001 SCC 36 ("***Mattel***") at para. 24; ***Dr. Q***, *supra* at para. 26; ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20 ("***Ryan***") at para. 27; ***Voice***, *supra* at para. 16; ***A.U.P.E. v. Lethbridge Community College***, 2004 SCC 28 ("***Lethbridge***") at para. 14. None of those four factors are determinative: ***Pushpanathan***, *supra* at para. 27; ***Mattel***, *supra* at para. 24, but evaluated collectively, they will indicate the appropriate degree of deference to afford the administrative decision-maker.

[32] There are three standards of review, from least to most deferential: correctness, reasonableness, and patent unreasonableness: ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 30; ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at para. 55; ***Ryan***, *supra* at paras. 20 & 24.

[33] Legislative intent underlies each factor in the pragmatic and functional analysis: ***Dr. Q***, *supra*; ***Voice***, *supra* at para. 18. In this case, the governing legislation is the ***GUA***, the ***AEUBA***, and the ***PUBA***. (See Appendix A)

Privative Clause/Right of Appeal

[34] Section 10 of the ***AEUBA*** gives the Board the same jurisdiction and powers granted to the Public Utilities Board ("PUB"). Thus, the Board has jurisdiction to "hear and determine all questions of law or of fact" pursuant to s. 30 of the ***PUBA***.

[35] Section 26 of the ***Alberta Energy and Utilities Board Act***, R.S.A. 2000, c. A-17 and s. 70 of the ***Public Utilities Board Act***, R.S.A. 2000, c. P-45 allow for appeals from decisions of the Board on questions of law or jurisdiction where leave has been granted. Such a statutory right of appeal implies legislative intent to afford the Board less deference on questions of law or jurisdiction: ***Barrie Public Utilities et al. v. Canadian Cable Television Association et al.*** (2003), 304 N.R. 1, 225 D.L.R. (4th) 206 at 217 (S.C.C.) ("***Barrie***"). However, granting leave on a matter of law or jurisdiction will not necessarily attract a correctness standard: ***Barrie***, *ibid*; ***Alberta Energy v. Goodwell Petroleum*** (2003), 339 A.R. 201, 2003 ABCA 277 at para. 23. Matters falling within the Board's expertise will warrant deference even where there is a statutory right of appeal: ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 at 591 ("***Pezim***"); ***Atco Gas***, *supra* at para. 35.

[36] This factor suggests that the Board's decision be afforded limited deference.

Relative Expertise

[37] The Board is a specialized tribunal with expertise in the area of gas utility regulation, which includes protecting the public interest by balancing the competing interests of customers and utilities: ***Coalition of Citizens v. Alberta (Energy and Utilities Board)*** (1996), 187 A.R. 205 at para. 14 (C.A.); ***ATCO Ltd. v. Calgary Power* Ltd.**, [1982] 2 S.C.R. 557 at 576; ***Atco Gas***, *supra* at para. 34; ***ATCO Electric*** at para. 53. However, the expertise of the Board relative to that of this Court will depend on the issue in question: ***Pushpanathan***, *supra* at para. 33; ***Barrie***, *supra* at 219.

[38] In this case, the issue for which ATCO was granted leave is the following:

> Did the Board err in law in determining the appropriate standard to be applied with respect to the prudence and reasonableness of the decision of the Applicant utility in the context of this case?

[39] This question could be understood in two ways. Did the Board have jurisdiction to set and apply a standard of prudence in reviewing ATCO's decisions? Alternatively, assuming the Board did have jurisdiction, did the Board employ the proper standard of prudence in respect of ATCO's management decisions? If it is the former, the issue involves legislative interpretation, for which the Board's expertise does not necessarily exceed that of this Court. However, if it is the latter, the issue straddles the line between statutory interpretation and industry-specific practice, in which case, the Board's expertise may very well exceed that of this Court. For the reasons that follow, I conclude the question is one of law and not of jurisdiction.

