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November 6, 2019

Mr. Patrick Wruck
Commission Secretary and Manager
Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

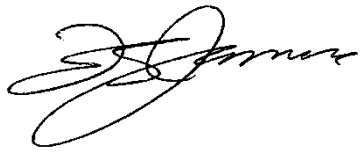
Dear Mr. Wruck:

RE: British Columbia Utilities Commission (BCUC or Commission)
British Columbia Hydro and Power Authority (BC Hydro)
City of Coquitlam Application for Reconsideration and Variance of Order G-80-19

BC Hydro writes to provide its Final Argument in accordance with the regulatory timetable established by Commission Order No. G-234-19.

For further information, please contact Geoff Higgins at 604-623-4121 or by email at bchydroregulatorygroup@bchydro.com.

Yours sincerely,



Fred James
Chief Regulatory Officer

st/tl

Enclosure

BC Hydro
Power smart

City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Counsel's Final Written Submission
on behalf of
British Columbia Hydro and Power Authority

November 6, 2019

Table of Contents

1 Introduction

BC Hydro submits this final argument on the City of Coquitlam's ("**City**") request that the British Columbia Utilities Commission ("**BCUC**") reconsider and vary BCUC Order No. G-80-19 dated April 15, 2019.

BC Hydro's final argument focuses on the BCUC's jurisdiction, particularly regarding decommissioned public utility equipment. In summary, BC Hydro submits that:

(i) Section 121 of the *Utilities Commission Act*[1] ("**UCA**") applies broadly to any power conferred on the BCUC, not just authorizations issued under section 46 of the UCA;

(ii) The BCUC has jurisdiction under sections 45 and 46 of the UCA to order that equipment be decommissioned in place. This power is a necessary and incidental aspect of the jurisdiction to regulate utility plant and is consistent with the overall object and scheme of the UCA. If these sections are interpreted to exclude this power, then the BCUC would lack an essential element of its ability to regulate public utility plant - i.e., the end of its life. Substantial and unnecessary costs may be borne by ratepayers if, for example, a public utility is required to remove equipment once it is no longer used for utility service, even though it does not interfere with any other uses of the land where it is located;

(iii) Section 32 of the UCA applies to resolve conflicts between a public utility and a municipality related to decommissioned distribution equipment. That section is engaged when a public utility has the right to enter a municipality to place its distribution equipment, and it continues to be engaged as long as the distribution equipment is on the municipal lands and the BCUC has not ordered its removal; and

[1] RSBC 1996, c 473.

(iv) Generally, an order specifying the allocation of costs for the removal of equipment should be made at the time of a request to remove the equipment. Any such order should be based on the circumstances at that time, including the reason for why the equipment must be removed and whether there are any alternatives.

BC Hydro addresses each of these points in more detail below.

2 Background

On October 16, 2015, the BCUC issued Order No. C-11-15 granting a Certificate of Public Convenience and Necessity ("**CPCN**") to FortisBC Energy Inc. ("**FEI**") for the Lower Mainland Intermediate Pressure System Upgrade Projects ("**LMIPSU Project**") pursuant to sections 45 and 46 of the UCA. A component of the LMIPSU Project is a new Nominal Pipe Size 30 Intermediate Pressure gas line ("**NPS 30 Pipeline**"). The NPS 30 Pipeline will replace a Nominal Pipe Size 20 Intermediate Pressure gas line ("**NPS 20 Pipeline**") that was granted a CPCN in 1955 and is further authorized by section 45(2) of the UCA, which provides that a public utility operating a plant or system on September 11, 1980 is deemed to have received a CPCN.

The BCUC issued Order No. G-80-19 setting terms for FEI's use of lands for the Coquitlam segment of the LMIPSU Project. Paragraphs 1 and 2 of Order No. G-80-19 state:

> NOW THEREFORE the BCUC orders as follows:
>
> 1. Pursuant to section 121 of the UCA, it is affirmed that FEI is authorized to abandon the decommissioned NPS 20 Pipeline in place.
>
> 2. Pursuant to section 32 of the UCA, upon request by the City in circumstances where it interferes with municipal infrastructure, the costs of removal of any portion of the

> decommissioned NPS 20 Pipeline shall be shared equally between FEI and the City.

In its reconsideration application, the City asks the BCUC to rescind those two paragraphs of Order No. G-80-19 in their entirety.

