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Attention: Laurel Ross, Acting Commission Secretary

FILED ELECTRONICALLY

October 11, 2016

Dear Mesdames/Sirs:

Re: British Columbia Hydro and Power Authority
2015 Rate Design Application
Project No. 3698781

These are the Final Submissions of MoveUP regarding BC Hydro's 2015 Rate Design Application (2015 RDA). MoveUP is the Canadian Office and Professional Employees Union, Local 378 (COPE 378). The Union's intervention in the 2015 RDA is rooted in its role as the sole certified bargaining agent for the majority of the corporations' inside (office) workers. MoveUP is a long time, active participant in processes before the BCUC, bringing its members' inside knowledge of BC Hydro's inner workings to bear to the benefit of ratepayers, interveners, the BCUC, and the Corporation itself. The Union's interest in this process is to bring forward information and alternatives it deems worthy of BCUC consideration in a bid to ensure that this rate design operates in a manner consistent with the law and British Columbian policies and values while the utility remains strong and stable with broad public support.

The Union's submission is, for convenience and clarity, presented in two parts: the first focusses on the various proposals brought forward in this process by BC Hydro and the second, BCOAPO's various low income proposals: the Essential Services Usage Block (ESUB), the Crisis Intervention Fund, and various terms and conditions designed to provide low income ratepayers with relief in the face of British Columbia's steeply rising energy costs.

Part 1: BC Hydro's RDA Proposals

In advance of this Application, BC Hydro engaged in a truly remarkable stakeholder engagement process that included not only a number of interactive workshops but, when appropriate, meetings with individual stakeholder groups. Given the issues at stake in any Rate Design and the large number of government imposed legal and policy constraints under which BC Hydro was forced to operate in its development of its 2015 Rate Design proposals, the Union commends the Utility. This approach truly did reduce the amount of post-filing process to a manageable level far more appropriate to the conservative content of this Application.

The Bonbright Criteria

BC Hydro has declined to prioritize efficiency as one of the top principles of the Bonbright Criteria used to evaluate this Rate Design Application, instead listing its top three priorities as 1. customer understanding and acceptance, 2. stable rates and 3. the fair apportionment of cost amongst customers.[1] In its Final Submission, BC Hydro acknowledged that parties to this process are concerned about this change and the Utility has attempted to justify this significant shift by pointing to the following factors it says have signaled that a change in its priorities is now needed:

[1] BC Hydro Final Argument, paragraph 28.

- A number of elements such as a change to the self-sufficiency regulatory regime and reduced load forecasts led to a reduced forecasted energy and capacity need since 2007.

- As discussed above, this resulted in a lower energy LRMC as compared to 2007. The reduced need for energy and capacity is one of the factors leading BC Hydro to prioritize customer understanding and acceptance and stable rates for customers over the Bonbright efficiency criterion.

- The reduced forecast energy and capacity needs enabled BC Hydro to take stock of existing rates introduced to achieve energy conservation since 2007 (RIB rate, MGS two-part baseline rate, LGS two-part baseline rate) and to propose replacement or amendment of rates that clearly do not meet the customer understanding and acceptance criterion such as the LGS and MGS rates;

- Recent B.C. Government initiatives conveyed a focus on rate impacts such as the Direction No. 7 rate caps and the Government's response to the 2013 Industrial Electricty Policy Review (IEPR) task force. These additional factors also led BC Hydro to prioritize customer understanding and acceptance, including bill impacts. [2]

The Union notes that energy efficiency is a core British Columbian value referenced (for example) numerous times in the *Clean Energy Act* (*CEA*), *the Pacific Coast Action Plan on Climate and Energy*, and *The Ministry of Energy and Mines and Minister Responsible for Core Review's 2015/16 – 2017/18 Service Plan.*

[2] BC Hydro Final Submission, paragraph 28, pages 14-15.

The Pacific Coast Action Plan, signed on October 28, 2013 by our Premier Christy Clark includes the following passages that clearly show British Columbia's commitment to efficient energy use:

> "Celebrating that our own governments have reduced greenhouse gas emissions by adopting regulatory, policy and market-based measures that shift energy generation to clean and renewable sources, manage energy use through greater efficiency and conservation, and enable and promote consumer choice for clean vehicles,"[3]
>
> And,
>
> "1) Transform the market for energy efficiency and lead the way to "net-zero" buildings. Energy efficiency is the lowest cost way to reduce greenhouse gas emissions while creating good local jobs. The governments of California, British Columbia, Oregon and Washington will work to harmonize appliance standards, increase access to affordable financing products, and support policy that ensures that energy efficiency is valued when buildings are bought and sold. Our efforts intend to build a vibrant, growing regional market for energy efficiency products and services."[4]

The Ministry of Energy and Mines and Minister Responsible for Core Review, 2015/16 – 2017/18 Service Plan also speaks to British Columbia's commitment to efficiency:

> "The Ministry focuses on increasing the efficiency of products and appliances, reducing the carbon intensity of transportation fuels, expanding infrastructure for

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[3] The Pacific Coast Collaborative – Action Plan on Climate and Energy, Preamble. (http://www.pacificcoastcollaborative.org/Documents/Pacific%20Coast%20Climate%20Action%20Plan.pdf)

[4] Supra, section III.

electric vehicles, and coordination with utilities on programs to reduce energy use and power bills for residential, commercial and industrial ratepayers."[5]

And:

"Objective 2.2:
British Columbia's economic and environmental priorities are served through sustainable energy use and development across all sectors of the economy.

Strategies

- Work with all public and private stakeholders to continue development and implementation of policies, programs, regulations, codes and standards to advance energy efficiency and conservation.
- Support energy utilities with the planning and implementation of coordinated, cost effective demand side management measures.
- Work with BC Hydro to develop the Site C Clean Energy Project and with Columbia Power/BC Hydro to cost-effectively redevelop BC Hydro assets in the Columbia Basin.
- Participate in and support long-term clean energy planning initiatives at the regional and national level, including the Pacific Coast Collaborative, Pacific NorthWest Economic Region, and Canadian Energy Strategy."[6]

While we have seen a variety of significant changes in the Forecast Load Resource Balance and the LRMC in recent years, there is nothing on the record of this proceeding or elsewhere to indicate that British Columbians or their provincial government have abandoned their strong commitments to efficient energy use. Given the importance efficiency plays in our province's priorities as well as the value is has to all British Columbians in the face of steeply

[5] The Ministry of Energy and Mines and Minister Responsible for Core Review 2015/16 – 2017/18 Service Plan, page 6 (http://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/electricity-alternative-energy/mem-service-plan.pdf)
[6] *Supra*, page 10.

rising BC Hydro rates, it makes no sense whatsoever to allow the Utility to abandon efficiency as one of its top rate design considerations.

While the Union recognizes that factors like the failure of the government's rosy election-time LNG load predictions to materialize has significantly reduced BC Hydro's load and capacity forecast needs as well as the LRMC, the Union cannot condone a decision to abandon efficiency as one of the utility's top priorities. This is a short term and reactive approach that leaves the Utility and its ratepayers vulnerable should yet another ground shift in the Load/Resource Forecast take place before the next Rate Design is approved and its provisions come into full effect.

It is, in our submission, short-sighted to abandon efficiency as a top priority. In the very recent past we have seen how quickly Load Forecasts can change and MoveUP has no desire to see the fallout of yet another change negatively impacting all customers and, in particular, low income customers or the Utility itself. No one aside from opportunistic market players would benefit if the Utility is forced to scramble to reorganize its operations, rates, and planning priorities to compensate for yet another sudden change in the energy/load resource balance. As a result, abandoning efficiency as a top priority is a dangerous gamble the Union is not willing to endorse.

To be clear, MoveUP is not advocating for a situation where the Utility is ordered to prioritize efficiency above all else to the detriment of other important Bonbright Criteria such as clear, transparent, and stable rates or the fair apportionment of cost amongst customers. Instead, the Union sees significant value in maintaining efficiency as a fourth top priority, and to operate in a manner that strikes a reasonable balance between all four.

Residential Service

BC Hydro has proposed no changes to its current residential rate class structure and opposes the BCOAPO low income rate proposals. During this process, MoveUP has, at every opportunity, urged BC Hydro to consider lowering its Basic Customer Charge. The Union

sees real value in this proposal and there are both strong efficiency (conservation) and equity arguments for this change. Loading more costs onto the use of energy incents efficient use and it avoids the very real burden the larger Basic Customer Charge places on low use ratepayers.

In paragraph 56 of its Final Argument, BC Hydro indicates that it dismissed this alternative because to implement it would "diminish the relationship between the basic charge and fixed costs,"[7] but there is no evidence on the record of this proceeding regarding the actual customer service cost consequences, particularly the incremental costs, associated with the addition of new accounts that might have allowed a more fulsome analysis of BC Hydro's position on this issue.

Finally, the Union is, quite frankly, surprised that BC Hydro did not proposed any change to the ratio of the Tier 1 and Tier 2 rates when, during the course of this process, the LRMC shrank or the fact that that the Tier 1 rate does not provide many low use, non-low income customers with a price signal to conserve.

However, throughout this process the Union has been cognizant that this is, in many ways, a placeholder Rate Design Application so at this time it is content to take no position regarding BC Hydro's status quo residential rate proposal (aside from the Utility's opposition to BCOAPO's low income rate proposals). The Union intends to more fully canvass these issues in the next Rate Design consultation and hearing processes.

<u>BC Hydro's other Rate Design Proposals</u>

While MoveUP agrees with BC Hydro's abandonment of the current MGS and LGS rates, the Union submits that the Utility has failed to address the adverse effects on conservation and efficiency of its failure to maintain a relatively high marginal rate. This problem is exacerbated by the proposed increase in the Basic Charge for SGS customers as well as the

[7] BC Hydro Final Submission, paragraph 56, page 27.

increase in the demand charge cost recovery from MGS and LGS customers: the resultantly lower energy charges provide no incentive to use energy efficiently. Again, because BC Hydro has chosen to discount the importance of efficiency in this rate design, the Utility sees no problem with that but the Union has made clear its concerns should BC Hydro continue to operate and plan for the future absent a strong commitment to efficiency.

Conclusion

While MoveUP has determined to take no position on BC Hydro's current residential, commercial and industrial rate proposals, the Union has determined that, based on the evidence, BCOAPO's position regarding Terms and Conditions mirrors its own, both where it accepts BC Hydro's proposals, where it agrees but urges BC Hydro to go further, where BCOAPO disagrees with BC Hydro altogether, and when it proposes its own Terms and Conditions.

Part 2: BCOAPO's Low Income Proposals

The coalition of groups known in this process as BCOAPO have presented proposals for a number of changes to BC Hydro's rates, terms & conditions, and business practices designed to assist those low income BC Hydro ratepayers who, due to rising Hydro rates, experience energy poverty. BCOAPO retained Roger Colton, an expert in low income rate design who has participated in a large number of regulatory processes to speak to its proposed low income rates, terms and conditions, and business practices and Seth Klein, the Director of the British Columbia office of the Canadian Centre for Policy Alternatives to speak as an expert on the issues of poverty and energy poverty in British Columbia. BCOAPO filed evidence from these experts and a variety of advocates and low income BC Hydro ratepayers, and had its expert evidence tested both through interrogatories and cross-examination during the Public Oral Hearing.

On September 26, 2016, both BC Hydro and BCOAPO filed their Final Arguments for the RDA, and not surprisingly, both focussed largely on the jurisdictional elephant in the room: Does this Commission have the jurisdiction to approve a low income rate?

The BCUC's Jurisdiction: An Overview

This Commission's general jurisdiction to set and review rates are rooted in sections 23, 38, and 58 through 61 of the UCA with two of those sections, ss. 59 and 60, playing pivotal roles in the cases put forward thus far in this process arguing both for and against the principle that this Commission has the jurisdiction to approve low income rates. In BCOAPO's Final Submission, counsel has properly situated that rate setting jurisdiction within the greater context of the BCUC's general supervision of public utilities (per section 23 of the *UCA*) and the requirement that public utilities must provide, "service to the public that the commission considers in all respects adequate, safe, efficient, just and reasonable." In this case, that context as well as an analysis of the wording of the rates sections clearly define the Commission's jurisdiction as one that includes the lawful ability to approve low income rates provided they are fair, just and reasonable.

Section 23 of the *UCA* gives the Commission a broad mandate: the general supervision of all public utilities with the power to make orders about a variety of matters it considers "necessary or advisable for the safety, convenience or service of the public."

> **23** (1) The commission has general supervision of all public utilities and may make orders about
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> (a) equipment,
>
> (b) appliances,
>
> (c) safety devices,
>
> (d) extension of works or systems,
>
> (e) filing of rate schedules,

(f) reporting, and

(g) other matters it considers necessary or advisable for

(i) the safety, convenience or service of the public, or

(ii) the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

(2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

The goal of this Commission oversight is to ensure BC Hydro and other public utilities provide, "adequate, safe, efficient, just and reasonable" service to the public.

38 A public utility must

(a) provide, and

(b) maintain its property and equipment in a condition to enable it to provide,

a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

Section 59 states:

59 (1) A public utility must not make, demand or receive

(a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or

(b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

(a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or

(b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

(3) The commission may, by regulation, declare the circumstances and conditions that are substantially similar for the purpose of subsection (2) (b).

(4) It is a question of fact, of which the commission is the sole judge,

(a) whether a rate is unjust or unreasonable,

(b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or

(c) whether a service is offered or provided under substantially similar circumstances and conditions.

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

And section 60 reads as follows:

60 (1) In setting a rate under this Act

(a) the commission must consider all matters that it considers proper and relevant affecting the rate,

(b) the commission must have due regard to the setting of a rate that

(i) is not unjust or unreasonable within the meaning of section 59,

(ii) provides to the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands, and

(iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,

(b.1) the commission may use any mechanism, formula or other method of setting the rate that it considers advisable, and may order that the rate derived from such a mechanism, formula or other method is to remain in effect for a specified period, and

(c) if the public utility provides more than one class of service, the commission must

(i) segregate the various kinds of service into distinct classes of service,

(ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and

(iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates set for any other unit.

(2) In setting a rate under this Act, the commission may take into account a distinct or special area served by a public utility with a view to ensuring, so far as the commission considers it advisable, that the rate applicable in each area is adequate to yield a fair and reasonable return on the appraised value of the plant or system of the public utility used, or prudently and reasonably acquired, for the purpose of providing the service in that special area.

(3) If the commission takes a special area into account under subsection (2), it must have regard to the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.

(4) For this section, the commission must exclude from the appraised value of the property of the public utility any franchise, licence, permit or concession obtained or held by the utility from a municipal or other public authority beyond the money, if any, paid to the municipality or public authority as consideration for that franchise, licence, permit or concession, together with necessary and reasonable expenses in procuring the franchise, licence, permit or concession.

Jurisdiction Generally: The Caselaw

Dalhousie Legal Aid Service v *Nova Scotia Power (Dalhousie)*

Not surprisingly, given BC Hydro's opposition to BCOAPO's low income proposals, the Utility has placed great stock in the decision of the Nova Scotia Court of Appeal. This decision said the province's regulator could not order a low income rate as a result of section 67 of *The Public Utilities* Act. Section 67 stated:

Equal rates and charges for similar services

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

(2) The taking of tolls, rates and charges contrary to the provisions of this Section and the regulations made pursuant thereto is prohibited and declared unlawful. R.S., c. 380, s. 67.

With respect, this case is distinguishable from the one before this Panel due to the substantial and substantive differences in the wording of Nova Scotia's section 67 and British Columbia's sections 59 as well as the effect of British Columbia's section 60. In the *Dalhousie* case, the Court of Appeal expressly relied on the clear wording of section 67(1):

> **39** Section 67(1) is not ambiguous: "rates ... shall always ... be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description". The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer. There is no latitude for the interpretive presumption.[8]

Unlike Nova Scotia's *PUA*, nowhere in the *UCA* there is there an absolute requirement that rates under substantially similar circumstances and conditions in respect of service of the same description always be charged equally all persons, only that the rates charged must be regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description and that those rates must not constitute an "unjust, unreasonable, unduly discriminatory or unduly preferential rate[s] for a service provided by it in British Columbia". As is so often the case in the law, the devil is in the details and the differences in the wording between these two sections are telling.

[8] *Dalhousie Legal Aid Service* v *Nova Scotia Power Inc.*, 2006 NSCA 74, 268 D.L.R. (4th) 408.

In addition, the interpretation of the sections of the *UCA* cited above cannot be done in a legal or contextual vacuum. Proper interpretation of sections 59 and 60 requires a consideration of the broad jurisdictional powers granted and considerations commended to the Commission by sections 23 and 38.

The wording of Nova Scotia's *PUA* clearly limits its Board's jurisdiction far more than British Columbia's *UCA* and as a result this Commission Panel should divorce itself from any consideration of this case aside from a determination that it is entirely distinguishable on its face and as such, it does not define or limit this Commission's jurisdiction.

Advocacy Centre for Tenants-Ontario v Ontario Energy Board (ATCO/OEB)

In this case, the majority of the three person panel sitting at the Ontario Superior Court of Justice found that OEB had the jurisdiction to establish a rate affordability assistance program for low income gas ratepayers. While, as BC Hydro notes, the Court found that the Board was an economic regulator, it also found that through section 36(3) of the *Ontario Energy Board Act,* 1998, the Board was authorized to fix just and reasonable rates using "any method or technique that it consider[ed] appropriate."[9]

> **36 (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.**
>
> **36 (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.**

This Commission Panel, through the operation of section 23 has the broad jurisdiction to make orders about a variety of matters including rates and "other matters it considers necessary or advisable for the safety, convenience, or service of the public..." Additionally, through the UCA's 60(1)(b.1) the Commission, "may use any mechanism, formula or other

[9] *Advocacy Centre for Tenants-Ontario* v *Ontario (Energy Board)* [2008], OJ 1970.

method of setting the rate that it considers advisable". Following the reasoning of *ATCO/OEB* and the wording of these two sections, this Panel has indeed been granted the jurisdiction to set low income rates. While these sections do not exactly mirror the wording of the Ontario legislation, they are substantially similar in both substance and context and they have the same effect: a broad jurisdiction to approve low income rates using whatever mechanism, formula or other method of setting rates the Commission considers advisable should the Commission also find them to be just, reasonable, and not unduly discriminatory.