[40] In support of its position that the proper standard of review is correctness, ATCO argues that any authority the Board has in terms of denying recovery of costs or imposing obligations on ATCO to refund are matters of statutory interpretation, which go to the Board's jurisdiction. However, ATCO was not granted leave on the jurisdictional argument.

[41] ATCO argues the broad applicability of the issue respecting prudence suggests minimal deference, citing ***Chieu v. Canada (Minister of Citizenship and Immigration)*** (2002), 208 D.L.R. (4^{th}) 107 at 120. While conceding the Board has expertise, ATCO says in the absence of a statutory framework, the Board has no expertise with respect to the test for prudence.

[42] ATCO's submissions on the leave question focus predominantly on what ought to be the proper test for prudence, as do submissions by the Board and by Calgary. None of the parties make submissions regarding the Board's jurisdiction to set such a test. Moreover, the issue on which leave was granted was framed as one of law and not as one of jurisdiction. Therefore, focus will be

confined to the issue of law as to whether the Board adopted the proper test of prudence.

[43] The Board enunciated its test of prudence in the context of rate-setting. Fixing just and reasonable rates is a matter squarely within the Board's expertise: ***TransAlta Utilities Corp. v. Alberta Public Utilities Board*** (1986), 68 A.R. 171 at para. 22 (C.A.) ("***TransAlta***"); ***Industrial Power Consumers Assn. of Alberta v. TransAlta Utilities Corp.*** (2000), 255 A.R. 194 at para. 4 (C.A.). The issue is polycentric and requires expertise.

[44] Given the nature of the legal issue and the context surrounding it, the expertise of this Court does not exceed that of the Board which suggests the Board must be afforded curial deference.

Legislative Purpose

[45] The purpose of the governing statutory scheme as a whole, and the specific applicable provisions in particular, must also be considered in determining the appropriate standard of review: ***Dr. Q***, *supra* at para. 30; ***Lethbridge***, *supra* at para. 18.

[46] The Supreme Court of Canada spoke generally to the mandate conferred on the Board by the ***GUA*** and the ***PUBA*** in ***ATCO v. Calgary Power***, [1982] 2 S.C.R. 557 at 576:

> 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.

[47] The general legislative mandate on the Board is to protect the public interest by way of regulating public utilities. A reviewing court should grant deference where the statutory scheme governing an expert tribunal allows the tribunal to balance competing interests and address broad policy concerns: ***Pezim***, *supra* at 591-92; ***ATCO Electric***, *supra* at para. 56.

[48] In reconciling the DGA and setting a 'just and reasonable' prospective GCRR, the Board conducted a prudence review of the Board's management decisions respecting withdrawal from storage. The question is whether the Board applied the correct test for prudence.

[49] Specific provisions of the governing legislation that confer authority on the administrative tribunal can also be indicators of limited review.[1] Although there is no particular provision in any

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[1] In ***TransAlta***, *supra* at para. 22, Kerans J.A. stated:

> . . . Sometimes a legislature invites limited review not by purporting to limit the power of the reviewing court but rather by conferring delegated legislative powers on the tribunal. When the delegation is manifest, as when the tribunal is empowered to "make regulations", the matter is beyond dispute. In other cases, the delegation is not so obvious but is found in the description of the powers of a tribunal in terms which are at once imprecise and evocative. The use of elastic adjectives is usually considered by a court as an implicit granting of a power

of the governing Acts which refers to a prudence review, the applicable legislative provisions do give the Board authority to fix 'just and reasonable' rates, a specific mandate connected to the general legislative purpose: ***Re City of Dartmouth*** (1976), 17 N.S.R. (2d) 425 at 432 (S.C.A.D.). The words 'just and reasonable' suggest that the criteria with which the Board exercises its power is flexible and discretionary, and subject to limited review.