3 Modern principle of statutory interpretation

The City argues, among other things, that the BCUC did not have jurisdiction to make the orders referred to above, because the BCUC does not have jurisdiction under sections 45 or 46 of the UCA to order equipment be decommissioned in place, and that section 121 of the UCA is therefore not applicable. The City also argues that section 32 of the UCA does not apply to decommissioned equipment.

BC Hydro submits that the City's interpretations of sections 32, 45, 46 and 121 of the UCA are too narrow and are not in accordance with the modern principle of statutory interpretation. The City's interpretations would impair the BCUC's main function of rate setting and utility plant regulation. Specifically, it would impair the BCUC's ability to consider the public interest when a public utility decommissions equipment and removes it from utility service.

The Supreme Court of Canada ("**SCC**") has described the modern principle of statutory interpretation as follows: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[2]

In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* ("***ATCO***"), the SCC considered similar public utility legislation in Alberta and described how the broadly worded powers must be grounded in the main function of the Board:[3]

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[2] Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 at para 21 (SCC), quoting Elmer Driedger, Construction of Statutes (2nd ed. 1983) at 87; Book of Authorities, Tab 1.

[3] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 SCR 140, 2006 SCC 4(CanLII) at para 7; Book of Authorities, Tab 2.

> ...The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

Therefore, sections 32, 45, 46 and 121 must be read harmoniously with the scheme and objective of the UCA. The UCA provides the BCUC broad jurisdiction to determine whether dedicating property to public utility service is in the public interest, as well as broad jurisdiction to determine whether removing property from utility service is in the public interest.

4 Section 121 of the UCA applies broadly

BC Hydro agrees with the City that section 121 of the UCA does not, itself, confer jurisdiction or powers on the BCUC; rather, it prescribes how certain potential conflicts of laws are resolved.

Section 121 of the UCA states, in part:

> Nothing in or done under the *Community Charter* or the *Local Government Act*
>
> (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
>
> …
>
> (2) In this section, "authorization" means
>
> (a) a certificate of public convenience and necessity issued under section 46
>
> …

For the reasons discussed below, and contrary to what the City argues, the BCUC has jurisdiction under sections 45 and 46 of the UCA to order that equipment be decommissioned in place. Accordingly, nothing in or done under the *Community Charter* or the *Local Government Act* can supersede or impair a condition imposed on, or a term attached to, a CPCN to decommission equipment in place.

However, section 121 applies to all powers conferred on the BCUC by the UCA, not just the powers conferred under sections 45 or 46. The first part of section 121(1)(a) states that: "Nothing in or done under the *Community Charter* or the *Local Government Act* … supersedes or impairs a power conferred on the commission … [emphasis added]."

The phrase "a power conferred on the commission" is broad and it is the core of section 121. That phrase is not limited by the subsequent reference to a CPCN issued under section 46. In fact, BC Hydro submits that the only reason why the Legislature considered it necessary to refer to section 46 is to make clear that section 121 also applies to the exemptions referred to under subsections 121(2)(b) and (c).

The BCUC has discussed section 121 and how it works together with section 10(1) of the *Community Charter*, which expressly states that a municipal bylaw has no effect if it is inconsistent with a Provincial enactment. The BCUC held that: "both the Charter and the UCA expressly recognize that where an action taken by a municipality is contrary or in conflict with the action taken by the BCUC pursuant to the UCA then the lawful actions of the BCUC prevail."[4]

[4] SSL-Sustainable Services Ltd. Status as a Public Utility under the Utilities Commission Act, BCUC Order No. G-104-18, Reasons for Decision at page 9; Book of Authorities, Tab 3.

5 BCUC's jurisdiction to order equipment be decommissioned in place

5.1.1 BCUC's jurisdiction under sections 45 and 46 of the UCA

The City argues that the BCUC does not have jurisdiction under section 46 of the UCA to order that equipment be decommissioned in place if it is not used and useful for the utility. The City appears to interpret the words "construct", "operate" and "maintain" in sections 45 and 46 to somehow limit the BCUC's jurisdiction regarding the decommissioning of equipment,[5] which is an overly narrow interpretation.

Sections 45 and 46 discuss the construction and operation of a public utility plant or system, and section 41 discusses the ceasing of operations. Once a public utility plant or system is constructed, it remains in place subject to an order by the BCUC under sections 45 or 46 of the UCA. Those sections must be interpreted broadly so the BCUC has the necessary power to regulate all aspects of the utility plant life cycle to protect the public interest.