Legislative Intent and the BC Hydro's Reliance Upon a Private Members Bill

In paragraphs 190 through 204 of its Final Argument, BC Hydro sought to rely upon MLA John Horgan's introduction of a Private Members' Bill in 2008, 2014, and 2016 as evidence of legislative intent. These private bills sought to make explicit the BCUC's jurisdiction to set low income rates.

With respect, BC Hydro's reliance upon the *Sullivan* case (Tab 2 of BC Hydro's Book of Authorities) fails utterly to counter the important purpose of section 37 of the *Interpretation Act*, a section the Union notes, amongst other things, prevents the unthinkable situation where a Private Members' Bill could actually be crafted specifically or used after the fact to bring about an alteration in the interpretation and application of the law.

No implications from repeal, amendment, etc.

> **37** (1) The repeal of all or part of an enactment, or the repeal of an enactment and the substitution for it of another enactment, or the amendment of an enactment must not be construed to be or to involve either a declaration that the enactment was or was considered by the Legislature or other body or person who enacted it to have been previously in force, or a declaration about the previous state of the law.

> (2) The amendment of an enactment must not be construed to be or to involve a declaration that the law under the enactment prior to the amendment was or was considered by the Legislature or other body or person who enacted it to have been different from the law under the enactment as amended.
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> (3) An amendment, consolidation, re-enactment or revision of an enactment must not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

A fortiori, a Private Member's Bill, particularly one introduced by an Opposition MLA and never adopted by the Legislature, cannot be relied upon to interpret the state of the law.

Unjust, Unreasonable, Unduly Discriminatory or Unduly Preferential

Unjust

In paragraph 209 of its Final Argument, BC Hydro said, "low-income rates without a cost-of-service basis and not otherwise justified in regard to the nature and quality of the service to which they relate are inconsistent with the "fair, just and not unduly discriminatory" standard." However, MoveUP notes that in its argument, BC Hydro failed to provide a definition of the terms fair and just, choosing instead to focus on its interpretation of what does and does not constitute an unduly discriminatory rate.

The word "just" comes from the Latin word "iūstus", meaning fair, equitable, lawful, justified, and proper. Over time, its use and spelling have changed somewhat until today when "just" as an adjective is defined as follows:

1. Factually right, correct; factual.

   *It is a **just** assessment of the facts.*

2. Rationally right, correct
3. Morally right; upright, righteous, equitable; fair.

   *It looks like a **just** solution at first glance.*

4. proper, adequate [10]

As just's antonym, unjust means wrong, false, incorrect, dishonorable, sinful, unfair, unacceptable, and intolerable.

Despite hundreds of pages of argument having been filed thus far, there is no legal basis upon which BC Hydro can seek to limit an interpretation of the word "just" or its antonym "unjust" as it is used in the *UCA* from the consideration of moral fairness or righteousness of the rates the Commission imposes. Nothing in the law relied upon by BC Hydro in its attempt to scuttle BCOAPO's low income proposals would relieve the Commission of its obligation to consider the full meaning of these words in its interpretation of the *UCA*, and in particular the broad jurisdiction granted to it by sections 23, 38, 59 and 60 of that Act.

The evidence of poverty and, in particular, energy poverty Mr. Klein put on the record is uncontested. There is, to the Union's knowledge, not one party to this process who has gone on record stating that energy affordability is not currently a live issue for those in British Columbia living in poverty. In addition there is the evidence of thirteen advocates and low income ratepayers speaking to the same issues. Altogether, there is ample evidence on record demonstrating the growth of BC Hydro's rates far outstripping the increases in this province's Income Assistance, Disability Assistance, and Minimum Wage since 2006, a stark and shocking gap most clearly shown in Table 1 on page 8 of BCOAPO's Final Submission.

[10] https://en.wiktionary.org/wiki/just

"Just" and "unjust" are antonyms. They are opposite concepts: they are the up and down, the day and the night. "Legal" and "moral" are not. They are two sides of the same coin, complementary and interdependent, with both defining the Commission's jurisdiction to consider whether a rate is just or unjust. It is not under any reasonable person's moral code "right, upright, righteous, equitable or fair," nor "fair, equitable, lawful, justified, and proper," to leave British Columbia's most vulnerable to suffer the disproportionately more severe consequences of low income persons' growing disparity between their cost of power and their economic means when the Commission has the ability and the jurisdiction to approve a rate as well as terms and conditions that would help, particularly when the cost to others to do so is minimal.

Unduly Discriminatory or Unduly Preferential

In this process, as in the 2008 RIB, BC Hydro appears to be relying the idea that low income rate designs, because they involve subsidies between ratepayers, inevitably engage in undue discrimination. While the connotation of the word discrimination is wholly negative, the reality is that in the context of energy utility regulation, discrimination is necessary unless the utility is willing and able to charge each customer individualized rates that reflect the true cost to serve them. In reality that is not practicable so discrimination is the Utility's only alternative. Charles F. Phillips' staple regulatory treatise, The Regulation of Public Utilities[11] recognizes that discrimination in rates is built into utility regulation and that it is perfectly acceptable provided it is discrimination based on just and reasonable grounds:

> It should be noted at this point that discrimination is accepted in the rate structures of public utilities, but that such discrimination must be "just and reasonable." Discrimination is both unintentional and purposive. It is unintentional in that some discrimination results from the efforts of utilities and commissions to simplify the rate structures by grouping customers into a

[11] Phillips, Charles F. *The Regulation of Public Utilities: Theory and Practice.* Public Utilities Reports, 1984 at page 62.

> limited number of classifications. It is purposive in that discrimination may be the only way in which service can be provided to some customers. Low-density routes may be subsidized by high density routes (even under competition), small towns by large cities. Rather than preventing discrimination, regulation merely seeks to control what discrimination takes place.

It is trite that subsidies are the bedrock of all utility regulation and the bricks and mortar upon which British Columbia's postage stamp rates are built. In our province, depending on a number of factors, high volume users, those closest to energy sources and those in high density areas may subsidize those who are low volume users, and those who live in more remote or low density areas because within each rate class, everyone currently pays the same rate.

The BCUC is empowered via sections 58, 29, and 60 not to prevent subsidies but to ensure the subsidization (or discrimination) that takes place is just and reasonable: that it is "due" rather than "undue".

In paragraphs 205 through 209 of its Final Submission, BC Hydro relied upon *Attorney General (Canada)* v *Toronto (City)*, an 1893 case that BCOAPO ably spoke to in its October 11, 2016 Response Submission, stating:

> "the decision is a concurring decision and stare decisis does not therefore apply. Second, the decision predates modern utility regulation legislation, as well as modern statutory tribunals tasked with regulating public utilities. Administrative tribunals are statutory creations and statutes prevail over pre-existing common law. Third, social and economic circumstances have changed greatly in the past 123 years, as has the common law. Fourth, the concurring decision predates the Modern Approach to statutory interpretation. Finally, this concurring decision did not preclude the Ontario Superior Court of Justice from deciding that the Ontario Energy Board had the jurisdiction to order a

> rate affordability program, having considered the Toronto (City) case directly at paragraph 51 for the point that "[t]he historical common law approach for public utility regulation has been that consumers with similar cost profiles are to be treated equally so far as reasonably possible with respect to the rates paid for services." The case also did not prevent the Ontario Court of Appeal from confirming the OSCJ's decision. It also did not preclude the Manitoba Public Utility Board from determining that it had jurisdiction to order Manitoba Hydro to develop a bill affordability program.[12]

Quite frankly, the Union agrees entirely with BCOAPO's position on the dubious applicability and utility of a position that relies upon this case for the reasons listed above.

Paragraphs 208 and 209 of BC Hydro's Final Argument sought to rely upon the "more recent" 1958 case from British Columbia's Court of Appeal, *Prince George Gas Co. v Inland Natural Gas Co.,* 1958 CarswellBC 37. More specifically, BC Hydro stated, "It follows that a proposed rate in 2016 that is divorced from the "nature and quality" of the service it is in relation to - including cost of service - is as inconsistent with the statutory provisions governing rate-making today as the Prince George-Inland rate was in 1958."

Here too, the Union is aware of the Response BCOAPO has tendered to this case and endorses rather than repeats it.

British Columbia (Hydro and Power Authority) v. *Terasen Gas (Vancouver Island) Inc.*[13] *(Centra)*

The *Centra* case is a far more recent decision, an appeal from the British Columbia Utilities Commission's Order G-42-03 that required BC Hydro to contribute to Terasen Gas'

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[12] BCOAPO October 11, 2016 Response, pages 32 & 33.
[13] [2004] B.C.J. No 1250, 2004 BCCA 346, 200 B.C.A.C. 233, 30 B.C.L.R. (4th) 305, 131 A.C.W.S. (3d) 954.

Vancouver Island operation's revenue deficiency recovery account through its toll charges. The Appellants in that case were BC Hydro and a group doing business as the Vancouver Island Gas Joint Venture. The Joint Venture supported BC Hydro because it had an interest in BC Hydro's tolls: if they were lower than those in the Joint Venture then the Joint Venture had the option of terminating its existing agreement and seeking ones equivalent to BC Hydro's lower tolls.

BC Hydro's complaint regarding the order for it to contribute to the revenue deficiency recovery account was comparable to the one made in the *Prince George* case, "the balance in the Deficiency Account represents accumulated deficiencies between revenues and cost of service in the Distribution System and no part of its recovery should be included in the rates charge to BC Hydro and the other large transmission service end users who take delivery of their gas directly from the Pipeline and do not use the facilities of the Distribution System."[14]

This case included a consideration of section 59's (4) and (5),

> (4) It is a question of fact, of which the commission is the sole judge,
>
> (a) whether a rate is unjust or unreasonable,
> (b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or
> (c) whether a service is offered or provided under substantially similar circumstances and conditions.
>
> (5) In this section, a rate is "unjust" or "unreasonable" if the rate is
>
> (a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,
> (b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or
> (c) unjust and unreasonable for any other reason.

The conclusion of the Court in this case reads:

> **52** The economic viability of a utility, and service to its customers, depends upon its ability to meet its revenue requirement through tolls set by its regulator

[14] *Supra*, at paragraph 15

> for its customers. No party to these appeals has questioned the revenue requirement determined by the Commission for Centra. Recovery of the Deficiency Account balance is part of the revenue requirement as mandated by the Special Direction. The share of Centra's revenue requirement that can be recovered from Distribution System customers is limited by competition from alternative fuels, reflected in the soft cap mechanism which all parties accept is a reasonable response to the competitive exigencies. The Joint Venture tolls are fixed by the Joint Venture Agreement and the Special Direction expressly excludes recovery of any part of the revenue deficiency from the Joint Venture. The only remaining source of customer revenue available for contribution to amortization of the revenue deficiency is BC Hydro. The Commission was faced with the choice of setting tolls for BC Hydro that included contribution to the amortization or deferring amortization into an indefinite future, likely after 2011 when Centra will lose the contribution to revenue from gas royalty credits, and its ability to meet its revenue requirement may become more precarious. The Special Direction instructed the Commission to set rates that would amortize the accumulated deficiency "over the shortest period reasonably possible". The Special Direction does not preclude the Commission from including a contribution to amortization in BC Hydro's tolls. In light of the other constraints on the sources of revenue available to meet the revenue requirement, setting tolls for BC Hydro that includes a contribution to amortization simply recognizes the economic realities of the Centra utility. In my opinion, it was not an unreasonable determination by the Commission in the exercise of its jurisdiction and there was no reviewable error in the Commission's order.

This case involved a subsidy intended to assist a group of customers who would have been hard pressed to cover the revenue deficiency that had accumulated as a result of Centra's efforts to service Vancouver Island. BC Hydro had not contributed to that revenue deficiency, nor benefitted from it but the Court found it was a reasonable exercise of the Commission's jurisdiction to require that BC Hydro contribute additional monies to address that revenue deficiency through the tolls it paid to Centra.

Here, as in the *Centra* case, it is not an unreasonable exercise of the Commission's jurisdiction to require that residential ratepayers make some small contribution of additional monies after due consideration of the proposal's merits and the Commission's jurisdiction to address a serious deficiency in the ability of some to pay their rising BC Hydro bills.

Conclusion

It is clear to the Union that yes, this Commission is indeed empowered by the *UCA* to approve a low income rate and after a review of the evidence, MoveUP has determined the proposed rate and other measures are sound and will help alleviate some of the effects of BC Hydro's rising energy costs on low income ratepayers. As a result, the Union urges this Commission panel to approve BCOAPO's low income proposals, particularly the ESUB rate, the Crisis Intervention Fund and the various Terms & Conditions described in detail in BCOAPO's September 26, 2016 Final Submission.

All of which is respectfully submitted.

Yours truly,
Allevato Quail & Worth

per Leigha Worth & Jim Quail

cc: parties of record, via email

Case Name:

Dalhousie Legal Aid Service v. Nova Scotia Power Inc.

Between
Dalhousie Legal Aid Service, Appellant, and
Nova Scotia Power Inc., Respondent

[2006] N.S.J. No. 243

2006 NSCA 74

268 D.L.R. (4th) 408

245 N.S.R. (2d) 206

149 A.C.W.S. (3d) 355

Docket: CA 248695

Nova Scotia Court of Appeal
Halifax, Nova Scotia

J.W.S. Saunders, G.B. Freeman and J.E. Fichaud JJ.A.

Heard: May 29, 2006.
Judgment: June 20, 2006.

(40 paras.)

Administrative law -- Boards and tribunals -- Powers -- Appeal by Dalhousie Legal Aid from decision of Utility and Review Board dismissed -- Board did not err in concluding it lacked authority to consider Dalhousie's proposed rate credit program for low income customers of Nova Scotia Power -- Statute clearly did not give Board power to approve program to charge customers different rates -- Public Utilities Act, s. 67(1).

Administrative law -- Public utilities -- Appeal by Dalhousie Legal Aid from decision of Utility and Review Board dismissed -- Board did not err in concluding it lacked authority to consider Dalhousie's proposed rate credit program for low income customers of Nova Scotia Power -- Statute clearly did not give Board power to approve program to charge customers different rates -- Public Utilities Act, s. 67(1).

Natural resources law -- Hydro-electricity -- Rates -- Regulation -- Appeal by Dalhousie Legal Aid from decision of Utility and Review Board dismissed -- Board did not err in concluding it lacked authority to consider Dalhousie's proposed rate credit program for low income customers of Nova Scotia Power -- Statute clearly did not give Board power to approve program to charge customers different rates -- Public Utilities Act, s. 67(1).

Appeal by Dalhousie Legal Aid from a Utility and Review Board decision, concluding it had no authority to consider implementing a program requiring Nova Scotia Power to give credits to low income customers. NS Power applied to the Board for a rate increase. Dalhousie intervened, requesting that the Board approve a program featuring rate credits for low income customers. The Board held the Public Utilities Act did not authorize the Board to reduce power rates based on customers' income levels. The Board considered the proposed program would result in some customers subsidizing the bills of other customers, a social and public policy that was within the purview of the legislature rather than the Board.

HELD: Appeal dismissed. The Board's decision was reviewable on the correctness standard, as it dealt with statutory interpretation. The Act was clear in stating customers in similar circumstances had to be charged equally for services from NS Power. It was up to the legislature to decide whether or not to expand the Board's purview to implement a plan such as that proposed by Dalhousie. The Board did not err in concluding it was precluded from considering Dalhousie's program.

Statutes, Regulations and Rules Cited:

Public Utilities Act, R.S.N.S. 1989, c. 380, ss. 2(f) "service", 15, 44, 52, 64(1), 67(1), 73, 86, 107

Telecommunications Act, S.C. 1993, c. 38, ss. 7, 47(1)

Utility and Review Board Act, S.N.S. 1992, c. 11, ss. 26, 30(1)

Court Summary:

Utility and Review Board -- Rate hearing -- Power of Board to order rate assistance for low income users of electricity.

Nova Scotia Power Inc. applied for a rate increase. Intervenor requested that Utility and Review Board approve a Rate Assistance Program to give credits against power rates to low income customers of Nova Scotia Power. Board held that the legislation gave it no authority to consider such a program.

Issue: Does the Utility and Review Board have the authority, under the *Public Utilities Act* and *Utility and Review Board Act* to implement a Rate Assistance Program for low income customers of electric power?

Result: The Board's decision was affirmed. The legislation did not give the Board authority to lower power rates based on the income level of the customer. The Court of Appeal dismissed the appeal.

[Note: This summary does not form part of the Court's judgment. Quotations must be from the judgment, not this summary.]

Counsel:

Claire McNeil and Vincent Calderhead, for the appellant

Daniel Campbell, Q.C., for the respondent

Richard Melanson, for Nova Scotia Utility and Review Board

Stephen McGrath, for the Attorney General of Nova Scotia

[Editor's note: An erratum was released by the Court September 18, 2006; the correction has been made to the text and the erratum is appended to this document.]

Held: Appeal is dismissed without costs, per reasons for judgment of J.E. Fichaud J.A.; J.W.S. Saunders and G.B. Freeman JJ.A. concurring.

1 J.E. FICHAUD J.:-- Nova Scotia Power applied to the Utility and Review Board for a rate increase. Dalhousie Legal Aid intervened and requested that the Board approve a program featuring power rate credits for low income customers. The Board declined. The Board was of the view that the legislation did not authorize the Board to reduce power rates based on the income level of the customer. Dalhousie Legal Aid appeals. The issue is whether the Board committed reviewable error by concluding that it had no statutory authority to adopt a rate assistance program for low income customers.