[50] The Board has authority to fix just and reasonable rates, taking into account retrospective considerations respecting revenues and costs: ***GUA***, ss. 28(a) and 32(a); ***PUBA***, ss. 81(a) and 83(a). The Board also has authority to fix just and reasonable standards to be observed by utilities: ***GUA***, s. 28(c); ***PUBA***, s. 81(c).

[51] The discretion to determine what is just and reasonable includes the discretion to define justness and reasonableness: see ***Memorial Gardens Association (Can.) Ltd. v. Colwood Cemetery Co.*** [1958] S.C.R. 353 at 357; and ***TransAlta***, *supra* at para. 24, citing ***Edmonton, Jasper Place et al v. Northwestern Utilities Ltd.*** (1960) 34 W.W.R. 241 (Alta. S.C.A.D.). Such discretion suggests a legislative intent to give deference to the Board's methodology in fixing rates and standards. Support for that premise is found in ***Newfoundland Light & Power Co. v. P.U.C. (Bd.)*** (1987), 25 Admin. L.R. 180 (NFCA). There the Court rejected the argument that the Board had exceeded its jurisdiction in determining a just and reasonable rate of return by failing to adopt a particular methodology. That decision was cited with approval in ***Newfoundland (Board of Commissioners of Public Utilities) (Re)*** (1998), 164 Nfld. & P.E.I.R. 60 at para. 29 (NFCA) by Green J.A., who stated:

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

[52] ATCO's customers are charged with the actual cost of gas supplied by ATCO. Actual costs incurred by a utility are reflected in the DGA balance. Those costs depend in part on that utility's management strategy, including the execution and management of a hedging plan. Assessing management decisions may necessarily factor into a reconciliation hearing and the Board's determination and implementation of just and reasonable rates: see Costello, K., "Should Commissions Pre-Approve a Gas Utility's Hedging Activities?" (***NRRI***, 34th Annual Regulatory

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to the tribunal to form its own "opinion" or make "policy" or to exercise a "discretion" - in fine, to make law. The key power of this Board is to fix "fair and reasonable" rates. This is a good example of a grant of a wide discretion.

Conference: Tampa, Florida, December 10, 2002).

[53] The Board's determination of the test governing its review of ATCO's management decisions accords with the general legislative mandate to serve the public interest by balancing the consumer's interest in just and reasonable rates with the utility's interest in earning a reasonable rate of return. In light of the discretionary nature of the specific rate-setting provisions, this factor suggests that deference be given by this Court.

Nature of the Question

[54] Leave to appeal is granted only on questions of law or jurisdiction, which would generally favour less deference. However, as the question relates to the management of a utility and marketing strategies, it is one for which the Board has greater expertise than does this Court. Where the question of law is at the core of the administrative decision-maker's expertise, some deference is owed to that decision-maker: ***Voice***, *supra* at para. 29.

[55] ATCO argues the Board erred in its articulation and application of the prudence test, in finding ATCO imprudent. The application of the test is an issue of mixed fact and law. Because the governing legislation grants a right of appeal with leave only on questions of law or jurisdiction, questions of mixed fact and law can only come before this Court where there is an extricable legal question: see ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235 at para. 36. The Board's application of its prudence test is an issue inextricably bound to the facts and is therefore not properly before us. The question of whether the prudence test set by the Board was correct, is extricable and is a question of law. Because it is a question which falls within the discretion granted to the Board by its governing legislation, some deference must be afforded.

Conclusion on Standard of Review

[56] In the context of this case, only one of the four ***Pushpanathan*** factors, the statutory right of appeal, indicates a less deferential standard. Otherwise, the Board's expertise and the governing legislation suggest the Board be given a high degree of deference, given the nature of the issue.

[57] In a decision released after oral argument concluded in this case, this Court found that because the legal question engaged was of general import, the appropriate standard to be applied to the Board's decision concerning entitlement to carrying costs is in the mid-range of judicial review spectrum, that is reasonableness. But the Court also found that "the Board enjoys expertise superior to this Court in determining the appropriate methodology for calculating prudent costs of financing a particular segment of a utility's operations": ***ATCO Electric***, *supra* at para. 62. Thus, Fraser C.J.A. concluded the appropriate standard to apply to that decision is patent unreasonableness. However, here, the Court is not being asked to review a methodology of calculation of rates, but rather whether the Board erred in determining the appropriate standard in reviewing the reasonableness of managerial decisions.