Subsection 46(3) gives the BCUC the power to attach terms to a CPCN, including conditions about the CPCN's duration, that, in the BCUC's judgment, are required by the public convenience or necessity. Subsection 45(9) allows the BCUC to impose conditions about the construction, equipment, maintenance, rates or service in relation to a CPCN, as the public convenience and interest reasonably require.

An important aspect of any project for which a CPCN is required is how the public utility intends to decommission its equipment once it is no longer needed for utility service. BC Hydro submits that subsections 45(9) and 46(3) of the UCA give the BCUC the power to impose conditions on, and attach terms to, a CPCN regarding decommissioning if, in the BCUC's judgment, such conditions or terms are required by the public convenience or necessity.

[5] City Argument at paras 21 to 23.

For example, in some cases, it may be in the public interest for the BCUC to impose a condition on, or attach a term to, a CPCN ordering that equipment be decommissioned in place. Doing so may avoid adverse economic, environmental and social impacts. In fact, the BCUC discussed such factors regarding the NPS 20 Pipeline in its Phase 2 Reasons for Decision for Order G-80-19 ("**Phase 2 Reasons**").[6]

This interpretation is consistent with the BCUC's principal function under the UCA, which is the determination of rates and protecting the integrity and dependability of the supply system.[7] Substantial and unnecessary costs may be borne by ratepayers if a public utility is required to remove equipment once it is no longer used for utility service, even though the equipment does not interfere with any other uses of the land where it is located. In the Phase 2 Reasons, the BCUC held that its authorization to decommission the NPS 20 Pipeline in place goes to the core of the BCUC's role as a public utility regulator, because it had significant economic implications for ratepayers, as well as social and environmental implications.[8]

This interpretation is also consistent with the scheme of public utility regulation under the UCA. The BCUC has jurisdiction under section 41 of the UCA to grant permission to a public utility to cease operations for which a CPCN is necessary. In deciding whether to grant permission under section 41, the BCUC considers whether it would be in the public interest.

In its decision regarding BC Hydro's Salmon River Diversion section 41 application, the Commission held that:[9]

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6 See section 2.4.1, pages 15 and 16; Book of Authorities, Tab 4.

7 FortisBC Energy Inc. ~ Application for Reconsideration to Exclude Employee Information from 2015 Data BCUC Order No. G-161-15, BCUC Order No. G-20-19, Reasons for Decision dated January 30, 2019 at page 10; Book of Authorities, Tab 5.

8 See section 2.4.1, pages 15 and 16; Book of Authorities, Tab 4.

9 British Columbia Hydro and Power Authority Salmon River Diversion Ceasing of Operations, BCUC Decision and Order No. G-96-17 dated June 16, 2017 at page 4; Book of Authorities, Tab 6.

> …factors similar to a CPCN application should be considered and weighed in reviewing a section 41 application. It is the Panel's view that in proceedings in which project alternatives have very similar economics, environmental and social factors should be considered and weighed. The Panel is of the view the specific factors and relative weighting depend on the unique circumstances of each application.

The economic, environmental and social factors that are to be considered and weighed in the context of a section 41 application may favour decommissioning equipment in place rather than removing it. For example, as discussed above, decommissioning equipment in place may avoid adverse economic impacts to ratepayers and it may also avoid adverse environmental and social impacts. If the BCUC does not have jurisdiction to order that equipment be decommissioned in place, then its ability to make decisions in the public interest under section 41 of the UCA would be unreasonably constrained. BC Hydro submits that the UCA must be interpreted to give the BCUC the powers needed to accomplish its main function of rate setting (this is discussed further in the following section about the doctrine of necessary implication).

Section 23 and subsection 46(7) are further examples of BC Hydro's interpretation being consistent with the regulatory scheme of the UCA. Section 23 gives the BCUC broad jurisdiction regarding the general supervision of public utilities. It states:

> The commission has general supervision of all public utilities and may make orders about
>
> (a) equipment,
>
> …
>
> (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.

Subsection 46(7) allows the BCUC to amend a CPCN previously issued. A public utility and the BCUC may not know all of the public interest considerations regarding the decommissioning of equipment at the time a CPCN is applied for. That is why the BCUC may amend a CPCN subsequently under subsection 46(7) to attach terms regarding decommissioning if, in the BCUC's judgment, they are required by the public convenience or necessity.