Background

2 Nova Scotia Power Incorporated ("NSP") produces and supplies electrical energy. As of December 31, 2003, NSP served approximately 460,000 customers throughout Nova Scotia. NSP is the successor to the Nova Scotia Power Corporation, a Crown corporation that was privatized in 1992. In January 1999, NSP became the principal subsidiary of what is now Emera Incorporated.

3 NSP is a public utility regulated under the *Public Utilities Act* RSNS 1989, c. 380, as amended. Section 64(1) reads:

> 64(1) No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.

The "Board" is the Nova Scotia Utility and Review Board, created by the *Utility and Review Board Act* SNS 1992, c. 11, as amended ("*URB Act*").

4 In May 2004 NSP filed with the Board an application for approval of increased rates, followed by a revised application in June 2004. The application would have resulted in an average overall increase of 12.4% for all classes of customer.

5 The Board gave notice by advertisement as provided in s. 86 of the *Public Utilities Act*. Thirty-seven intervenors responded. One intervenor was the appellant Dalhouse Legal Aid Service ("DLA").

6 The Board conducted a public hearing over 16 days between November 16, 2004, and January 14, 2005. On March 31, 2005, the Board issued a decision [2005] N.S.U.R.B.D. No. 24, (2005 NSUARB 27). The decision dealt with NSP's requested rate increase and related topics. Only one topic is relevant to this appeal. That is DLA's request that the Board approve a Rate Assistance Program for low income consumers of power.

7 The Board's decision summarized DLA's submission:

> **9.1 Rate Assistance Program (RAP)**
>
> [246] While DLAS has opposed the approval of a FAM [Fuel Adjustment Mechanism] and the SA [Settlement Agreement], and has detailed concerns regarding aspects of customer service provided by NSPI, its main focus at the hearing was the implementation of a proposed Rate Assistance Program ("RAP") to help low-income customers meet their electricity costs.
>
> [247] DLAS filed evidence from several individuals, including Dr. Richard Shillington, a principal of Tristat Resources and Roger Colton, a principal of Fisher, Sheehan & Colton, with respect to this issue. Dr. Shillington, in his direct evidence (Exhibit N-126), outlined the challenging costs of shelter and electricity for low-income Canadians. Mr. Colton's evidence focused on low-income energy assistance programs and his efforts, in a number of US states, in designing rate affordability programs. Mr. Colton's position is that NSPI should "... be directed toward allowing low-income consumers to obtain quality utility service at affordable prices within a reasonable budget constraint." Mr. Colton also submits that the costs of such a program, to be shared by customers, are offset, although perhaps not fully, by savings realized by the Utility resulting from the adoption of a universal service program'.

Mr. Colton's report summarized his fixed credit proposal:

> Although a variety of percentage-of-income based approaches exists, I recommend the delivery of rate affordability assistance using a fixed credit approach. The fixed credit approach begins as an income-based approach. In order to be eligible for the rate, a household must meet *both* eligibility criteria: (1) that the household income is at or below the Low-Income Cutoff (LICO) for Nova Scotia; and (2) that the household electric burden exceeds the burden deemed to be affordable.
>
> The fixed credit approach differs from a straight percentage of income approach in the calculation of the bill to the household. The fixed credit calculates what bill credit would need to be provided to the household in order to reduce the household's energy bill to a designated percent of income. To calculate the fixed credit involves three steps: (1) calculating a burden-based payment; (2) calculat-

ing an annual bill; and (3) calculating the fixed credit necessary to reduce the annual bill to the burden based payment. Each step is explained below.

1. The first step in the fixed credit model is to calculate a burden-based payment. Assume that the household has an annual income of $8,000 and is required to pay three percent (3%) for its home energy bill. The required household payment is thus $240. This is simply $8,000 x 3% = $240.

   Distinctions are also made between heating and non-heating customers. A heating customer should be asked to pay six percent (6%) of the household's income toward her home heating bill, while a non-heating customer would be asked to pay three percent (3%) toward his or her electric bill.

2. The next step is to calculate a projected annual household energy bill. This calculation is to be made using whatever method NSPI *currently* uses to estimate annual bills for other purposes. NSPI, in other words, has an established procedure for estimating an annual bill for purposes of placing residential customers (low-income or not) on a levelized Budget Billing Plan (where bills are paid in equal installments over 12 months). Let me assume for purposes of illustration that this existing process results in an estimated annual bill of $960.
3. The final step is to calculate the necessary fixed credit to bring the annual bill down to the burden-based payment. Given an annual bill projection of $960 and a burden-based payment of $240, the annual fixed credit would need to be $720 ($960 - $240 = $720). The household's *monthly* fixed credit would be $60 ($720/12 = $60).

8 The Board, in response to DLA's request, cited s. 67(1) of the *Public Utilities Act*:

> 67(1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

The Board accepted that "all customers, regardless of income, receive substantially similar' electrical service from NSP." The Board concluded that it had no power to consider DLA's proposed Rate Assistance Program:

> [256] After reviewing the submissions of DLAS, Board Counsel and the relevant provisions of the **Act**, the Board finds that it does not have the statutory authority to approve a RAP. The Board has the authority given to it by the Legislature to perform its duties in accordance with the provisions of the **Act**. The Board's role is to make decisions, based on fact and law, within the parameters of the statuto-

> ry authority it has been given by the Legislature. The Board's duty is to follow public policy decisions made by the Legislature and expressed in statutes. The Board does not have jurisdiction to establish public policy. That is the role of elected officials who are accountable to the public for this function. It seems almost certain that the RAP, as described by Mr. Colton, would result in the electricity bills of certain customers, depending on their income, being subsidized by other customers. In the Board's view, this is a social and public policy question which falls within the purview of the Legislature rather than the Board. Should NSPI and DLAS wish to pursue this matter with Government, the Board would be pleased to offer assistance with respect to regulatory and ratemaking principles.

9 DLA appeals under s. 30(1) of the *URB Act*, permitting an appeal based on an error of law or jurisdiction.

Issue

10 The issue is whether the Board committed an appealable error by declining to consider the merits of DLA's proposed Rate Assistance Program for low income electricity customers.

Standard of Review

11 Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and the court on the appealed or reviewed issues; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. The ultimate question is whether the legislature intended that the issue under review be left to the tribunal. From this analysis the court selects, for each issue, a standard of review of correctness, reasonableness or patent unreasonableness: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 26; *College of Physicians and Surgeons of British Columbia v. Dr. Q.*, [2003] 1 S.C.R. 226, at paras. 26-35; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 27; *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 at paras. 15-19; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 55-62; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, [2005] N.S.J. No. 441, 2005 NSCA 141, at para. 21; *Nova Scotia Teachers Union v. Nova Scotia Community College*, [2006] N.S.J. No. 64, 2006 NSCA 22, at para. 11; *The Nova Scotia Government and General Employees Union v. Capital District Health Authority*, [2006] N.S.J. No. 153, 2006 NSCA 44, at para. 36.

12 In *Johnson (Re)*, [2005] N.S.J. No. 261, 2005 NSCA 99, at paras. 33-46, Justice Oland applied the four contextual factors to the expropriation powers of the Utility and Review Board, and concluded:

> [46] After considering the four contextual factors of the functional and pragmatic approach, in my view the standard of review to be applied to questions of law, such as any entitlement for compensation for owner's time and for pension loss, the standard of review is correctness. For questions of mixed law and fact, such as matters related to compensation for market value and injurious affection, the

> standard is patent unreasonableness. For findings of fact, the standard is patent unreasonableness.

Though there is correspondence among the Board's different functions, the pragmatic and functional analysis for expropriation is not necessarily commutable to rate-making. So I will consider the four contextual factors from the perspective of utility rating.

13 Section 26 of the *URB Act* says that the Board's findings of fact are "binding and conclusive", while s. 30(1) prescribes an appeal to this court on questions of law or jurisdiction. The Legislature contemplated a serious judicial role in the review for legal error, particularly on threshold issues.

14 Section 44 of the *Public Utilities Act* entitles the Board to fix rates "as it deems just." Section 67(1) quoted earlier directs equal charges for "similar circumstances and conditions" of service and authorizes the Board to enact regulations that define "substantially similar circumstances and conditions." The Board has a standing membership, repeatedly has examined NSP rate applications and has developed a body of governing jurisprudence. Clearly, the Board has more expertise than the court in the architecture of rate-making.

15 In *Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (A.D.), at para. 17, Chief Justice MacKeigan summarized the purposes of the *Public Utilities Act*:

> 17 The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined - that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects - that a public utility give adequate service and charge only reasonable and just rates.

The legislation considered by Chief Justice MacKeigan included ss. 42 and 63(1), the equivalents to the current ss. 44 and 67(1) that are central to this appeal (see *NS (PUB)*at paras. 15, 28).

16 DLA says its argument is "jurisdictional" and therefore the standard of review must be correctness. It may be that, after the court reviews the four contextual factors, true jurisdictional issues usually will attract the correctness standard. But I disagree that every labelled "jurisdictional" argument is tethered to correctness, and I reiterate this court's comment in *NSGEU v. Capital District Health Authority*:

> [28] ... The court no longer reviews for pigeonholed "jurisdictional errors." The phrase "goes to jurisdiction" describes a type of issue for which the proper standard of review is correctness, after the reviewing court has performed the pragmatic and functional analysis. But the "jurisdictional" inquiry is not a substitute for the pragmatic and functional approach. [Citing *Pushpanathan* at para. 28; *Dr.* Q. at paras. 20-25; *Voice* at para. 21; *Granite* at para. 41(b) and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 4 at paras. 21-32.]

17 A similar issue arose in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4. A public utility applied to Alberta's Energy and Utilities Board for approval of a sale of assets and allocation of the sale proceeds. The Board allocated a portion of the proceeds of sale to the rate-paying customers. On appeal from the judicial review, the Supreme Court of Canada considered whether the Board had statutory authority to allocate any sale proceeds to the ratepayers. Despite the "jurisdictional" aspect of the issue, Justice Bastarache for the majority said that the pragmatic and functional analysis was necessary:

> 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.

In *ATCO*, a threshold issue of statutory interpretation determined whether the Board could exercise its core functions. Justice Bastarache selected a correctness standard, having reasoned as follows:

> 30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) GUA and s. 15(3)(d) AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.
>
> 31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. ...

> 32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" *(Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:
>
> > ... the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

18 The Board's rate-making power is a core function entitled to deference. But the issue here is whether the statute precludes the Board from exercising that power. After considering the four contextual factors, and given the statutory right of appeal and the comments in *ATCO*, in my view the Legislature intended no deference on that issue. The threshold legal question is governed by a correctness standard.

Did the Board err in law by declining to consider the Rate Assistance Program?

19 This is a question of statutory interpretation. The words of a statute are 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 the Legislature: *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 41; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 33; *Nova Scotia (Minister of Health) v. R.G.*, [2005] N.S.J. No. 143, 2005 NSCA 59, at para. 24; *Doctors Nova Scotia v. Nova Scotia (Department of Health)*, [2006] N.S.J. No. 192, 2006 NSCA 59, at para. 25.

20 DLA focusses on the grammatical and ordinary meaning of the Board's general rate-making power in s. 44 of the *Public Utilities Act*:

> 44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefore.

DLA submits that the Board is mandated to consider whether a rate assistance program for low income customers is "just".

21 The court must also grapple with the basis of the Board's ruling, s. 67(1):

> 67(1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be

> charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

DLA says that its Rate Assistance Program would provide a credit against the rate, but would not alter the rate itself. DLA says that s. 67(1) refers to pure "rates", not credits, and is irrelevant to DLA's Program.

22 In my respectful view, DLA's rate/credit distinction is artificial and analytically flawed. A gross rate subject to an automatic credit is just a net rate charged to the customer by NSP. The "charge" under s. 67(1) is the net amount. The Board's "rate" making power is not a blind stab at gross revenue. The rating involves a projection of NSP's expenses, net income and rate of return. The Board must consider the effect of a credit against rates just as it must consider NSP's expenses to generate power. DLA cites s. 44 of the *Public Utilities Act* as authority for its Rate Assistance Program, including the credit. Yet, s. 44, quoted earlier, empowers the Board to approve "tolls, rates and charges," saying nothing of "credits". Rate credits are integrated with "rates and charges" in s. 67(1) no less than rate credits pertain to the Board's "rating" power in s. 44, upon which DLA relies.

23 DLA's factum said that low income customers do not have "substantially similar circumstances" to higher income customers. So, different rates would not be barred by s. 67(1). At the appeal hearing DLA's counsel retreated somewhat from this submission.

24 With respect, the factum's submission misinterprets s. 67(1). The provision refers to "substantially similar circumstances and conditions ***in respect of service of the same description***." To justify a rate difference, the relevant dissimilarity is not in customers' incomes. It is in the service from NSP. The Board accepted, and there is no basis to question, that NSP provides substantially similar electrical service whatever the domestic customer's income.

25 Section 67(1) is mandatory. The rates and charges "shall always ... be charged equally" to persons of similar circumstances and conditions in respect of service. The statute does not endow the Board with discretion to consider the social justice of reduced rates for low income customers. It is not for the Board or this court to read into s. 67(1) the words:

> ... similar circumstances and conditions in respect of ***the income level of customers and*** service of the same description,

It is for the Legislature to decide whether to expand the Board's purview with the italicized words.

26 This point is illustrated by *Allstream Corp. v. Bell Canada*, [2005] F.C.J. No. 1237, 2005 FCA 247, cited by DLA. The Federal Court of Appeal upheld the decision of the CRTC to provide low rates to schools and municipalities for fibre optic service. DLA's factum says:

> This case stands for the proposition that the jurisdiction to regulate utilities ***includes*** non cost-based rates and by analogy would include programs similar to a rate assistance program for low income consumers. [emphasis in original]

27 I disagree with DLA's measure of *Allstream*'s reach. The Federal Court of Appeal said:

> 34. ... It is apparent that the Commission was greatly concerned about the effect of a denial of services on the communities concerned and the dislocation of complex

> equipment and facility configurations at a significant cost and to the detriment of school boards and municipalities in the relevant areas and that such concerns outweighed, in its view, Bell's failure to seek prior approval of these rates. These are considerations that a specialized board can entertain and weigh relative to other considerations. It is true that these considerations are not purely economic in the sense referred to by the appellant such as costs, investment, allowance for necessary working capital, rate of return, etc. These considerations, however, are ***part of the Commission's wide mandate under section 7***, a mandate it alone possesses and are quite distinct from the grant of a rate under paragraph 27(6)(b) of the Act, a power the Commission did not invoke. [emphasis added]

Section 47(a) of the *Telecommunications Act*, S.C. 1993, c. 38 directed the CRTC to implement the telecommunications policy objectives from s. 7. Those included enriching the "social and economic fabric", rendering "affordable" and "accessible" service, and responding to "the economic and social requirements of users." [legislation quoted in para. 10 of *Allstream*]. Nova Scotia's Utility and Review Board has no such statutory mandate.

28 The grammatical and ordinary interpretation of s. 67(1), outlined above, is consistent with the statutory context, scheme and object of the *Act*, and intention of the Legislature.

29 The *Act* connects the Board's rate-making to NSP's "service". Section 2(f) of the *Public Utilities Act* defines "service" as including:

> (iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power,

Section 44 authorizes the Board to make rates "for services rendered or facilities provided." Section 52 requires the public utility to "furnish services and facilities that are adequate, just and reasonable." Section 64(1) prohibits the utility from charging compensation for any "service" until the Board has approved the rate for that service. Section 107, entitled "offence and penalty for unjust discrimination," prohibits the utility from charging "for any service" a rate that is higher or lower than charged to any other person "for a like and contemporaneous service."

30 Section 73 of the *Public Utilities Act* allows preferential rates for

> (3) ... a senior citizens club, service club, volunteer fire department, a Royal Canadian Legion, community hall or recreational facility owned by a community and used for general community purposes, a charitable or religious organization or institution ...

and authorizes the Lieutenant Governor-in-Council to extend this list by order-in-council.

31 The legislative context ties the Board's rate levels to the utility's services. The Legislature enacts, or assigns to order-in-council, non-compliant rates for specific classes of customer based on social criteria.

32 The Board sets rates for a utility that has a virtual monopoly on the supply of electric power. The Board's decision discusses this process: (2005 NSUARB 27)

> [17] ... NSPI is not like an unregulated retailer. It is a virtual monopoly which operates its business on a cost-of-service basis. Providing electricity to all communities in the Province was not (and likely still is not) financially feasible for private, competitive companies. For that reason, the Province's electric service supplier is a cost-of-service monopoly. In return for undertaking and continuing the costs of electrification of the Province, the utility is permitted, under the *Act*, to recover the reasonable and prudent costs of providing the service. Because it is a monopoly, regulation operates as a surrogate for competition. One of the regulator's tasks is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates.
>
> [18] It is in the interests of all Nova Scotians to ensure that NSPI continues to be a stable and financially sound company. This is a reality which the Board must consider when determining what, if any, rate increase is warranted.
>
> [19] In short, rates charged to customers are based on costs incurred by the Utility in providing service. If the Board finds certain costs to be imprudent or unreasonable, it can (and has) disallowed such expenditures and reduced proposed rate increases accordingly.

33 I agree with this portrayal of the background to the Board's rate-making function. The Board's regulatory power is a proxy for competition, not an instrument of social policy.