[58] Considering the four contextual factors in this case, and the import of the prudence test to the utilities industry, I conclude the appropriate standard of review is reasonableness *simpliciter*. Applying that standard, the Court must ask "whether there is a rational basis for the decision . . . in light of the statutory framework and the circumstances of the case": ***Cartaway Resources Corp. (Re)*** (2004), 319 N.R. 1, 2004 SCC 26 at para. 49.

ANALYSIS

Did the Board err in law in determining the appropriate test to be applied with respect to the prudence and reasonableness of the decision of the Applicant utility in the context of this case?

[59] The Board concluded ATCO acted imprudently because it "could have, and ought to have, maximized the value of the 'excess' deliverability by using it on days when prices were spiking or by selling the deliverability it did not intend to use . . .", and by failing to do so, ATCO "was not acting in the best interests of customers . . ." In reaching that conclusion the Board adopted the following test of prudence:

> . . . a utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of the utility knew or ought to have known at the time the decision was made. In making decisions, a utility must take into account the best interests of its customers, while still being entitled to a fair return.

[60] The Board cited its earlier Decision 2000-01, wherein it stated:

> [The concept of prudence]. . . has been recognized as a tool available to regulators, and in most instances involves an evaluation of whether or not a decision reflects good judgment and discretion and is reasonable in the circumstances which were known, or reasonably should have been known when the decision was made.

[61] ATCO maintains that the proper test for prudence requires the presumption of managerial prudence, and that the Board erred by failing to presume management had acted prudently. Although the Board did not expressly presume prudence, it may have done so implicitly by determining to uphold ATCO's decision unless it was satisfied that ATCO acted unreasonably: AB I, p. F21. But ATCO also submits that mere unreasonableness or error in judgment is not sufficient to establish imprudence and that a regulator is not entitled to step into the role of a manager. In ATCO's view, if any error was made at all, it was a mere error of judgment and not outside the realm of what any reasonable business person would do. Any such error would not constitute negligence and could thus not properly constitute imprudence.

[62] In the course of ATCO Pipelines 2003/2004 General Rate Application (Tab 18 ATCO's authorities), Calgary disputed any presumption of prudence in regulatory law that ATCO Pipelines' forecasts are reasonable, which in its view would be a reversal of the onus of proof. Further, Calgary says there is no logical reason to apply a presumption of correctness to a utility budget. Instead, Calgary says the utility has the onus of establishing the reliability of its forecast expenditure. Calgary says there is no major difference between the Board's and ATCO's articulation of the test for prudence, and that ATCO's main complaint is with the application of the test.

[63] Calgary also notes that the test applied by the Board has been applied by the Ontario Energy Board, which addressed the test for prudence in the context of rate regulation in the transportation industry in RP - 2001-0029. That Board acknowledged that a presumption of prudence on the part of a regulated utility is implicit in the framework underlying rate regulation. The Ontario Energy Board said that in considering the prudence of any action, it is engaged in a retrospective review of the reasonableness of the utility's action at a given point, and the forseeability of any changes in circumstances is critical to that review. At para. 2.36 that Board stated:

> A poor outcome does not govern the assessment of prudence. Prudence is however, called into question if the commitment was made casually, that is without a reasonable level and scope of analysis, or recklessly, or primarily for some ulterior non-utility or ulterior corporate purpose. (Calgary authorities Tab 18 p. 21)

[64] The term "prudence" is well known in the utility rate-making industry and has a significant history. Included in Calgary's materials is a 2002 paper from The National Regulatory Research Institute of Ohio State University (the "NRRI") entitled, "State Commission Regulatory Considerations Concerning Security-Related Cost Recovery in Utility Network Industries", which references a 1985 NRRI publication: *The Prudent Investment Test in the 1980's* (the "*Prudent Investment Test*"). *The Prudent Investment Test* describes the history of the concept of prudence and its use in regulated public utilities. The authors describe the concept of prudent investment as: "a regulatory oversight standard that attempts to serve as a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": ch. 2, p. 20. The 2002 NRRI paper cited by Calgary and *The Prudent Investment Test* at 93, both suggest that before a regulator investigates the prudence of a utility, the presumption of prudence must be rebutted.