5.1.2 BCUC's jurisdiction by necessary implication

Even if the BCUC finds that neither section 45 nor 46 explicitly give it jurisdiction to order that equipment be decommissioned in place, BC Hydro submits that the BCUC has such jurisdiction by necessary implication. In *ATCO*, the SCC applied the doctrine of jurisdiction by necessary implication which it described as follows:[10]

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

In a different reconsideration decision issued earlier this year, the BCUC cited *ATCO* in holding that: "…the powers provided by the UCA include not only the express grants of power but also those required which are practically necessary to

[10] ATCO at para 50, quoting Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), 1989 CanLII 67 (SCC), [1989] 1 SCR 1722 at 1756; Book of Authorities, Tab 2.

accomplish the BCUC's main function of rate setting and maintaining the integrity of the system."[11]

As explained above, not being able to order, in any circumstances, a public utility to decommission its equipment in place would restrict the BCUC's ability to regulate rates and utility plant. This restriction could lead to suboptimal outcomes related to the end of life treatment for decommissioned utility plant and may lead to unnecessarily higher rates for ratepayers.

5.1.3 BCUC's jurisdiction applied to the NPS 20 Pipeline

In its Reasons for Decision for Order No. G-80-19, the BCUC discussed the NPS 20 Pipeline that FEI intends to decommission in place as follows:[12]

> The BCUC, in its 2015 CPCN decision [Decision for Order C-11-15], clearly approved FEI's plans to abandon in place the decommissioned NPS 20 Pipeline and stated in part, "…The steps FEI plans to take to minimize environmental and social impacts are appropriate as they are both cost effective and result in a minimum of disruption."

The City argues that "the BCUC did not pursuant to Order No. C-11-15 grant to FEI a CPCN under section 46 of the UCA for abandonment in place of FEI's decommissioned NPS 20 pipes."[13]

However, as discussed above, once a public utility plant or system is constructed, it remains in place subject to an order by the BCUC under sections 45 or 46 of the UCA. In this case, the BCUC explicitly approved FEI's plans to decommission the NPS 20 Pipeline in place pursuant to sections 45 and 46 of the UCA. The BCUC's

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[11] FortisBC Energy Inc. ~ Application for Reconsideration to Exclude Employee Information from 2015 Data BCUC Order No. G-161-15, BCUC Order NO. G-20-19, Reasons for Decision dated January 30, 2019 at page 10; Book of Authorities, Tab 5.

[12] FortisBC Energy Inc. ~ Application for Use of Lands under sections 32 and 33 of the Utilities Commission Act in the City of Coquitlam for the Lower Mainland Intermediate Pressure System Upgrade Projects, BCUC Order No. G-80-19, Phase 2 Reasons for Decision dated April 15, 2019 at page 15; Book of Authorities, Tab 4.

[13] City Argument at para 26.

reasons for doing so – i.e., the minimization of environmental and social impacts, and cost effectiveness – are consistent with the object and scheme of the UCA.

This City also argues that if the BCUC has jurisdiction to order that equipment be decommissioned in place under section 46, such an order would not grant to FEI the necessary property rights in Como Lake Avenue to decommission in place the NPS 20 Pipeline without the City's agreement. BC Hydro agrees with the City in that regard, but notes that, if an agreement cannot be reached, then section 32 of the UCA would apply. As discussed below, BC Hydro submits that section 32 applies to equipment that is decommissioned in place, such as the NPS 20 Pipeline.

6 Section 32 of the UCA applies to decommissioned equipment

The City argues that section 32 does not apply in this case, because FEI is not seeking to "place" the NPS 20 Pipeline in Como Lake Avenue – it has been there for over 60 years. The City also relies on the definition of "distribution equipment" in the UCA – "posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers" – to argue that the equipment must currently be in utility service for section 32 to apply.

Again, the City's interpretation is too narrow. Section 32 of the UCA states:

> 32(1) This section applies if a public utility
>
> (a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and
>
> (b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.
>
> (2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of

> the street or other place by the public utility for that purpose and specify the manner and terms of use.