34 DLA points to the Board's approval of rates that prefer large industrial power customers. In *Re Nova Scotia Power Inc.*, [2000] NSURBD No. 72, the Board approved NSP s application for a load retention rate. This rate would be determined between the individual customer and NSP, then submitted to the Board for approval. Paragraph 5 of the Board's decision describes the features of NSP's proposed load retention rate:

> 5 NSPI states in its application that "the proposed rate is an appropriate approach to retaining existing customers who, in the absence of this rate, would reduce their purchases from the Company, to the detriment of all other customers." The rate would be available to customers "who are considering an alternate supply of at least 2000 KVA or 1800 KW." It would not be available for new load. The rate would only be available if the following conditions are satisfied:
>
> 1. The customer's option to use a supply of power and energy (alternate supply) other than NSPI's is both technically and economically feasible.
> 2. Retaining the customer's load, at the price offered by this rate, is better for other electric customers than losing the customer load in question.
> 3. The price offered by this rate is not less than that necessary to make the customer in question indifferent with respect to alternate supply versus continuing to purchase the electric power and energy from NSPI.

DLA says that, if the Board can approve a load retention rate for large industrial customers, then it can approve a rate assistance program for low income customers.

35 The Board's decision in [2000] NSURBD No. 72 is not under appeal. Neither are its decisions on similar issues such as the extra large industrial interruptible rate: *Re Nova Scotia Power Inc.*, [2003] N.S.U.R.B.D. No. 7, 2003 NSUARB No. 6 and *Re Nova Scotia Power Inc.*, [2003] N.S.U.R.B.D. No. 88, 2003 NSUARB No. 91. I make no comment on those rulings, except to say that they do not support DLA's submission here that the Board can implement social policy. The Board's approval of the load retention rate was premised on the finding that, otherwise, the large customer could leave NSP, obtain its energy from another source, and this would hike NSP's rates to its remaining customers. The Board's approach affirms the Board's role as a competition surrogate. The Board's load retention rate recognizes the microeconomic reality that NSP is not an absolute energy monopoly with a vertical customer demand curve, and is subject to elastic demand from high volume customers with other energy options. No such factors govern DLA's proposed Rate Assistance Program.

36 DLA says that legislation should be interpreted in a manner that is consistent with the *Charter of Rights and Freedoms*. DLA's counsel makes a forceful submission that the impoverished are a protected category under s. 15 and, following *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, this court may direct the institution of a program to ameliorate their disadvantage. DLA's submission is interpretive and does not challenge the validity of the legislation.

37 I make no comment on s. 15. The statutory language does not accommodate the suggested construction.

38 The constructive principle applies only when the statute is ambiguous. In *R. v. Rodgers*, [2006] S.C.J. No. 15, 2006 SCC 15, at para. 18, Justice Charron for the majority said:

> It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras. 17-19. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 62, Iaccobuci J., writing for a unanimous court, firmly reiterated this rule:
>
> > ... to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

To the same effect: *Bell ExpressVu Ltd. Partnerships v. Rex*, [2002] 2 S.C.R. 559 at paras. 27-30, 60-66.

39 Section 67(1) is not ambiguous: "rates ... shall always ... be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description". The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer. There is no latitude for the interpretive presumption.

Conclusion

40 The Board did not err in its conclusion that s. 67(1) precludes the Board from considering DLA's rate assistance program for low income customers. I would dismiss the appeal without costs.

J.E. FICHAUD J.A.
Concurred in:
J.W.S. SAUNDERS J.A.
G.B. FREEMAN J.A.

* * * * *

Erratum
Released: September 18, 2006

[1] In para. 27 "Section 47(1) of the *Telecommunications Act*" should read "Section 47(a) of the *Telecommunications Act*".

cp/e/qw/qlmxf/qlrsg/qlsxs/qljxl/qlsxs/qlsxs

Case Name:

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board)

Between
Advocacy Centre for Tenants-Ontario and Income Security Advocacy Centre on behalf of Low-Income Energy Network, Appellant, and
Ontario Energy Board, Respondent

[2008] O.J. No. 1970

293 D.L.R. (4th) 684

166 A.C.W.S. (3d) 384

238 O.A.C. 343

Court File No.: 273/07

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

F.P. Kiteley, P.A. Cumming and K.E. Swinton JJ.

Heard: February 25, 2008.
Judgment: May 16, 2008.

(111 paras.)

Natural resources law -- Public utilities -- Operation of utility -- Terms and conditions of service -- Collection or rates and charges -- Toll methodology -- Just and reasonable tolls -- Rates -- Regulation rationale -- Appeal of Ontario Energy Board's decision that it had no jurisdiction to order a "rate affordability assistance program" under the Ontario Energy Board Act allowed with dissent -- The board had the jurisdiction to take into account the ability to pay in setting rates given the expansive wording of s. 36(2) and (3) having considered the purpose of the legislation within the context of the statutory objectives for the board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose -- Ontario Energy Board Act, s. 2, s. 36(2), s. 36(3).

Appeal under s. 33 of the Ontario Energy Board Act seeking a declaration that the board had the jurisdiction to order a "rate affordability assistance program" for low income consumers of the utility, Enbridge Gas Distribution Inc., within its franchise areas as the distributor of natural gas. By a majority decision of April 26, 2007, the board determined that the Act did not explicitly grant the board jurisdiction to order the implementation of a low income affordability program. The board also found it did not gain the requisite jurisdiction through the doctrine of necessary implication. Presently, EGD, the board and the intervenor Consumers Counsel of Canada argued that the issue was one of public policy to be dealt with by the Legislature falling outside the board's jurisdiction.

HELD: Appeal allowed (with dissent). The board had the jurisdiction to establish a rate affordability assistance program for low income consumers purchasing the distribution of natural gas from the utility. The board had the jurisdiction to take into account the ability to pay in setting rates. The court found so having taken into account the expansive wording of s. 36(2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose. Such an interpretation complied with the legislative text, it promoted the legislative purpose and the outcome was reasonable and just. The jurisdiction to consider ability to pay in rate setting was explicitly within the Act. The board was an economic regulator rather than a formulator of social policy. However, the board was authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates".

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, Schedule B, s. 15

Income Tax Act, R.S.O. 1990, c. I.2, s. 8.6.1

Income Tax Amendment Act (Ontario Home Electricity Relief), 2006, S.O. 2006, c. 18, s. 1

Energy Costs Assistance Measures Act, S.C. 2005, c. 49,

Legislation Act, S.O. 2006, c. 21, Schedule F, s. 64(1)

Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 19

Ontario Energy Board Act, 1988, S.O. 1998, c. 15, Schedule B, s. 33, s. 36, s. 79

Power Corporation Act, R.S.O. 1990, c. P.18, s. 108

Counsel:

Paul Manning and ***Mary Truemner***, for the Appellant.

Michael Miller, for Ontario Energy Board.

Fred Cass and ***David Stevens***, for Enbridge Gas Distribution Inc.

Robert Warren, for Consumers Council of Canada.

Reasons for judgment were delivered by F.P. Kiteley and P.A. Cumming JJ. Separate dissenting reasons were delivered by K.E. Swinton J.

F.P. KITELEY and P.A. CUMMING JJ.:--

The Appeal

1 The Respondent Ontario Energy Board (the "Board") is the provincial economic regulator for the natural gas and electricity sectors. The Board exercises its jurisdiction within the statutory authority established by the Legislature, being the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "*Act*").

2 By a majority (2:1) decision dated April 26, 2007, the Board determined that the *Act* does not explicitly grant to the Board jurisdiction to order the implementation of a low income affordability program: *Enbridge Gas*

Distribution Inc. (April 26, 2007), EB-2006-0034 (Ont. Energy Bd.) (the "Board Decision"). The Board also found that the Board does not gain the requisite jurisdiction through the doctrine of necessary implication.

3 Enbridge Gas Distribution Inc. ("EGD") sought approval by the Board of EGD's 2007 gas distribution rates based simply upon the Board's traditional, standard "cost of service" rate-making principles. The Appellant Low Income Energy Network ("LIEN") had intervened in the application before the Board. LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected. LIEN proposed that the Board accept as an issue in the EGD proceeding the following matter:

> Should the residential rate schedules for EGD include a rate affordability assistance program for low-income consumers? If so, how should such a program be funded? How should eligibility criteria be determined? How should levels of assistance be determined?

4 LIEN seeks from the Board the introduction of a rate affordability assistance program to make natural gas distribution rates affordable to poor people. The underlying premise of the proposal of LIEN is that low income consumers (estimated to be about 18% of households in Ontario) should pay less for gas distribution services than other consumers. LIEN emphasizes that the supply of natural gas (or other source of energy) serves to meet basic human needs such as warmth from heating and the generation of power. Those who cannot afford to use natural gas as a source of energy may be placed at a significant disadvantage. LIEN submits that the Board can consider ability to pay in setting rates if it is necessary to meet broad public policy concerns. Access to an essential service is arguably such a concern. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest.

5 The majority of the Board held that the LIEN proposal amounted to an income redistribution scheme. The Board noted that such a scheme would require a consumer rate class based upon income characteristics and would implicitly require subsidization of this new class by other rate classes. It is undisputed that a common, if not universal, historical feature of rate-making for a natural monopoly is the application of the same charges to all consumers within a given consumer classification based upon cost of service, that is, cost causality.

6 Section 33 of the *Act* provides for an appeal to this Court on a question of law or jurisdiction. LIEN seeks a declaration that the Board has the jurisdiction to order a "rate affordability assistance program" for low income consumers of the utility, EGD, within its franchise areas as the distributor of natural gas.

7 The position of EGD, the Board and the intervenor, the Consumers Council of Canada, is that LIEN's quite understandable and commendable concern is an issue of public policy to be dealt with by the Legislature and falls outside the jurisdiction of the Board.

The Standard of Review

8 The issue is whether the Board is correct in its determination that it does not have jurisdiction to implement a low income affordability program.

9 There is common ground that the standard of review is correctness. That is, this Court will interpret the statutory grant of authority on the basis of its own opinion as to a statute's construction, rather than deferring to the Board's determination of the issue. A tribunal's determination that it has no jurisdiction will be set aside as a "wrongful declining of jurisdiction" if the Court is of the view that the tribunal's decision is wrong. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at 14-3 to 14-4.

Analysis of the Board's Jurisdiction

A. Applicable Principles

10 The Court is to be guided by the principles of statutory interpretation as set forth in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

11 The words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the Legislature's intent. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 at para. 37 [*Atco*].

12 The statute shall be interpreted as being remedial and given such "fair, large and liberal interpretation as best ensures the attainment of its objects." *Legislation Act*, S.O. 2006, c. 21, Schedule F, s. 64(1).

13 A statutory administrative tribunal obtains its jurisdiction from two sources: explicit powers expressly granted by statute, and implicit powers by application of the common law doctrine of jurisdiction by necessary implication. *Atco, supra*, at para. 38.

14 The Court must apply a "pragmatic or functional" analysis in determining the issue of jurisdiction, by considering the wording of the *Act* conferring jurisdiction upon the Board, the purpose of the *Act* creating the Board, the reason for the Board's existence, the area of expertise of its members and the nature of the problem before the Board. *Union des employés de Service, local 298 v. Bibeault,* [1988] 2 S.C.R. 1048 at 1088.

B. The Wording of the Act

15 Section 36 of the *Act* confers the Board's jurisdiction:

> 36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> ...
>
> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

16 LIEN submits that the Board's authority to fix "just and reasonable rates" by adopting "any method or technique it considers appropriate", conferred by s. 36(2) and (3) of the *Act* is very broad and the statutory language must be given its ordinary meaning.

17 The Board argues that the word "rates" is in the plural form in s. 36(2) to allow the Board to set different rates for different classes of consumers based upon the costs of serving those consumers. For example, large industrial users are typically considerably more expensive to serve than residential consumers. Separate rate classes are a necessity to ensure that consumers reimburse for the actual costs of the service they receive.

18 The majority opinion in the Board Decision is of the view that the words "any method or technique" cannot reasonably be interpreted to mean "a fundamental replacement of the rate making process based on cost causality with one based on income level as a rate grouping determinant." (p. 9)

19 The phrase "approving or fixing just and reasonable rates" in the present s. 36(2) was first introduced by s. 17(1) of Bill 38, *An Act to Establish the Ontario Energy Board*, 1st Sess., 26th Leg., Ontario, 1960 by the then Minister of Energy Resources, the Hon. Robert Macaulay. He outlined for the Legislature the philosophy underlying rate setting (*Legislature of Ontario Debates*, 9 (8 February 1960) at 199 (Hon. Macaulay)):

> First, why are there rate controls? There are rate controls because, in effect, the distribution of natural gas is a monopoly, a public utility. Secondly ... it is fair that whatever rate is charged should be one designated, not only in the interests of the consumer, but also in the interests of the distributor ... [O]ne really should have in mind 3 basic objectives: First, the rate should be low enough to secure to the user a fair and just rate. Second, the rate should be adequate to pay for good service and replacement and retirement of the used portion of the assets. Third, it should be high enough to attract a sufficient return on capital ...

20 He went on to explain the purpose of the Government's policy (at 205):

> [F]irst, to protect the consumer, and to see that he pays a fair and just rate, not more or less, and that is competitive with other fuels. Second, to make sure the rate is sufficient to provide adequate service, replacements and safety for the company providing the service. Third, it is that the company should be able to charge a rate which is sufficient to attract the necessary capital to expand.

21 The present s. 36(3) replaced s. 19 of the old *Ontario Energy Board Act*, R.S.O. 1980, c. 332, which required a traditional cost of service analysis in very prescriptive terms:

> 19(2) In approving or fixing rates and other charges under subsection (1), the board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base ... is reasonable.
>
> The rate base ...shall be the total of,
>
> (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;
> (b) a reasonable allowance for working capital; and
> (c) such other amounts as, in the opinion of the Board, ought to be included.

22 The authority was granted in s. 36(3) to use "any method or technique it considers appropriate" in approving "just and reasonable rates" i.e., employing methods other than simply on a traditional cost of service basis as proscribed in the repealed s. 19 to set rates for the gas sector. This aligned the approach for natural gas with the non-prescriptive authority seen governing Ontario Hydro as a Crown corporation in rate setting for electricity distributors.

23 Thus, under the former *Act* the phrase "just and reasonable rates" was limited to the cost of service basis articulated in prescriptive detail in s. 19. The change in repealing s. 19 and allowing the Board to "adopt any method or technique it considers appropriate" provides greater flexibility to the Board to employ other methods of rate making in approving and fixing "just and reasonable rates" rather than simply the traditional cost of service regulation seen in the former s. 19.

24 Subsection 36(3) allows the Board to adopt "any method or technique that it considers appropriate" in fixing "just and reasonable rates." The majority Board Decision view is that this provision, considered within the context of the *Act* as a whole, allows the Board to employ flexible techniques and methods for cost of service analyses in determining rates, for example, the incentive rate mechanisms currently used for the major gas utilities.

25 In the same rate setting proceeding that is under review, EGD reportedly asked the Board to approve two fuel-switching programs to enable residential consumers to shift from electric-water heaters to gas-water heaters, given that the latter promote conservation inasmuch as there is greater energy efficiency. The programs are identical except that there is a subsidy offered for the low income group of $800 per participant but a subsidy of only $600 for other consumers. Vice Chair Kaiser in dissenting points out that none of the parties have objected to this proposal and no one has argued that the Board does not have jurisdiction to approve different subsidies based upon income levels.

26 Indeed, the majority opinion in the Board Decision allows that the Board has ordered that specific funding be channeled aimed at low income consumers for "Demand Side Management Programs."

27 As well, the Board on occasion has reduced a significant rate increase because of so-called "rate shock" by spreading the increase over a number of years. Although this does not in itself suggest an unequal approach as between residential consumers it does indicate that the Board considers it has jurisdiction to take "ability to pay" into account in rate setting.

28 EGD, like other utilities, makes annual contributions to enable emergency financial relief through the so-called "Winter Warmth Program" which provides funds as a subsidy to some low income consumers, enabling them to be able to heat their homes in winter months. These subsidies are taken into account as costs of the utility in the approval and fixing of rates by the Board. Although the program is funded by all consumers, to some extent there is indirect cross-subsidization within the residential consumer class.

29 The Board points out that this is a relatively small program in the nature of a charitable objective, involving the United Way, which is specific to individual consumers in a financial crisis situation. But the fact remains that its implementation means that some residential consumers are paying less for the distribution and purchase of natural gas than other residential consumers are paying. If the Board has jurisdiction to approve utilities paying subsidies to the benefit of low income consumers then it arguably has jurisdiction to order utilities to provide special rates on a low income basis.

30 Section 79 of the *Act* explicitly authorizes the Board to provide rate protection for rural or remote consumers of an electricity distributor. The majority decision argues that it is a reasonable inference that the Legislature, by virtue of the explicit singling out of a single category of consumers in s. 79, did not intend this benefit to apply to other categories of consumers. The Board argues that if s. 36(2) and (3) are intended to allow for differential rate setting for subsets of residential consumers, then s. 79 is unnecessary. The majority decision considers the existence of s. 79 as indicating that the Legislature has been explicit on issues that it considers warrant special treatment through a subsidy. The majority decision argues that the existence of s. 79 implicitly excludes any intent to confer jurisdiction to depart from simply the cost of service approach employed to implement the mandate given to the Board by s. 36.

31 Moreover, the majority decision points out that rural rate assistance through s. 79 does not consider income level as an eligibility determinant. Rather, eligibility is based upon location and the inherent higher costs of service related to density levels. The assistance from the program is conferred upon all consumers within a given geographical area irrespective of their income level. Hence, this program arguably serves simply to mitigate the effect of the cost differential related to geography and remains consistent with a rate making process based upon cost causality. Nevertheless, "rate protection" through s. 79 operates as a subsidy paid by some of Ontario's residential electricity consumers for the benefit of others and represents a departure from the principle of cost causality being applied on the same basis to all consumers within a given class (i.e., residential, commercial and industrial).