[65] As a standard in public utility regulation, prudence is described as a concept borrowed from legal principles, such as negligence. In other words, the public utility will be held to a managerial duty of care:

> What is prudent is deemed to be ascertainable through the reasonable efforts of competent managers with sound and reasonable judgment. That risk is involved in managerial decision making is judicially acknowledged. But, the deliberate exposure to substantial risk in the exercise of managerial discretion is by its very nature imprudent, for risk is to be avoided, if not altogether, at least insofar as possible

under the circumstances: *The Prudent Investment Test*, p. 47.

[66] A presumption of prudence triggers an onus of proof on the party impugning managerial decisions. However, if that presumption is rebutted, a public utility's decision will be reviewed, applying an objective test of reasonableness to the facts and circumstances surrounding the decision, without relying on hindsight: *The Prudent Investment Test*, p. 93

[67] In determining whether a company had exercised proper discretion in matters requiring business judgment, the U.S. Supreme Court in ***State of Missouri ex re, Southwestern Bell Telephone Company v. Public Service Commission of Missouri*** 262 U.S. 276, 289 (1923), stated:

> The Commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.

[68] In support of its submission that for actions to qualify as imprudent they must be dishonest or obviously wasteful, ATCO cites the dissenting judgment of Justice Brandeis, in footnote 1 at 289 of that case:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

[69] In ***West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 1)***, 294 U.S. 63, 68 (1935), at p. 25 the U.S. Supreme Court held that:

> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial.

The Court continued at p. 26:

> Good faith is to be presumed on the part of the manager of a business. . . In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.

[70] There, the Court concluded that imposition of a penalty was wholly arbitrary in the absence

of evidence showing any warning to the company that fault was imputed to it and that it must give evidence of care.

[71] The Board concedes that the standard of prudence is similar to the standard of care required in assessing negligence, but argues that with respect to a regulated public utility, the test is not what a reasonable businessman would have done in the circumstances, but rather what a reasonable public utility would have done. In ***Acker v. United States***, 298 U.S. 426, 431 (1936), cited in *The Prudent Investment Test* at 32, regarding management judgment, the U.S. Supreme Court held that:

> ...[T]he charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs...

[72] The Board's broad discretion to set just and reasonable utilities rates must be exercised in the public interest, which requires consideration of both sides of the rate paying equation: ***ATCO Electric***, *supra* at 132. That process implicitly entails scrutiny of management decisions. With respect to negotiated settlements Fraser C.J.A. held in ***ATCO Electric*** at para. 145 that the Board "is entitled to assume that what the utility has negotiated and agreed to is in fact in the utility's best interests." However, in the context of rate setting, the starting point for scrutinizing management decisions is the presumption that it is in the utility's interest to make prudent decisions which also reflect the interests of its customers, by avoiding needless expenditure. That presumption will matter only when the scales are evenly balanced.

[73] In this case, in determining to uphold ATCO's decision unless satisfied ATCO had acted unreasonably, the Board correctly acknowledged the presumption of prudence. The test it articulated to be applied in reviewing the prudence and reasonableness of ATCO's decisions is reasonable.

CONCLUSION

[74] ATCO's complaint with the Board's application of the prudence test involves questions of fact, and is not properly before this Court. The only matters at issue on this appeal are whether the Board properly acknowledged a presumption of prudence, and properly articulated the test of prudence, in assessing ATCO's management decisions. The Board's articulation of the prudence test is consistent with its previous decisions and with the line of authority addressing the concept of prudence in the context of public utilities. Given the governing legislation and the circumstances of this case, there is a rational basis for the test of prudence articulated and relied on by the Board in its decision.