The BCUC has described the purpose and broad nature of its jurisdiction under section 32 in a decision earlier this year:[14]

> The Panel finds the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is to safeguard the public interest.
>
> …
>
> The BCUC, in considering the public interest test under section 32 of the UCA, must decide how to balance the public interest in a public utility's authorization to use and occupy municipal public spaces pursuant to a CPCN or otherwise, with the competing interests of the municipality and its inhabitants in order to achieve a fair and balanced agreement.
>
> FEI submits that balancing these interests is best achieved through successful good faith negotiations by imposing commercially reasonable terms. However, the Panel does not agree that the public interest test is met by imposing commercially reasonable terms. That approach to the test is too narrow and limiting. It fails to consider the gravity and scope of the BCUC's jurisdiction under section 32 of the UCA to facilitate the imposition of a public utility's service in municipal public spaces… [emphasis added].

Subsection 32(1) describes the conditions that must be met for the BCUC to have jurisdiction under section 32. The BCUC does not then lose its jurisdiction under section 32 as soon as the applicable distribution equipment touches the ground or if it ceases to be in utility service, as the City suggests. Rather, the BCUC's jurisdiction under section 32 is engaged once the conditions in subsection 32(1) are met, and the BCUC then has such jurisdiction if there is ever a disagreement between the public utility and municipality about the use of the municipal lands, as long as the public utility's equipment is on those lands.

[14] FortisBC Energy Inc. and City of Surrey Applications for Approval of Terms for an Operating Agreement, BCUC Decision and Order No. G-18-19 dated January 29, 2019 at page 13; Book of Authorities, Tab 7.

In other words, a public utility does not lose its right to enter a municipality to place its distribution equipment until the BCUC makes an order taking away that right. For example, if a public utility is granted a CPCN to construct a system in a municipality, then it has a right to enter that municipality to place its distribution equipment and that right continues until the BCUC orders that the equipment be removed.

This interpretation is consistent with the object and scheme of the UCA, including the legal test applied by the BCUC in exercising its jurisdiction under section 32 - i.e., safeguarding the public interest. If the BCUC loses its jurisdiction under section 32 as soon as distribution equipment touches the ground or as soon as it ceases to be in utility service, then the public interest may be at risk, because economic (e.g., impacts on ratepayers), environmental and social impacts may not be considered if the public utility is required to remove the equipment by a municipality.

7 Allocation of costs for the removal of equipment

The City argues it was not reasonable for the BCUC to specify the allocation of costs for the removal of the NPS 20 Pipeline, at least partly because the determination of that allocation was not procedurally fair. BC Hydro does not take a position on whether, in this specific case, there were procedural fairness issues regarding the BCUC's order to specify the allocation of costs for the removal of the NPS 20 Pipeline.

However, BC Hydro submits that, generally, such an order specifying the allocation of costs for the removal of equipment should be made at the time of a request to remove the equipment. Any such order should depend on the circumstances at that time, such as the reason for why the equipment must be removed and whether there are any alternatives.

8 Conclusion

For the reasons discussed above, BC Hydro respectfully submits that the City's interpretations of sections 32, 45, 46 and 121 of the UCA are too narrow. The City's interpretations would impair the BCUC's main function of rate setting, and it would also impair the BCUC's ability to fully consider the public interest when a public utility decommissions equipment and removes it from utility service.

Sections 32, 45, 46 and 121 of the UCA must be interpreted with the modern principle of statutory interpretation, which is to say that they must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the UCA, the object of the UCA, and the intention of the Legislature. When interpreted that way, those sections give the BCUC clear authority to make orders about the decommissioning equipment, including decommissioning it in place, if it is in the public interest, as well as to specify the manner and terms of use of municipal lands for that purpose absent an agreement between the public utility and municipality.

ALL OF WHICH IS RESPECTFULLY SUBMITTED NOVEMBER 6, 2019

Per: "<Original signed by>"

Brandon Mewhort, Sr. Solicitor & Counsel,
British Columbia Hydro and Power Authority

BC Hydro
Power smart

City of Coquitlam Application for Reconsideration and Variance of Order G-80-19

BC HYDRO FINAL ARGUMENT
BOOK OF AUTHORITIES

November 6, 2019

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AUTHORITIES

1 *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) (excerpts)
2 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII) (excerpts)
3 BCUC Order No. G-104-18, Reasons for Decision (excerpts)
4 BCUC Order No. G-80-19, Reasons for Decision (excerpts)
5 BCUC Order No. G-20-19, Reasons for Decision (excerpts)
6 BCUC Decision and Order No. G-96-17 (excerpts)
7 BCUC Decision and Order No. G-18-19 (excerpts)

BC Hydro
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City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 1

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

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

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

BC Hydro
Power smart

City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 2

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

v.