32 As pointed out in the dissent by Board Vice Chair Gordon Kaiser, s. 79 was introduced in 1999 when the authority to regulate rates for *electricity* distributors was transferred to the Ontario Energy Board. Prior thereto, electricity distributors were regulated by Ontario Hydro, a Crown corporation which had established the policy of setting special rates in remote and rural areas through the now repealed s. 108 of the *Power Corporation Act,* R.S.O. 1990, c. P.18. The inference can be made, as Vice Chair Kaiser asserts, that s. 79 was introduced into the *Act* to expressly indicate to the Board that this significant historical policy must continue.

C. The Purpose of the Act and the Reason for the Board's existence

33 The objectives for the Board with respect to natural gas regulation are set forth in s. 2 of the *Act*:

> (2) The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
> 3. To facilitate rational expansion of transmission and distribution systems.
> 4. To facilitate rational development and safe operation of gas storage.
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
>
> 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers.

34 The Board is charged under s. 2 of the *Act* with protecting "the interests of consumers with respect to prices ..." The Board argues that this provision speaks to consumers as a single class, not to a particular subset of consumers. The majority decision of the Board says the Board's mandate is to balance the interests of consumers as a single group with the interests of the regulated utility in the setting of "just and reasonable rates."

35 The Divisional Court has emphasized in the past that the Board's mandate to fix just and reasonable rates "is unconditioned by directed criteria and is broad; the board is expressly allowed to adopt any method it considers appropriate." *Natural Resource Gas Ltd. v. Ontario Energy Board*, [2005] O.J. No. 1520 at para. 13 (Div. Ct.). The Divisional Court also stated in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 75 O.R. (3d) 72, [2005] O.J. No. 756 at para. 24:

> ... [T]he legislation involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.

36 Writing for the majority of the Supreme Court of Canada in *Atco, supra,* at para. 62 Bastarache J. stated that "[r]ate regulation serves several aims -- sustainability, equity and efficiency -- which underlie the reasoning as to how rates are fixed."

D.

The Area of Expertise of its Members and the Nature of the Problem before the Board

37 The Board was asked to consider the application of the utility to establish rates. In that context, an intervenor asked the Board to consider whether, as a factor in rate-setting, the Board could consider the interests of low-income consumers and establish a rate affordability program. That issue of rate-setting is squarely within the jurisdiction of the Board.

38 The majority opinion in the Board Decision correctly states that the Board's mandate for economic regulation is "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate costs allocation methodologies". However, that does not answer the question as to the full scope of the Board's jurisdiction in approving or fixing "just and reasonable rates" and adopting "any method or technique that it considers appropriate" in so doing.

39 The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.

40 In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting. *Re Union Gas Ltd. and Ontario Energy Board et al.* (1983), 1 D.L.R. (4th) 698 (Div. Ct.), 43 O.R. (2d) 489 at 501. The Board's regulatory power is primarily a proxy for competition rather than an instrument of social policy. *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.,* (2006), 268 D.L.R. (4th) 408 at para. 33 [*Dalhousie*].

41 *Dalhousie* dealt with a request for a low income affordability program like that advanced by LIEN. However, it involved a consideration of rate setting under s. 67(1) of the Nova Scotia *Public Utilities Act,* R.S.N.S. 1989, c. 380, which is very different in wording with respect to jurisdiction to that seen in s. 36 of the *Act* at hand. The Nova Scotia provision expressly provides that "rates shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate ...." Hence, the Nova Scotia Utility and Review Board found that it did not have jurisdiction to order low income affordability programs.

42 Section 36 of the *Act* has broad language, empowering the Board to set "just and reasonable" rates for the distribution of natural gas. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest. The Board has traditionally set rates on a "cost of service" basis, that is, on the basis of cost causality and employing a complex cost allocation exercise. In brief, this approach first looks to the utility's capital investments and maintenance costs including a fair rate of return to determine revenues required. The revenue requirement is then divided amongst the utility's rate paying consumers on a rate class basis (i.e., residential, commercial, industrial, etc.).

43 The rates have been traditionally designed with the principled objective of having each rate class pay for the actual costs that class imposes upon the utility. That is, the Board has sought to avoid inter-class and intra class subsidies. See RP-2003-0063 (2005) at 5. Consistent with this approach, the Board has refused the establishment of a special rate class to provide redress for aboriginal consumers. *Decision with Reasons* EBRO493 (1997) (O.E.B.). In that case, the Ontario Native Alliance ("ONA") requested the Board to order a utility to evaluate the establishment of a rate class for the purpose of providing a special rate class for aboriginal peoples. At 316-17, the Board stated:

> The Board is required by the legislation to "fix just and reasonable rates", and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and

> that the principles of cost causality are followed in allocating the underlying rates. While the board recognizes ONA's concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and it is not prepared to order the studies requested by ONA.

44 This decision would be within the Board's jurisdiction and a like response to LIEN in the case at hand would arguably be consistent and reasonable. However, the Board in dealing with the ONA request did not decline on the basis of jurisdiction. Rather, it said that it should not exercise its jurisdiction as requested by ONA for the reasons given.

45 A low income rate affordability program would necessarily lead to treating consumer groups on a differentiated basis with higher prices for a majority of residential consumers and subsidization of the low-income subset by the majority group and/or other classes of consumers.

46 If the Board were to reduce the rates for one class of consumers based upon an income determinant, the Board would have to increase the rates for another class or classes of consumers. In effect, such a rate reduction would impose a regressive indirect tax upon those required to pick up the shortfall. Such an approach would arguably be a dramatic departure from the Board's regulatory function as implemented to date, which has been to protect the collective interest of consumers dealing with a monopoly supplier through a "cost of service" calculation and then to treat consumers equally through determining rates to pay for the "cost of service" on a cost causality basis for classes of consumers.

47 The Board's mandate has not been directed to the public interest in social or distributive justice through a differentiation of rates on the basis of income. That need is seen to be met through other mechanisms and programs legislated by the provincial Legislature and/or Parliament, for example, by refundable tax credits and social assistance.

48 Indeed, the provincial income tax legislation previously provided for public tax expenditures to assist low income consumers with rising electricity costs. This was done through an "Ontario home electricity payment" by reference to income levels. *Income Tax Act*, R.S.O. 1990, c. 1.2, s. 8.6.1, as rep. by *Income Tax Amendment Act (Ontario Home Electricity Relief), 2006*, S.O. 2006, c. 18, s. 1. As well, Parliament has provided a one-time relief for energy costs to low income families and seniors in Canada through the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

49 The Board is an economic regulator, rather than a formulator of social policy. While no doubt the Board must take into account broad policy considerations, rate-setting is at the core of the Board's jurisdiction. *Garland v. Consumers' Gas Company* (2000), 185 D.L.R. (4th) 536 at paras. 17, 45-46 (Ont. S.C.J.). Special rates for low income consumers would not be based upon economic principles of regulation but rather on the social principle of ability to pay. Any program to subsidize low income consumers would require a source of funding which is a matter of public policy. See generally *Re Rate Concessions to Poor Persons and Senior Citizens*, 14 Pub. Util. Rep. 4th 87 at 94 (Or. 1976).

50 This view of the nature and limit of the regulatory function is generally accepted as the norm in other jurisdictions. See for example *Washington Gas light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A.2d 1187 at para. 38 (D.C. Ct. App.); *State of Louisiana v. the Council of the City of New Orleans and New Orleans Public Service, Inc.* (1975), 309 So. 2nd 290 at 294 (La. Sup. Ct.).

51 The historical common law approach for public utility regulation has been that consumers with similar cost profiles are to be treated equally so far as reasonably possible with respect to the rates paid for services. See, for example, *St. Lawrence Rendering Co. Ltd. v. The City of Cornwall,* [1951] O.R. 669-685 at 683; *Chastain et al. v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 at 454 (B.C.S.C); *Canada (Attorney General) v. Toronto (City)* (1893), 23 S.C.R. 514 at 519-520.

Conclusions on the Board's Jurisdiction

52 We agree that the traditional approach of "cost of service" is the root principle underlying the determination of rates by the Board because that is necessary to meet the fundamental, core objective of balancing the interests of all consumers and the natural monopoly utility in rate/price setting.

53 However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining rates, the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the *Act*. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

54 The "cost of service" determination will establish a benchmark global amount of revenues resulting from an estimated quantity of units of natural gas or electricity distributed. The Board could use this determination to fix rates on a cost causality basis. This has been the traditional approach.

55 However, in our view, the Board need not stop there. Rather, the Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

56 The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner. It is not engaged in setting social policy.

57 This is not, of course, to imply any preferred course of action in rate setting by the Board. The Board in its discretion may determine that "just and reasonable rates" are those that follow from the approach of "cost causality" once the "cost of service" amount is determined. That is, the principle of equality of rates for consumers within a given class (e.g., residential consumers) may be viewed as the most just and reasonable approach. A determination by the Board that all residential gas consumers (with relatively minor deviations through such programs as the "Winter Warmth Program") pay the same distribution rates is not in itself discriminatory on a prohibited ground. Indeed, it can be seen as a non-discriminatory policy in terms of prices paid.

58 Nor is it to suggest that as a matter of public policy, objectives of distributive justice or conservation in respect of energy consumption are best achieved by rate setting as compared to, for instance, tax expenditures or social assistance devised and implemented by the Legislature through mechanisms independent of the operation of the *Act*. It is noted that the Minister is given the authority in s. 27 of the *Act* to issue policy statements as to matters that the Board must pursue; however, the Minister has not issued any policy statement directing the board to base rates on considerations of the ability to pay. Moreover, the power granted to a regulatory authority "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable." *Re Multi Malls Inc. et al. and Minister of Transportation and Communications et al.* (1977), 14 O.R. (2d) 49 at 55 (C.A.). As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.

59 Nor does our conclusion presume as to what methods or techniques may be available in determining "just and reasonable rates." Efficiency and equity considerations must be made. Rather, this is to say only that so long as the global amount of return to the utility based upon a "cost of service" analysis is achievable, then the rates/prices (and the methods and techniques to determine those rates/prices) to generate that global amount is a matter for the Board's discretion in its ultimate goal and responsibility of approving and fixing "just and reasonable rates."

60 The issue before the Court is that of jurisdiction, not how and the manner by which the Board should exercise the jurisdiction conferred upon it.

61 In our view, and we so find, the Board has the jurisdiction to take into account the ability to pay in setting rates. We so find having taken into account the expansive wording of s. 36(2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the Board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose.

62 We also find that that interpretation is appropriate taking into account the criteria articulated in *Driedger,* above, namely it complies with the legislative text, it promotes the legislative purpose and the outcome is reasonable and just.

63 As indicated above, a statutory administrative tribunal obtains its jurisdiction from explicit powers or implicit powers. Having found that the jurisdiction to consider ability to pay in rate setting is explicitly within the *Act,* we need not consider the doctrine of necessary implication or the related principle of implied exclusion.

The issue of the *Canadian Charter of Rights and Freedoms*

64 Before concluding, it is appropriate to mention the submission made on behalf of LIEN in respect of s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the "*Charter*").

65 LIEN says it raises the *Charter* simply within the context of it being an interpretive tool in discerning the meaning of an asserted ambiguous s. 36 of the *Act*. LIEN says it does not raise any issue that the *Act* or the Board's actions or inactions are contrary to the *Charter*.

66 LIEN argues that in the absence of clear statutory provisions, the requirement for "just and reasonable rates" must be interpreted to comply with s. 15. The *Charter* applies to provincial legislation and can be used as an interpretive tool. *R. v. Rogers*, [2006] 1 S.C.R. 554, [2006] S.C.J. No. 15 at para. 18. In our view, as stated above, the *Act* provides the Board with the requisite jurisdiction without having to look to the *Charter*.

67 While we heard submissions from LIEN, we declined to hear from counsel for the respondents on this issue. We agree with our colleague Swinton J. that such an argument requires a full evidentiary record.

Disposition

68 For the reasons given, the appeal is allowed and it is declared that the Board has the jurisdiction to establish a rate affordability assistance program for low income consumers purchasing the distribution of natural gas from the utility, EGD.

69 All parties agree that there is not to be any award of costs in respect of this appeal.

F.P. KITELEY J.
P.A. CUMMING J.

70 K.E. SWINTON J. (dissenting):-- The sole issue in this appeal is whether the Ontario Energy Board (the "Board") erred in holding that it had no jurisdiction, when setting residential rates for gas distribution, to order a rate affordability program for low income consumers. In my view, the majority of the Board was correct in concluding that the Board lacked jurisdiction to make such an order.

71 The majority of the Board predicated its decision on the understanding that the appellants' proposal contemplated the establishment of a rate group for low income residential consumers that would be funded by general rates. I, too, proceed on that assumption. While there were no details of a specific program put forth by

the appellants during the hearing, it is inevitable that the Board, in setting lower rates for the economically disadvantaged, would have to impose higher rates on other consumers.

The Board's Practice in Setting Rates

72 Pursuant to the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B (the "Act"), the Board has authority to set rates for both gas and electricity. It has traditionally set rates for gas through a "cost of service" assessment, in which it seeks to determine a utility's total cost of providing service to its customers over a one year period (the "test year"). According to the Board's factum, these costs include the rate base (which is essentially the net book value of the utility's total capital investments) and the utility's operational and maintenance costs for the test year, among other things. The utility's total costs for the test year (usually including a rate of return on the rate base portion) forms the revenue requirement. The revenue requirement is then divided amongst the utility's ratepayers on a rate class basis (that is, residential, small commercial, industrial, etc.).

73 With respect to gas, it has always been the Board's practice to allocate the revenue requirement to the different rate classes on the basis of how much of that cost the rate class actually causes ("cost causality"). To the greatest extent possible, the Board has striven to avoid inter-class subsidies (see, for example, Decision with Reasons, RP-2003-0063 (2005), p. 5).

The Proper Approach to Statutory Interpretation

74 To determine the issue in this appeal, it is necessary to consider the powers conferred on the Board by its constituent legislation, the *Ontario Energy Board Act*. That Act must be interpreted using the modern principles of statutory interpretation described by Professor Ruth Sullivan in *Driedger on the Construction of Statutes* (3rd ed.) (Toronto: Butterworths, 1994) as follows:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions of special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (at p. 131)

75 The words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, its objects, and the intent of the Legislature (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 at para. 37).

The Words of the Provision in Issue

76 Subsection 36(2) of the Act gives the Board the broad authority to approve or fix "just and reasonable" rates for the distribution of gas. On its face, those words might encompass the power to set rates according to income. However, the words do not explicitly confer the power to do so, and the Supreme Court of Canada commented in *ATCO, supra* that a discretionary grant of authority to a tribunal cannot be viewed as conferring unlimited discretion. A regulatory tribunal must interpret its powers "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" (at para. 50).

77 The appellants also rely on s. 36(3), which states that in approving or fixing just and reasonable rates, the Board may adopt "any method or technique that it considers appropriate". These words were added to the Act in

1998. Examples of methods or techniques used by the Board for setting gas distribution rates are cost of service regulation and incentive regulation.

78 On its face, the words of s. 36(3) do not confer the jurisdiction to provide special rates for low income customers. The subsection replaced an earlier provision of the Act which required a traditional cost of service analysis in setting rates. I agree with the conclusion of the Board majority as to the meaning of s. 36(3) (Reasons, p. 10):

> It gives the Board the flexibility to employ other methods of ratemaking in fixing just and reasonable rates, such as incentive ratemaking, rather than the traditional costs of service regulation specified in section 19 of the old Act. The change in the legislation was coincident with the addition of the regulation of the electricity sector to the Board's mandate. The granting of the authority to use methods other than cost of service to set rates for the gas sector was an alignment with the non-prescriptive authority to set rates for the electricity sector. The Board is of the view that if the intent of the legislature by the new language was to include ratemaking considering income level as a rate class determinant, the new Act would have made this provision explicit given the opportunity at the time of the update of the Act and the resultant departure from the Board's past practice.

The Regulatory Context

79 According to longstanding principles governing public utilities developed under the common law, a public utility like the respondent Enbridge Gas Distribution Inc. ("Enbridge") must treat all its customers equally with respect to the rates they pay for a particular service (*Attorney General of Canada v. The Corporation of the City of Toronto* (1892), 23 S.C.R. 514 at 519-20; *St. Lawrence Rendering Co. Ltd. v. Cornwall*, [1951] O.R. 669 (H.C.J.) at 683; *Chastain v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C.S.C.) at 454).

80 As noted in the Board's majority reasons, the Board is, at its core, an economic regulator (Reasons, p. 4). Rate setting is at the core of its jurisdiction (*Garland v. Consumer's Gas Company* (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) at para. 45). I agree with the majority's description of economic regulation as being "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate cost allocation methodologies" (Reasons, p. 4).

81 Historically, in setting rates, the Board has engaged in a balancing of the interests of the regulated utility and consumers. The Board has not historically balanced the interests of different groups of consumers. As the Divisional Court stated in *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 43 O.R. (2d) 489 at p. 11 (Quicklaw):

> ... it is the function of the O.E.B. to balance the interest of the appellant in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interest of its customers to be served as cheaply as possible.

See, as well, *Northwestern Utilities v. The City of Edmonton*, [1929] S.C.R. 186 at 192.

82 In a similar vein, the Supreme Court in *ATCO, supra* spoke of a "regulatory compact" which ensures that all customers have access to a utility at a fair price. The Court went on to state (at para. 63):

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specified area at rates that will provide companies the opportunity to earn a fair rate of return for all their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers of their defined territories, and are required to have their rates and certain operations regulated ...

The Court described the object of the Act "to protect both the customer *and* the investor" (at para. 64).