[75] Accordingly, the appeal is dismissed.

Appeal heard on April 21, 2004

Reasons filed at Calgary, Alberta
this 29th day of March, 2005

Russell J.A.

I concur:

O'Leary J.A.

I concur:

Wittmann J.A.

Appearances:

H.M. Kay, Q.C.
L.E. Smith, Q.C.
For the Appellant

J.R. McKee
A.E. Domes
for the Respondent

P.L. Quinton-Campbell
R.B. Brander
for the Third Party

Appendix "A"

Current Legislative Provisions

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

> **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.

. . . . .

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

> **70(1)** Subject to subsection (2), on a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.
>
> **(2)** Leave to appeal shall be obtained from a judge of the Court of Appeal on application made within one month after the making of the order, decision, rule or regulation sought to be appealed from, or within any further time that the judge under special circumstances allows, and on notice to the parties and to the Board, and on hearing those of them that appear and desire to be heard, and the costs of the application are in the discretion of the judge.

. . . . .

Applicable Repealed Legislative Provisions

Alberta Energy and Utilities Board Act, S.A. 1994, c. A-19.5 [repealed] ("***AEUBA***")

> **10(1)** Fort he 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.

. . . . .

Gas Utilities Act, R.S.A. 1980, c. G-4, as amended. [Repealed] ("***GUA***")

> **16** When it is made to appear to the board, on the application of any owner of a gas utility

or of any 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 gas utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the gas supplied, the Board

> **(*a*)** may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the gas supplied, or to the performance of the service and the tolls or charges demanded therefor,
>
> . . .
>
> **(*c*)** may disallow or change, as it thinks reasonable, any 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 contract existing between the owner of the gas utility and a municipality at the time the application is made that the Board considers fair and reasonable.
>
> . . .

25(1) No owner of a gas utility shall

> **(*a*)** make, impose or extract any unjust or unreasonable or unjustly discriminatory or unduly preferential individual or joint rate, commutation rate or other special rate, toll, fare, charge or schedule for any gas or service supplied or rendered by it within Alberta,
>
> . . .
>
> **(*c*)** adopt, maintain or enforce any regulation, practice or measurement that is unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in contravention of law, or provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service that can reasonably be demanded and furnished when ordered by the Board,
>
> . . .

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

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

. . .

32 In fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed thereafter by an owner of a gas utility,

> **(*a*)** the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
>
> > **(*i*)** the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,
> > **(*ii*)** a subsequent fiscal year of the owner, or
> > **(*iii*)** 2 or more of the fiscal years of the owner referred to in subclauses (I) and (ii) if they are consecutive
>
> and need not consider the allocation of those revenues and costs to any part of that period,
>
> **(*b*)** the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
>
> **(*c*)** the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and
>
> **(*d*)** the Board shall by order approve 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 (b) or (c), is to be used or dealt with.

. . . . .

Public Utilities Board Act, R.S.A. 1980, c. P-37, as amended. [Repealed] ("***PUBA***")

30 The Board may, as to matters within its jurisdiction, hear and determine all questions of law or of fact.

. . .

81 The Board, either on its own initiative or on the application of a person having an

interest, may by order in writing, which shall be made after giving notice to and hearing the parties interested,

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

. . .

83(1) Subject to subsection (2), in fixing just and reasonable rates, tolls or charges, or schedules thereof, 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 thereof,
> > (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 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 thereof, as the Board determines is just and reasonable.
>
> (c) 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 thereof, as 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 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 (b)

or (c), is to be used or dealt with.

1981, c. E-4.1, s. 17; 1984, c. 60, s. 4; 1988, c. S-13.75, s. 9; 1995, c. 11, s. 14.