83 The Legislature, in conferring power on the Board, must be taken to have had regard to the principles generally applicable to rate regulation (*ATCO, supra* at paras. 50 and 64). I agree with the submission of Enbridge that those principles are the following:

> (a) customers of a public utility must be treated equally insofar as the rate for a particular service or class of services is concerned; and
> (b) the Legislature will be presumed not to have intended to authorize discrimination among customers of a public utility unless it has used specific words to express this intention.

84 Thus, the considerations of justice and reasonableness in the setting of rates have been and are those between the utility and consumers as a group, not among different groups of consumers based on their ability to pay.

Other Provisions of the Act

85 In applying s. 36(2), the Board must be bound by the objectives set out in s. 2 of the Act, which includes

> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

86 The appellants submit that these words are broad enough to permit the Board to order a rate affordability assistance program. However, that is not obvious from the words used, which refer to "consumers" as a whole, and not to any particular subset of consumers. Indeed, it can be argued that any low income rate affordability program would run counter to the stated objective, given that such a program must almost certainly be funded through higher rates paid by other consumers. The result would be to provide benefits to one group of consumers at the expense of others.

87 The reason for this conclusion lies in the Board's historical approach to rate setting, as described earlier in these reasons. The Board sets a revenue requirement for utilities before allocating those costs to the different rate classes. The only way the utility could recover its revenue requirement, given a rate class with lower rates for low income consumers, would be to increase the rates charged to other classes. Therefore, such higher prices can not be seen as protecting the interests of consumers with respect to prices, as set out in objective 2.

88 Moreover, the Act contains an explicit provision in s. 79 that allows the Board to provide rate protection for rural and remote customers of electricity distributors. Subsection 79(1) provides:

> The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules.

Section 79 also provides grandfathering for those who had a subsidy prior to the change in the Act. As well, it explicitly allows the distributor to be compensated for the subsidized rates through contributions from other consumers, as provided by the regulations.

89 This section was added to the Act in 1998, when the Board was given the authority over electricity rate regulation. Section 79 ensured the ongoing protection of rural rates put in place when electricity distribution was regulated by Ontario Hydro.

90 One of the principles of statutory interpretation is "implied exclusion". As Professor Sullivan has stated, this principle operates "whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (*supra,* p. 186). While the

purpose of s. 79 of the Act was to protect a pre-existing policy to assist rural and remote residential consumers, nevertheless, it is telling that there is no similar explicit power to order special rates or rate subsidies for other groups elsewhere in the Act.

The Significance of Ordering Rate Affordability Programs

91 An appropriate interpretation can be justified in terms of its promotion of the legislative purpose and the reasonableness of the outcome (see Sullivan, quoted above at para. 5).

92 The ability to order a rate affordability program would significantly change the role that the Board has played -- indeed, the majority of the Board stated a number of times that the proposal to base rates on income level would be a "fundamental" departure from its current practice. In the past, the Board has acted as an economic regulator, balancing the interests of the utility and its shareholders against the interests of consumers as a group. Were it to assume jurisdiction over rate affordability programs, it would carry out an entirely different function. It would enter into the realm of social policy, weighing the interests of low income consumers against those of other consumers. This is not a role that the Board has traditionally played. This is not where its expertise lies, nor is it well-suited to taking on such a role.

93 An examination of the particular case before the Board illustrates this. The appellants seek a rate affordability assistance program for gas in response to Enbridge's application for a rate increase for gas distribution -- that is, for the *delivery* of natural gas. Customers can make arrangements for the purchase of the commodity of natural gas with a variety of suppliers in the competitive market. Therefore, were the Board to assume jurisdiction to order a rate affordability assistance program here, it could address only one part of the problem that low income consumers face in meeting their heating costs -- the cost of distribution of gas.

94 In addition, the Board would have to consider eligibility criteria for a rate affordability assistance program that reasonably would take into account existing programs for assistance to low income consumers. Obviously, this would include social assistance programs. As well, Enbridge, in its factum, has identified other programs which provide assistance for low income consumers. For example, the Ontario government has implemented a program to assist low income customers with rising electricity costs through amendments to income tax legislation (*Income Tax Act*, R.S.O. 1990, c. I.2, s. 8.6.1, as amended S.O. 2006, c. 18, c.1). At the federal level, there was one-time relief for low income families and senior citizens provided by the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

95 Moreover, in order to cover the lower costs, the Board would have to increase the rates of other customers in a manner that would inevitably be regressive in nature, as it is difficult to conceive how the Board would be able to determine, in a systematic way, the ability of these other customers to pay.

96 Clearly, the determination of the need for a subsidy for low income consumers is better made by the Legislature. That body has the ability to consider the full range of existing programs, as well as a wide range of funding options, while the Board is necessarily limited to allocating the cost to other consumers. The relative advantages of a legislative body in establishing social programs of the kind proposed are well described in the following excerpt from a decision of the Oregon Public Utility Commissioner (*Re Rate Concessions to Poor Persons and Senior Citizens* (1976), 14 PUR 4th 87 at p. 94):

> Utility bills are not poor persons' only problems. They also cannot afford adequate shelter, transportation, clothing or food. The legislative assembly is the only agency which can provide comprehensive assistance, and can fund such assistance from the general tax funds. It has the information and responsibility to deal with such matters, and can do so from an overall perspective. It can determine the needs of various groups and compare those needs to existing social programs. If it determines a special program is needed to deal with energy costs, it can affect all energy sources rather than only those the commissioner regulates.

> With clear authority to establish social welfare policy, the legislative assembly also can monitor all state and federal welfare programs and the sources and extent of aid given to different groups. Without such overview, as independent agencies aid various segments of society, the total aid given each group is unknown, and unequal treatment of different groups becomes likely.

97 Where the issue of rate affordability programs has arisen in other jurisdictions, courts and boards have ruled that a public utilities board does not have jurisdiction to set rates based on ability to pay (see, for example, *Washington Gas Light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A. 2d 1187 (D.C. Ct. App.) at para. 38; *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S.C.A.) at 419; Alberta Energy and Utilities Board Decision 2004-066, Section 9.2.6 at 161, as well as the Oregon case, *supra*).

98 The appellants distinguish the *Dalhousie Legal Aid* case because the Nova Scotia legislation is different from Ontario's. Specifically, s. 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 provides that "[a]ll tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate".

99 While the language of the two statutes does differ, nevertheless, the reasons of the Nova Scotia Court of Appeal make it clear that the Board's role is not to set social policy. At para. 33, Fichaud J.A., observed, "The Board's regulatory power is a proxy for competition, not an instrument of social policy."

100 Moreover, the principle in s. 67(1) of the Nova Scotia Act requiring that rates be charged equally is a codification of the common law, set out earlier in these reasons. The Ontario Board has long operated according to the same principles.

101 The appellants submit that the recent decision in *Allstream Corp. v. Bell Canada*, [2005] F.C.J. No. 1237 (C.A.) assists their case. There, the Federal Court of Appeal upheld a decision of the Canadian Radio-Television and Telecommunications Commission (the "CRTC") approving special facilities tariffs submitted by Bell for the provision of optical fibre services pursuant to certain customer-specific arrangements. All but one related to a Quebec government initiative aimed at supporting the construction of broadband networks for rural municipalities, school boards and other institutions. The Court determined that the Commission's decision approving the tariffs was not patently unreasonable, given the exceptional circumstances of the case that justified a deviation from the normal practice of rate determination. The Court noted that the Commission considered matters that were not purely economic, but noted that such considerations were part of the Commission's wide mandate under s. 7 of the *Telecommunications Act,* S.C. 1993, c. 38 (at paras. 34-35).

102 Section 7 of that Act, unlike s. 2 of the *Ontario Energy Board Act,* expressly includes the power "to respond to the economic and social requirements of users of telecommunications services" (s. 7(h)), as well as to enrich and strengthen the social and economic fabric of Canada and its regions (s. 7(a)). Moreover, while s. 27(2)(b) of that Act forbids unjust discrimination in rates charged, s. 27(6) explicitly permits reduced rates, with the approval of the Commission, for any charitable organization or disadvantaged person.

103 In contrast to the broad mandate given to the CRTC, the objectives of the Board are much more confined. When the Board's objectives go beyond the economic realm, specific reference has been made to other objectives, such as conservation and consumer education (s. 2(5) and (6)). There is no reference to the consideration of economic and social requirements of consumers.

104 The appellants have also pointed out that the Board has in the past authorized programs that transfer benefits to lower income customers. The Winter Warmth program is one in which individuals can apply for emergency financial relief with heating bills. It is triggered by an application from a particular customer, and the program is funded by all customers. The fact that the Board has approved this charitable program does not lead to the conclusion that it has jurisdiction to set rates on the basis of income level.

105 With respect to the Demand Side Management (DSM) programs, the majority of the Board explained that this is not equivalent to a rate class based on income level. At p. 11 of its Reasons, the majority stated,

> The Board is vigilant in ensuring that customer groups are afforded the opportunity to receive the benefits of the costs charged. In the case of Demand Side Management (DSM) programs, for example, the Board has ordered that specific funding be channeled for programs aimed at low income customers. It cannot be argued that this constitutes discriminatory pricing. Rather, the contrary. It is an attempt to avoid discrimination against low income customers who also pay for DSM programs but may not have equal opportunities to take advantage of these programs.

106 Were the Board to assume jurisdiction to order a rate affordability assistance program, it would be taking on a significant new role as a regulator of social policy. Given the dramatic change in the role that it has historically played, as well as the departure from common law principles, it would require express language from the Legislature to confer such jurisdiction

Jurisdiction by Necessary Implication

107 In order to impute jurisdiction to a regulatory body, there must be evidence that the exercise of the power in question is a practical necessity for the regulatory body to accomplish the goals prescribed by the Legislature (*ATCO, supra* at paras. 51, 77). In this case, there is no evidence that the power to implement a rate affordability assistance program is a practical necessity for the Board to meet its objectives as set out in s. 2.

The Role of the Charter

108 The appellants submit that the values found in s. 15 of the *Canadian Charter of Rights and Freedoms* should be considered in the interpretation of the ratemaking provisions of the Act. However, the Charter has no relevance in interpretation unless there is genuine ambiguity in the statutory provision (*R. v. Rodgers*, [2006] 1 S.C.R. 554 at paras. 18-19). A genuine ambiguity is one in which there are "two or more plausible readings, each equally in accordance with the intentions of the statute" (at para. 18).

109 In my view, there is no ambiguity in the interpretation of s. 36 of the Act, and therefore, there is no need to resort to the Charter.

110 In any event, the appellants' argument is, in fact, that the failure of the Board to order a rate affordability program is discriminatory on the basis of sex, race, age, disability and social assistance, because of the adverse impact on these groups (Factum, para. 43, as well as para. 47). Such an argument can not be made without a full evidentiary record, and the inclusion of statistical material in the Appeal Book is not a sufficient basis on which to address this equality argument.

Conclusion

111 For these reasons, I am of the view that the majority decision of the Board was correct, and that the Board has no jurisdiction to order rate affordability assistance programs for low income consumers. Therefore, I would dismiss the appeal.

K.E. SWINTON J.

Case Name:

British Columbia (Hydro and Power Authority) v. Terasen Gas (Vancouver Island) Inc.

IN THE MATTER OF The Utilities Commission Act, R.S.B.C. 1996, c. 473
AND IN THE MATTER OF Centra Gas British Columbia Inc. (now Terasen Gas (Vancouver Island) Inc.) 2002 Rate Design Application
AND IN THE MATTER OF British Columbia Utilities Commission Decision Pronounced June 5, 2003 and Order Number G-42-03 Issued June 5, 2003
Between
British Columbia Hydro and Power Authority, appellant, and
Terasen Gas (Vancouver Island) Inc., Howe Sound Pulp & Paper Limited Partnership, Norske Skog Canada Limited, Pope & Talbot Ltd., and Western Pulp Limited Partnership, doing business as the Vancouver Island Gas Joint Venture, Consumers' Association of Canada (B.C. Branch), B.C. Old Age Pensioners' Organization, Council of Senior Citizens' Organizations, Senior Citizens Association of British Columbia, Tenants Rights Action Coalition, Vancouver Island Public Sector Natural Gas Consumers Group, and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Energy and Mines, respondents
(Vancouver Registry No. CA030969)
And between
Howe Sound Pulp & Paper Limited Partnership, Norske Skog Canada Limited, Pope & Talbot Ltd., and Western Pulp Limited Partnership, doing business as the Vancouver Island Gas Joint Venture, appellants, and Terasen Gas (Vancouver Island) Inc., British Columbia Hydro and Power Authority, Consumers' Association of Canada (B.C. Branch), B.C. Old Age Pensioners' Organization, Council of Senior Citizens' Organizations, Senior Citizens Association of British Columbia, Tenants Rights Action Coalition, Vancouver Island Public Sector Natural Gas Consumers Group and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Energy and Mines, respondents
(Vancouver Registry No. CA030984)

[2004] B.C.J. No. 1250

2004 BCCA 346

200 B.C.A.C. 233

30 B.C.L.R. (4th) 305

131 A.C.W.S. (3d) 954

Vancouver Registry Nos. CA030969 and CA030984

British Columbia Court of Appeal
Vancouver, British Columbia

Lambert, Mackenzie and Oppal JJ.A.

Heard: May 3 - 5, 2004.
Judgment: June 23, 2004.

(53 paras.)

Administrative law -- Judicial review and statutory appeal - - Standard of review -- Public utilities -- Commissions -- Regulation.

Appeals by Hydro and Power Authority and others from decisions by the Utilities Commission to include a contribution to Terasen Gas's revenue deficiency in the Authority's transmission service rates. The Authority also objected to the rate set by the Commission. Terasen operated a pipeline that supplied natural gas and distributed natural gas to individual customers. The Authority bought natural gas directly from the pipeline and did not use the distribution network. When the industry was restructured in 1995, the restructuring agreement provided for a Special Direction for rate-making purposes, issued by the Lieutenant Governor in Council to the Utilities Commission, which allowed the creation of a revenue deficiency account and set out the rules governing it. The Authority claimed that the revenue deficiency resulted from the distribution network.

HELD: Appeals dismissed. The standard of review had to be determined on a question-by-question basis. The Utilities Commission was correct in concluding that the Authority was a customer as per the Special Direction for the purposes of including the contribution to revenue deficiency in its rate. The level of contribution was a question of fact and was not outside the Utilities Commission's rate-setting mandate or general jurisdiction.

Statutes, Regulations and Rules Cited:

Vancouver Island Natural Gas Pipeline Act, s. 7.

Counsel:

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J.L. Quail: Counsel for Consumers' Association of Canada (B.C. Branch), B.C. Old Age Pensioners' Organization, Council of Senior Citizens' Organizations, Senior Citizens Association of British Columbia, Tenants Rights Action Coalition, and Vancouver Island Public Sector Natural Gas Consumers Group

The judgment of the Court was delivered by

1 MACKENZIE J.A.:-- These appeals, with leave, are from an order of the British Columbia Utilities Commission (the "Commission" or "BCUC") setting rates for the transmission and distribution of natural gas on Vancouver Island. The Commission's Order No. G-42-03 fixed rates for service effective 1 January 2003 for Centra Gas British Columbia Inc., now Terasen Gas (Vancouver Island) Inc. ("Centra").

2 The issues arise out of the Commission's determination to include in the transmission service rates for the appellant, British Columbia Hydro and Power Authority ("BC Hydro"), a contribution to the amortization of an accumulated shortfall between Centra's revenues and its cost of service. This "revenue deficiency", starting in 1996, has grown to a balance of $87.9M as at the end of 2002. This balance is recorded in a Revenue Deficiency Deferral Account (the "Deficiency Account" or "RDDA"). BC Hydro contends that including a contribution to revenue deficiency recovery in its tolls is unlawful, essentially because it conflicts with a Special Direction (the "Special Direction"), issued by the Lieutenant Governor in Council, that the Commission must follow in determining Centra's rates. BC Hydro also contends that the Commission erred by establishing a revenue to cost ratio of 1.25 for the purpose of setting the rates paid by BC Hydro. The 1.25 ratio facilitates the recovery of the revenue deficiency through BC Hydro's rates. The annual contribution to recovery from BC Hydro's tolls is estimated at $4.5M.

3 The appellants - Howe Sound Pulp & Paper Limited Partnership, Norske Skog Canada Limited, Pope & Talbot Ltd., and Western Pulp Limited Partnership, doing business as the Vancouver Island Gas Joint Venture (the "Joint Venture") - support BC Hydro and raise other related issues with respect to revenue deficiency recovery in transmission tolls. The Joint Venture is not directly impacted by the Commission's decision because its tolls are set by a formula in a long term transportation service agreement (the "Joint Venture Agreement") that does not include any revenue deficiency recovery. However, the Joint Venture has an interest in BC Hydro's tolls because if they were lower than the tolls in the Joint Venture Agreement, the Joint Venture has the option of terminating the agreements on notice and seeking tolls equivalent to those for BC Hydro.

The Centra Utility Undertaking

4 There are two parts to the Centra utility undertaking - a high pressure main transmission pipeline (the "Pipeline") that crosses the Strait of Georgia, and a lower pressure distribution system (the "Distribution System") connected to the Pipeline on Vancouver Island and the Sunshine Coast. The appellants are all connected directly to the Pipeline and purchase natural gas from producers upstream of the Pipeline rather than from Centra. They contract with Centra for transmission service to transport their gas through the Pipeline to their facilities. They do not use any part of the Distribution System.

5 Residential, commercial, and small industrial customers are connected to the Distribution System. They buy gas from Centra at their point of delivery and their rates include a charge for the commodity cost of the gas in addition to the charge for gas transportation through the Pipeline and the Distribution System. Some Distribution System customers have the option of buying gas from producers and contracting with Centra for transmission service only, but such arrangements are rare.

History of the Natural Gas Service to Vancouver Island

6 Natural gas transmission and distribution on Vancouver Island and the Sunshine Coast of British Columbia commenced in 1991 when the Vancouver Island Natural Gas Pipeline was completed. The high pressure transmission Pipeline transports gas from the Lower Mainland to distribution systems serving commercial and residential customers. The Pipeline also transports gas for the Joint Venture and, since 2001, to BC Hydro's

electricity co-generation plant at Elk Falls, near Campbell River. Until service to BC Hydro commenced, the Joint Venture and Squamish Gas were the only shippers connected directly to the Pipeline.

7 Until 1996, the Pipeline was owned and operated separately from the distribution systems by Pacific Coast Energy Corporation, a wholly owned subsidiary of Westcoast Energy Inc. The distribution systems connected to the Pipeline were operated by three wholly owned Westcoast subsidiaries, Centra Gas British Columbia Inc., Centra Gas Victoria Inc., and Centra Gas Vancouver Island Inc. The companies encountered financial difficulties from the inception of their operation.

The 1995 Centra Restructuring

8 In 1995 the companies were restructured: Pacific Coast Energy Corporation acquired the gas distribution assets of the Centra companies and then changed its name to Centra. The restructuring was documented by the Vancouver Island Natural Gas Pipeline Agreement (the "Agreement" or "VINGPA") dated 14 December 1995. The parties to the Agreement were the Province, the Centra distribution companies, Pacific Coast Energy Corporation and its then parent company, Westcoast Energy Inc. As part of the restructuring, the provincial government contributed $120M to the capital costs, which reduced the utility rate base by a corresponding amount. The Province also agreed to provide further assistance in the form of gas royalty credits estimated to contribute between $19.7M and $26.8M per year in revenues. These payments will end in 2011.

The Special Direction

9 The Agreement provided for a Special Direction to be issued to the Commission for rate-making purposes by the Lieutenant Governor in Council, acting under the authority of s. 7 of the Vancouver Island Natural Gas Pipeline Act, R.S.B.C. 1996, c. 474. Section 7 elevates the status of a special direction above any other inconsistent provisions, statutory or otherwise, relating to rate-making by the Commission, and makes plain the importance of a special direction as an instrument of government policy:

> 7(1) The Utilities Commission Act and the Gas Utility Act apply to the proponent and a local distribution utility except to the extent otherwise provided in this section or in a regulation under this section.
>
> (2) The Lieutenant Governor in Council may make regulations as follows:
>
> (a) ordering that prescribed provisions of the Utilities Commission Act or of the Gas Utility Act do not apply in respect of
>
> (i) the proponent,
> (ii) the local distribution utilities, or
> (iii) a particular local distribution utility;
>
> (b) prescribing limitations and conditions for the purposes of a regulation under paragraph (a).
>
> (3) **Despite Parts 3 and 6 of the Utilities Commission Act, the Lieutenant Governor in Council may issue directions to the British Columbia Utilities Commission, specifying one or more of the following:**
>
> (a) **the factors, criteria and guidelines that the commission must or must not use in regulating and fixing rates for the proponent or a local distribution utility;**
> (b) classes of customers of the proponent or of a local distribution utility, according to volume of natural gas taken, location, date of application for

natural gas service, type of premises or on any other basis the Lieutenant Governor in Council considers appropriate;

(c) the rates that may be permitted to be charged under the Utilities Commission Act by the proponent to its customers or by a local distribution utility to its customers, and, in specifying rates under this paragraph, the Lieutenant Governor in Council may differentiate among the classes of customers specified under paragraph (b);

(d) limitations or principles that must be applied by the commission in fixing or varying the rates charged by the proponent to its customers or by a local distribution utility to its customers, and, for any specification of limitations or principles under this paragraph, differentiating, or requiring or empowering the commission to differentiate, among the classes of customers specified under paragraph (b);

(e) for all or part of any year since the commencement of operation of the pipeline, one or more of the following:

(i) the cost of service of the proponent or a local distribution utility;
(ii) the manner of determining the proponent's or a local distribution utility's cost of service;
(iii) the components, factors and considerations that must or must not be taken into account in making a determination under subparagraph (ii);

(f) an order that has been made by the British Columbia Utilities Commission and is or may be relevant to the proponent, one or more local distribution utilities, or both, and doing either or both of the following:

(i) requiring the commission to apply or to refrain from applying that order or a specified portion or aspect of that order to the proponent, one or more local distribution utilities, or both;
(ii) directing the commission as to the extent or manner in which it must or must not apply that order or a specified portion or aspect of that order to the proponent, one or more local distribution utilities, or both.

(4) **Despite the Utilities Commission Act and the Gas Utility Act,**

(a) **the British Columbia Utilities Commission must comply with a direction issued under subsection (3) of this section, and**
(b) **if a direction issued under subsection (3) of this section is inconsistent or in conflict with the Utilities Commission Act or the Gas Utility Act, the direction prevails.** [Emphasis added]

The "proponent" referred to is Pacific Coast Energy Corporation, later Centra.

10 The Special Direction was issued 13 December 1995 as contemplated by the Agreement. It is divided into five parts. The first part includes definitions and s. 1.4 which reinforces the pre-eminence of the Special Direction in these terms:

1.4 General

> The BCUC shall regulate the Utilities and fix the rates charged by the Utilities in accordance with the requirements of this Special Direction, and in accordance with the requirements of the Utilities Commission Act and such regulatory principles that are otherwise applicable to the Utilities from time to time that are not inconsistent with this Special Direction. **In the event of any inconsistency between this Special Direction and any requirement of the Utilities Commission Act or any regulatory principles that would otherwise be applicable to the Utilities, the BCUC shall follow the provisions of this Special Direction.** For greater certainty, the BCUC shall not apply any provisions of the Utilities Commission Act (including, without limitation, Sections 64, 65, 66, and 67) in any manner which has the effect, directly or indirectly, of eliminating or varying any rates that have been specified in, or determined in accordance with, this Special Direction, or eliminating or varying any other determination or matter provided for herein. [Emphasis added]

11 At the date of the Agreement the assets of the Distribution System and the Pipeline were held by separate companies, as noted above, and Parts 2 and 3 of the Special Direction recognized that separation. Part 2 sets out detailed directions to the Commission with respect to rates for the Distribution System. Part 3 gives direction with respect to rates for the Pipeline. The Special Direction also recognized the intent of the Agreement to combine all the utility assets in a single entity and Part 4 is entitled "DETERMINATION OF ANNUAL REVENUE DEFICIENCY, RATE BASE, CAPITAL STRUCTURE AND RETURN ON EQUITY WHERE THE PIPELINE AND THE CENTRA DISTRIBUTION SYSTEM ARE OWNED BY A SINGLE ENTITY". The Pipeline and the Distribution System became a single entity as of 1 January 1996, or very shortly after the Special Direction was issued. The remaining Part 5 of the Special Direction has no application to the issues in these appeals.

12 "Annual Revenue Deficiency" is a term defined in s. 2.10 of the Special Direction as the amount by which Centra's adjusted cost of service exceeds its actual revenues in any year, and the Commission is directed to determine the balance of the Deficiency Account as the total of accumulated annual deficiencies. Section 2.10 also sets out detailed provisions for the determination of rate base, debt financing, deemed equity and return on equity. Critical to the issues on these appeals are two subsections of the Special Direction: s. 2.10(j), concerning the amortization of the Deficiency Account; and s. 4.1, directing that the calculation for annual deficiencies and the Deficiency Account be made for the single entity after its creation. The relevant portions of the provisions read:

> 2.10 Cost of Service and Revenue Deficiency
>
> **Subject to Part 4 of this Special Direction**, the BCUC shall determine Centra's cost of service and shall make the various associated determinations, all as described in, and in accordance with, the following directions.
>
> . . .
>
> (j) Deemed Redemption or Repayment of Instruments for the Determination of Cost of Service and Setting of Rates
>
> For each year beginning January 1, 2003, **the cost of service of Centra that is approved by the BCUC for the purpose of determining the rates to be charged to Centra's customers shall include an amount** for the deemed redemption of Class "A" Instruments or repayment of Class "B" Instruments **that the BCUC determines to be appropriate in order to amortize the balance of the Revenue Deficiency Deferral Account over the shortest period reasonably possible, having regard for Centra's competitive position relative to alternative energy sources and the desirability of reasonable rates.**

4.1 Annual Revenue Deficiencies

> **The BCUC shall determine Annual Revenue Deficiencies and the balance of the Revenue Deficiency Deferral Account for a Single Entity in the manner set out in Section 2.10 based upon the actual revenue and the cost of service associated with both the Centra Distribution System and the Pipeline** but without taking into account any revenue or costs that relate to any other business conducted, or assets owned, by the Single Entity. [Emphasis added]

13 The provisions of Part 4, including s. 4.1, prevail over Part 2 to the extent of any inconsistency. Before the creation of the single entity, Centra, as defined, refers to the companies owning the Distribution System; afterward it refers to the single entity. The reference to Class "A" and Class "B" instruments relates to the manner of financing the revenue deficiency until its amortization and does not require further explanation for the purposes of these reasons.

The Issues

14 The issues in these appeals largely turn on whether the Commission complied with the Special Direction in setting rates for the appellants.

15 BC Hydro's complaint essentially is that the balance in the Deficiency Account represents accumulated deficiencies between revenues and cost of service in the Distribution System and no part of its recovery should be included in the rates charged to BC Hydro and the other large transmission service end users who take delivery of their gas directly from the Pipeline and do not use the facilities of the Distribution System. BC Hydro contends that the Special Direction precludes the Commission from including a contribution to amortization of the Deficiency Account recovery in BC Hydro's rates.

16 The Commission's reasons for concluding that it may include a contribution to the revenue deficiency in BC Hydro's rates were as follows:

> In resolving the issue of whether or not it was the intention of the Special Direction that the RDDA be collected from [High-Pressure Transmission System ("HPTS")] customers other than the Joint Venture and Squamish Gas, the Commission has to consider the words and provisions of the Special Direction as a whole, as well as related documents such as the VINGPA and the Joint Venture TSA. In other words, the Commission must assess the factual matrix.
>
> After reviewing and considering the evidence and the arguments, the Commission determines that the interpretations of Centra, CAC (BC) et al. and the Public Sector Consumers are more consistent with the applicable documents. The Commission finds that the Special Direction does not prohibit the Commission from allowing Centra to recover some of the RDDA in its transmission tolls from HPTS customers other than the Joint Venture and Squamish Gas, as well as in rates to distribution system customers on the [Centra Distribution System ("CDS")].
>
> An argument advanced to support the position that tolls on the CDS and the HPTS should be treated separately, is based on the use of the word "customers" in Section 2.10(j) of the Special Direction. BC Hydro argues that this excludes parties who only transport gas on the HPTS system, since those parties are referred to as "shippers" in the Joint Venture TSA and the [Pacific Coast Energy Corporation] Terms and Conditions (Schedule H to the Special Direction). The Commission rejects that interpretation. If natural gas service were unbundled on the Centra system, then

> distribution system customers who chose to purchase gas from a third-party shipper would be able to avoid RDDA recovery in contrast to similar customers who continue to purchase gas from Centra. Also, as pointed out by Centra in argument, the VINGPA uses the term customers in a way that is consistent with the use of the word in Section 2.10(j) of the Special Direction (see, for example, the ninth recital of the VINGPA). Finally, if the distinction raised by BC Hydro was intended, the Commission would expect that "shippers" and "customers" would be defined terms in the Special Direction (as are many other terms), but they are not.
>
> The Commission agrees with BC Hydro that the terms of the Special Direction only prevail over the provisions of the Act and applicable regulatory principles if they are inconsistent with the Special Direction (BC Hydro Argument, p. 20). The Commission notes that it is directed in Sections 2.8, 2.10(d) and 3.7 of the Special Direction, to apply normal regulatory principles. For reasons discussed later in this Decision, the Commission also concludes that its interpretation is consistent with normal regulatory principles, and with the requirements of the UCA. [Emphasis in original]

17 There are certain aspects of the Deficiency Account that are clear and non-controversial. Section 4.1, set out above, specifically directs the Commission to determine the annual revenue deficiencies and the balance of the Deficiency Account for a single entity based on the revenue and cost of service of the combined Distribution System and the Pipeline. The Commission is also specifically directed to establish a single rate base, capital structure and return on equity for the combined single entity.

18 BC Hydro submits that Parts 2 and 3 of the Special Direction established separate rate-making criteria for "customers" of the distribution system and "shippers" connected directly to the Pipeline, and that the separation of the two groups is maintained notwithstanding the combination of the Distribution System and the Pipeline into a single entity. BC Hydro argues that the revenue deficiency results from a shortfall between revenue and cost of service of the Distribution System and is not attributable to the cost of service of the Pipeline. BC Hydro argues that it is not a "customer" within the Part 2 rate-making methodology and that s. 3.7 excludes BC Hydro and other Pipeline shippers from contributing to amortization of the revenue deficiency.

The Standard of Review

19 The first question to be answered is the standard of review to be applied in addressing the issues. The Supreme Court of Canada jurisprudence is extensive but the principles may be conveniently summarized. Courts are directed to take a robust and pragmatic approach to review and to consider four factors for determining the appropriate standard. They are: 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 judge on the issue in question; 3) the purposes of the legislation, and of the provision in particular; and 4) the nature of the problem: Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206, 2003 SCC 28 [paragraph] 10; see also Alberta Union of Provincial Employees v. Lethbridge Community College, [2004] S.C.J. No. 24, 2004 SCC 28.

20 Addressing the first factor, s. 101 of the Utilities Commission Act provides for a right of appeal, with leave, to this Court from orders of the Commission. Section 105(2) bars other forms of judicial review. The ambit of an appeal is limited by s. 79 which states:

> The determination of the commission on a question of fact in its jurisdiction ... is binding and conclusive on all persons and on all courts.

21 The Commission's exclusive jurisdiction over rates is further expanded by ss. 59(4) and (5):

> (4) It is a question of fact, of which the commission is the sole judge,

(a) whether a rate is unjust or unreasonable,
(b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or
(c) whether a service is offered or provided under substantially similar circumstances and conditions.

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,
(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or
(c) unjust and unreasonable for any other reason.

22 The legislative scheme also includes power for the provincial government to give special directions to the Commission under two sections, both of which are similar: s. 3(1) of the Utilities Commission Act and ss. 7(1) to (4) of the Vancouver Island Natural Gas Pipeline Act, set out above.

23 I have set out the statutory provisions at length because they express the determination of the Legislature to insulate the Commission from judicial review of its specialized rate-making jurisdiction and they establish a close policy connection between the government and the Commission through the mechanism of special directions which take precedence over inconsistent provisions of the Commission's governing statutes or regulatory principles otherwise applicable. This implies a high degree of judicial deference within the terms of a special direction but less deference in the interpretation of terms that are mandatory and do not import an element of discretion.

24 Moving on to the second and third factors to be considered in determining the standard of review, the legislative scheme emphasizes the expertise of the Commission within its rate-making mandate, including the statutory declarations that just and reasonable rates are questions of fact and Commission findings of fact within its jurisdiction are conclusive. The statutory recognition of the Commission's expertise in determining rates reinforces curial deference. The Commission is required to resolve and balance the economic interests of various constituencies, well illustrated by the parties to these proceedings, which gives its jurisdiction a polycentric quality, as termed by the Supreme Court of Canada in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, 226 N.R. 201 [paragraph] 36. The Commission's function is pragmatic and often robust.

25 The final factor is the nature of the problem or question. Here the appellants have raised several questions and, as the Supreme Court of Canada has observed, the standard of review may be different for different questions.

BC Hydro's First Issue

26 The first question raised by BC Hydro was defined by the Commission's conclusion, set out above, that the Special Direction does not prohibit the Commission from allowing Centra to recover some of the revenue deficiency from transmission tolls of BC Hydro.

27 BC Hydro is the only high pressure transmission service customer apart from the Joint Venture and Squamish Gas, and it disputes its designation as a "customer", for reasons discussed below. BC Hydro submits that this question goes to the delineation of the Commission's mandate and the standard of review is correctness. The Commission agrees that it must be correct in answering that question. Centra also agrees that at the broad jurisdictional level, the appropriate standard is correctness on the question of whether the Special Direction prohibits the Commission from setting rates for BC Hydro that include a contribution for amortization of the Deficiency Account balance. I propose to apply the standard of correctness to the first issue as so defined.

28 Centra and Centra Distribution System are both defined terms in the Special Direction. The Centra Distribution System is defined as the physical assets comprising the distribution system and not the entity holding those assets. Centra has a dual meaning. When the Distribution System assets and the Pipeline are held by separate entities, Centra means the entities holding the Distribution System assets only. After the assets are combined in a single entity, Centra means that entity, which includes both the Distribution System and Pipeline assets. Therefore there is no definitional impediment to construing references to Centra in Part 2, post combination, as including the Pipeline, to the extent that Part 4 applies the terms of Part 2 to the single entity.

i) The "customer" argument

29 BC Hydro contends that "customer" in Part 2 is limited to Distribution System customers who pay Centra a bundled rate for transportation and the commodity cost of gas delivered, as opposed to shippers who are charged a toll for transportation only and purchase the gas separately from gas producers. The Commission, in its reasons quoted above, rejected that submission, noting that if natural gas service were unbundled on the Centra system, then Distribution System customers who chose to purchase gas from a third-party shipper would be able to avoid Deficiency Account recovery, in contrast to customers who continue to purchase gas from Centra. The Commission further noted that the use of "customer" for which Centra contends is consistent with its use in s. 2.10(j) of the Special Direction - the Special Direction does not define "customer" and generically the term is capable of including end users of transportation service as well as purchasers of both transportation service and the gas commodity from Centra. BC Hydro refers to the definition of "Shipper" as any person who enters into a "Service Agreement" - defined as a gas transportation service agreement with Pacific Coast Energy Corporation, as set out in the general conditions for gas transportation service approved and attached as a schedule by s. 3.5 of the Special Direction - as applicable to all transportation service agreements. BC Hydro also relies on the division of customers in s. 2.2 of the Special Direction into "Pioneer Customers" and "New Customers".

30 The Commission rejected BC Hydro's submission that shippers under transportation service agreements could not be customers for the reasons quoted above. Centra supported the Commission's conclusion by noting that the distinction between Pioneer and New Customers, with one limited exception, had no application after 31 December 2002, the effective commencement date for the single entity. The distinction was not intended to be exclusive because it referred to other customers who were neither Pioneer nor New Customers. The reference to persons entering into transportation service agreements as "shippers", for the purposes of the terms and conditions of those transportation agreements, does not preclude them from being customers generically; they are customers in the ordinary sense of the word as they purchase a service from Centra. "Shipper" is not a defined term in the Special Direction other than its reference to the transportation service agreements' general terms and conditions, and Centra contended that the absence of any restrictive definition to limit the generic meaning of customer supports the conclusion that shippers were included within customers of the single entity for the purposes of s. 2.10(j).

ii) The section 3.7 argument

31 BC Hydro contended that its position was supported by s. 3.7 of the Special Direction which makes reference to the Deficiency Account. It states:

> 3.7 Rates and Transportation Tolls Otherwise Applicable to the Joint Venture, Squamish Gas, and Centra
>
> For the purpose of fixing transportation tolls to be charged by [Pacific Coast Energy Corporation] other than as directed in Sections 3.2, 3.3 and 3.4, the BCUC shall, subject to the exception set out below, apply such regulatory principles that are generally applied by the BCUC from time to time to gas utilities operating within British Columbia. In no event whatsoever shall the rates or transportation tolls that are

> approved for the Joint Venture or Squamish Gas pursuant to this Section 3.7 include any amount for the recovery in whole or in part, directly or indirectly, of dividends or interest as described in paragraph 2.10(h), or for the amortization, reduction, or recovery of the Revenue Deficiency Deferral Account balance.

This provision clearly excludes the tolls of the Joint Venture (and Squamish Gas) from any contribution to revenue deficiency recovery. BC Hydro contended that the intent of s. 3.7 was to exclude all persons with transportation service contracts from contributing to the deficiency recovery and the specific reference to the Joint Venture and Squamish Gas was only for greater certainty, out of an abundance of caution. BC Hydro notes that the Joint Venture and Squamish Gas were the only parties with transportation service contracts when the Special Direction was issued.

32 BC Hydro's argument contains an implicit admission that without the specific reference, s. 3.7 is otherwise potentially ambiguous. Centra argued that s. 3.7 makes specific reference to exemptions for the Joint Venture and Squamish Gas and is not a general exemption for those with transportation service agreements. Centra relied on the implied exclusion argument that:

> Whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded: R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 186; see also 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, 179 D.L.R. (4th) 577, 69 B.C.L.R. (3d) 201 [paragraph] 65.

Centra contended that s. 3.7 supports the Commission's conclusion that persons with transportation service agreements other than those specifically exempted were not intended to be excluded from revenue deficiency recovery.

iii) The revenue deficiency source argument

33 BC Hydro argued that the revenue deficiencies resulted entirely from revenue deficits on the Distribution System and that the Pipeline transportation users were paying their full cost of service on the Pipeline and not contributing to the deficiency. The Commission was unable to determine that the entire revenue deficiency arose solely as a result of costs exceeding revenues on the Distribution System and it concluded that: "The Pipeline would not have been viable without the combined loads and the government support provided to deliver gas to Vancouver Island" and "the transmission facilities would not have been constructed if the expectation had been to only serve large volume customers taking transmission service." The Pipeline and the Distribution System were interrelated from the inception of the project. The government's interest is reflected in the $120M contributed under the Vancouver Island Natural Gas Pipeline Agreement, conditional on the creation of the merger of the Pipeline and the Distribution System under that agreement, and supports the government's policy interest in combining the two for the economic viability of the system as a whole.

34 The Commission recognized that the availability of fuel oil and electricity as competitive alternative fuels for residential and commercial customers limited the rates for natural gas to those customers. The Commission established a "soft cap" mechanism which limited rates to those customers to the maximum that the residential and commercial customers could be expected to pay given the price of alternative fuels. BC Hydro and the Joint Venture did not challenge the rationale or methodology of the soft cap mechanism before the Commission, and a BC Hydro witness agreed that setting rates for residential and commercial customers relative to the price of oil and electricity was not unreasonable. The rates set under the soft cap mechanism were projected to amortize only a portion of the Deficiency Account by 2011.

35 The ability of Centra to earn a fair return on its utility rate base is an imperative of the Special Direction and the regulatory scheme. General regulatory principles require the Commission to grant a utility the

opportunity to earn a fair return: Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission) (1992), 66 B.C.L.R. (2d) 1, 12 B.C.A.C. 1 [paragraph] 57. The "soft cap" on rates paid by Distribution System customers because of the competition from alternative energy sources imposed a pragmatic limit on the revenue that could be obtained from those customers. The rates for the Joint Venture and Squamish Gas were fixed by formulas in their transportation service agreements and confirmed by the Special Direction. While the rates set for Distribution System customers are projected to make some contribution to the amortization of the accumulated revenue deficiency, they will still leave a substantial portion outstanding in 2011, when the royalty credits will end, with a corresponding increase in the cost of service. The alternatives facing the Commission were to set rates for BC Hydro that provided for a contribution to the amortization or defer substantial recovery to an uncertain future after 2011. The submission of Mr. Quail, on behalf of the Consumers' Association of Canada (BC Branch) and other residential consumer groups, emphasized the continued financial vulnerability of the utility if amortization of the Deficiency Account were deferred to an indefinite, uncertain future. The Special Direction instructs the Commission to set rates that will amortize the Deficiency Account balance "over the shortest period reasonably possible" (s. 2.10(j)). The legislative scheme, the Special Direction and economic exigencies of the single entity utility all look to BC Hydro (and any new transportation service contracts) to contribute substantially to the amortization of the accumulated deficiency.

36 I am satisfied that the Commission was correct in concluding that the term "customer" in Part 2 of the Special Direction included transmission shippers following the establishment of the Single Entity and the coming into effect of the Part 4 provisions. I agree with Centra's submission that the meaning of "customers" of the single entity extends to include transportation shippers and 2.10(j) applies to BC Hydro's rates. I think that the limited exemption of the Joint Venture and Squamish Gas in s. 3.7 reinforces the conclusion that other transportation service contracts were not exempted. In my view, there is nothing in the Special Direction or otherwise in the regulatory scheme that precluded the Commission from setting rates for BC Hydro that included amortization of the Deficiency Account balance. Accordingly, I would reject BC Hydro's first ground of appeal.

BC Hydro's Second Issue

37 BC Hydro submits that the Commission erred in establishing tolls for BC Hydro at a revenue to cost ratio of 1.25, that is forecast revenues from BC Hydro's tolls that exceed its allocated cost of service by 25 per cent. BC Hydro's statement of this issue acknowledges that the 1.25 ratio is linked to BC Hydro's contribution to the amortization of the Deficiency Account. In that respect, the second issue is a variant of BC Hydro's first issue. I have concluded above that a contribution to amortization is within the Commission's rate setting mandate under the Special Direction. The only additional element posed by the second issue is whether a 1.25 revenue to cost ratio is an erroneous exercise of its mandate. The legislative provisions quoted above state that whether a rate is unjust or unreasonable is a question of fact and that the Commission's determination of a question of fact is binding and conclusive. The ambit of judicial review is therefore very limited.

38 Centra is entitled to rates designed to recover the revenue requirement approved by the Commission. The maximum revenues that can be recovered from the distribution customers are constrained by the competitive alternatives reflected in the soft cap mechanism. The rates for the Joint Venture and Squamish Gas are fixed by formulas in their transportation service contracts. The revenue requirement allocated to BC Hydro's tolls, as the only other user of the system, is the residual amount of the revenue requirement remaining after the revenues produced from the distribution service rates and the fixed transportation contract formulas have been determined. It simply reflects the tolls BC Hydro is required to pay if Centra is to have a reasonable opportunity to recover its revenue requirement, including a contribution to the revenue deficiency, the determination of which, following the resolution of the first issue, is within the Commission's mandate. The 1.25 ratio is within the range of revenue to cost ratios of rates for particular classes of Distribution System customers, which vary from 0.84 to 1.42.

39 As I understand BC Hydro's submission, it does not challenge the rate as reviewable under the Commission's general mandate. Rather it contended that the Special Direction prevails over the statutory provisions otherwise applicable and the 1.25 ratio conflicts with the Special Direction. BC Hydro argued that s.

3.1 of the Special Direction requires that its cost of service be determined on a separate rate base for the Pipeline as provided in that section. However, s. 3.1 is expressly stated to be "Subject to Part 4 of this Special Direction". Part 4 includes, in s. 4.2, a direction to determine a single rate base, capital structure and return on equity for the Single Entity. Section 4.1 requires that the Commission determine annual revenue deficiencies and the balance of the Deficiency Account for the single entity. In my view, Part 4 of the Special Direction was clearly intended to combine the rate base of the Pipeline and the Distribution System once the assets were merged in the single entity, and the Deficiency Account is explicitly stated to be one account for the single entity. In my opinion, the Special Direction did not preclude the Commission from setting tolls for BC Hydro that provided for a contribution to amortization of the Deficiency Account that resulted in a 1.25 ratio. The rate set was not otherwise outside the Commission's rate-setting mandate in the exercise of its general jurisdiction.

40 Accordingly, I do not think that there is merit in BC Hydro's second ground of appeal.

The Joint Venture Appeal

41 The Joint Venture is not directly affected by the Commission's order because its tolls are determined independently by formulas in the Joint Venture Transportation Service Agreement dated 14 December 1995 which the Commission was directed to approve under s. 3.2 of the Special Direction. The Joint Venture may elect to terminate the Joint Venture Agreement on one year's notice and move to tolls otherwise determined by the Commission, which presumably would be comparable to tolls set by the Commission for BC Hydro. The Joint Venture thus has a prospective interest in lower tolls for BC Hydro and therefore supported BC Hydro's appeal. It also raised other issues arising from the Special Direction and the terms of the Joint Venture Agreement.

42 The Joint Venture submitted that the Commission erred in failing to distinguish between the Pipeline and the Distribution System, as required by s. 4.5 of the Special Direction and s. 60(1)(c) of the Utilities Commission Act. The Joint Venture also contended that the Commission has abandoned cost-based rate design principles required by article 11.01(b) of the Joint Venture Agreement and that the tolls set for BC Hydro are discriminatory within the meaning of s. 59(1)(a) of the Utilities Commission Act and contrary to article 11.01(c) of the Joint Venture Agreement.

i) The cost-based rates issue

43 The Joint Venture contended that Centra and the Commission failed to comply with the separate records requirement of s. 4.5 of the Special Direction as follows:

> 4.5 Separate Records
>
> The BCUC shall require that the Single Entity keep separate records relating to the Pipeline and the Centra Distribution System sufficient at all times to differentiate, where appropriate, between all activities related to the construction and operation of the Pipeline and the Centra Distribution System.

Centra's position is that it kept separate records for the pipeline and the distribution system in compliance with s. 4.5 of the Special Direction and the adequacy of those records was a matter that the Commission settled in favour of Centra. In my view, that was a matter within its specialized expertise and there was no reviewable error.

(ii) The Pipeline/Distribution System Distinction

44 The Joint Venture's second issue is founded on article 11.01(b) of the Joint Venture Agreement that reads:

> 11.01 Covenants. Pacific Coast covenants with and in favour of Shipper that Pacific Coast:
>
> . . .
>
> (b) shall, in respect of the tolls to be charged to any new Third Party Shipper of gas through the Pacific Coast System, apply to the BCUC for approval of tolls which are determined in accordance with the full fixed-variable cost of service methodology and which, in the case of the mainline sections of the Pacific Coast System, are determined on a rolled-in basis as opposed to an incremental basis; and . . .

Article 11.01(b) is a covenant of Pacific Coast Energy, later Centra, which the Joint Venture contended was a condition of Centra's application for rates that the Commission was obliged to respect. The Joint Venture submitted that BC Hydro was a "Third Party Shipper" within article 11.01(b) and both Centra's application and the Commission's decision were not in accordance with "the full fixed-variable cost of service methodology" required.

45 The Joint Venture's submission is in part a restatement of the customer/shipper distinction advanced by BC Hydro. In my view, it fails for the same reason, namely that "customer" is not a defined term in the Special Direction. Its meaning can extend to include "shippers" on the pipeline for the purposes of s. 2.10(j) with respect to the Deficiency Account because of the application of Part 4 of the Special Direction to the single entity. The amortization of the Deficiency Account consequently becomes a part of the cost of service for Distribution System customers and Pipeline shippers (apart from the Joint Venture and Squamish Gas specifically exempted by s. 3.7) and therefore included in any "full fixed-variable cost of service methodology". According to the Commission's reasons, quoted in paragraph 16 above, the inclusion of revenue deficiency amortization in the cost of service is consistent with regulatory principles.

46 In my view, determination of cost of service and allocation of that cost among users of the utility services for rate-making purchases is at the heart of the Commission's specialized expertise. Curial deference to that expertise is underlined by the statutory provisions that declare just and reasonable rates to be factual questions on which the Commission's determination is conclusive.

47 Centra submitted in its factum that:

> A full fixed-variable cost of service methodology is one in which the fixed costs are allocated by way of a demand determinant and the variable costs are allocated by way of a commodity or variable determinant. Centra's Rate Design Application as it related to the firm transportation rate for service on the transmission facilities conformed with a full fixed-variable cost of service methodology.

The Commission rejected the Joint Venture's argument that Centra's application and the Commission's approach breached article 11.01(b). The Commission concluded:

> The Joint Venture's concerns about potential breach[es] of Section 11.01(b) seem to hinge on collection of [Revenue Deficiency Deferral Account] in the rates of other [High Pressure Transmission System] shippers. That has been dealt with elsewhere in the Special Direction.

In my view, the Commission recognized that the rate-making treatment of the Deficiency Account was the real complaint and, as concluded above, its treatment of that account accorded with its Special Direction mandate. To the extent that the Special Direction departed from general regulatory principles otherwise applicable, the Special Direction governed. The Commission concluded that the Special Direction and general regulatory principles were not inconsistent and there was no breach of article 11.01(b). Once the conclusion is reached that

the Commission was correct in interpreting its Special Direction mandate, the Commission's determination was within its rate-making jurisdiction and does not contain any reviewable error. In my view, there is no basis for this Court to disturb the order of the Commission on this ground of appeal.

iii) Discrimination

48 The Joint Venture also contends that the Commission has set discriminatory rates contrary to 11.01(c) of the Joint Venture Agreement that reads:

> (c) Pacific Coast will operate the Pacific Coast System so as to provide Firm Transportation Service and Interruptible Transportation Service under the General Terms and Conditions for Gas Transportation Service on a non-discriminatory basis in respect of gas to be transported and delivered to Shipper, Third Party Shippers and to the Centra Distribution System.

49 The Commission determined that the transmission tolls set for BC Hydro were non-discriminatory. The tolls for the Joint Venture are negotiated charges defined by the Joint Venture Agreement and confirmed by the Special Direction. BC Hydro's tolls inevitably were going to be different unless the Commission simply imposed the Joint Venture Agreement formulas, which was not advocated by the Joint Venture or any other party. Indeed, imposing formula rates would defeat the Joint Venture's objective of rates for BC Hydro that were lower than those rates. In my opinion, there was no error in the Commission's conclusion that the tolls set for BC Hydro were non-discriminatory.

50 The Joint Venture also raises a difference between curtailment rights applicable to the Joint Venture and to other industrial customers connected to the Distribution System. The curtailment rights with respect to the Joint Venture are negotiated terms agreed in a peaking gas management agreement between the parties and reflect the fact that the Joint Venture pulp and paper mills each have alternative heavy fuel oil burning capability. It was not unreasonable for the Commission to conclude that it was not discrimination to accept different curtailment rights for other customers who may not have had similar standby capability.

51 I am satisfied that none of the issues raised by the Joint Venture involve a reviewable error by the Commission.

Conclusion

52 The economic viability of a utility, and service to its customers, depends upon its ability to meet its revenue requirement through tolls set by its regulator for its customers. No party to these appeals has questioned the revenue requirement determined by the Commission for Centra. Recovery of the Deficiency Account balance is part of the revenue requirement as mandated by the Special Direction. The share of Centra's revenue requirement that can be recovered from Distribution System customers is limited by competition from alternative fuels, reflected in the soft cap mechanism which all parties accept is a reasonable response to the competitive exigencies. The Joint Venture tolls are fixed by the Joint Venture Agreement and the Special Direction expressly excludes recovery of any part of the revenue deficiency from the Joint Venture. The only remaining source of customer revenue available for contribution to amortization of the revenue deficiency is BC Hydro. The Commission was faced with the choice of setting tolls for BC Hydro that included contribution to the amortization or deferring amortization into an indefinite future, likely after 2011 when Centra will lose the contribution to revenue from gas royalty credits, and its ability to meet its revenue requirement may become more precarious. The Special Direction instructed the Commission to set rates that would amortize the accumulated deficiency "over the shortest period reasonably possible". The Special Direction does not preclude the Commission from including a contribution to amortization in BC Hydro's tolls. In light of the other constraints on the sources of revenue available to meet the revenue requirement, setting tolls for BC Hydro that includes a contribution to amortization simply recognizes the economic realities of the Centra utility. In my opinion, it was not an unreasonable determination by the Commission in the exercise of its jurisdiction and there was no reviewable error in the Commission's order.

53 I would dismiss both appeals.

MACKENZIE J.A.
LAMBERT J.A.:-- I agree.
OPPAL J.A.:-- I agree.