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

and

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

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

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

et

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

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

Neutral citation: 2006 SCC 4.

Répertorié : ATCO Gas and Pipelines Ltd. *c.* Alberta (Energy and Utilities Board)

Référence neutre : 2006 CSC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

N^{o} du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Bastarache J.

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

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

Jurisprudence

Citée par le juge Bastarache

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

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

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

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

By Binnie J. (dissenting)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 3

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ORDER NUMBER
G-104-18

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

SSL-Sustainable Services Ltd.
Status as a Public Utility under the *Utilities Commission Act*

BEFORE:
D. M. Morton, Panel Chair/Commissioner
B. A. Magnan, Commissioner

on June 5, 2018

ORDER

WHEREAS:

A. On December 16, 2015, the British Columbia Utilities Commission (BCUC) received a complaint from a resident of the City of Langford (the City) regarding energy services in a subdivision provided by SSL-Sustainable Services Ltd.'s (SSL) geothermal system;

B. SSL has not been granted a Certificate of Public Convenience and Necessity, nor has it made an application for approval of rates for public utility service under the Stream B criteria of the BCUC's Thermal Energy System (TES) Regulatory Framework Guidelines (TES Guidelines). SSL has also not been granted Stream A status per the TES Guidelines;

C. The BCUC reviewed the complaint and the information provided by SSL in its response letters and on June 9, 2016 via Order G-87-16, and pursuant to section 83 of the *Utilities Commission Act* (UCA), another panel made the order that initiated this proceeding to determine whether SSL is a public utility under the UCA (Proceeding);

D. A workshop and procedural conference were held on January 18, 2017. SSL, the City, FortisBC Energy Inc. (FEI) and BCUC staff made submissions at the procedural conference;

E. By Order G-12-17 dated January 31, 2017 and Order G-22-17 dated February 23, 2017, the BCUC established further regulatory timetables for the Proceeding, which included the filing of information packages and information requests to both SSL and the City;

F. By Order G-135-17 and as amended by Order G-138-17, the BCUC established a regulatory timetable for written final and reply arguments to be filed concurrently by all parties. The orders provided for an oral argument phase subject to the Panel's determination on the need to have one, after written final and reply arguments were received;

G. SSL, the City and FEI submitted written final and reply arguments. The City requested an oral argument phase and SSL supported the City's request. FEI submitted that it saw no need for an oral argument phase, but stated it would participate in one if the BCUC considered it to be of benefit;

H. By Order G-3-18 dated January 8, 2018, the BCUC established an oral argument phase for Tuesday, February 20, 2018. SSL then made a request to reschedule the oral argument phase and the BCUC amended the regulatory timetable for it to take place on Friday, March 9, 2018;

I. On Friday, March 9, 2018, the BCUC held an oral argument phase and SSL, the City and FEI participated;

J. The BCUC has reviewed and considered the evidence filed in this proceeding and the final, reply and oral arguments from all parties and finds that a determination is necessary.

NOW THEREFORE pursuant to the *Utilities Commission Act* and for the reasons attached as Appendix A to this order, the BCUC orders as follows:

1. SSL is a public utility as defined in section 1 of the UCA and is therefore subject to regulation under the UCA by the BCUC.

2. SSL is directed to file with the BCUC, within 90 days of this order, an application seeking required regulatory approvals for its rates and operating system. SSL must include in its application a submission on whether or not the agreement between SSL and the City is a franchise agreement as defined in the UCA, and if it is subsequently determined to be a franchise agreement, the rationale for BCUC approval of the franchise agreement allowing for inclusion of the associated fees in rates to be recovered from ratepayers.

3. Pursuant to section 90 of the UCA, the current rates that SSL charges to its customers are made interim as of the date of this order for a period of the lesser of i) 90 days or ii) the filing of its first application to the BCUC. Any differences between the interim and permanent rates that are determined by the BCUC are subject to refund/recovery, with interest at the average prime rate of SSL's principal bank for its most recent year, in the manner as set out by a BCUC order that establishes permanent rates.

4. SSL is directed to consult with BCUC staff prior to making its first application with the BCUC.

5. SSL is directed to file interim tariff pages for endorsement within 15 days of the date of this order.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of June, 2018.

BY ORDER

Original signed by

D. M. Morton
Commissioner

Attachment

SSL-Sustainable Services Ltd.
Status as a Public Utility under the *Utilities Commission Act*

REASONS FOR DECISION

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Decision on Public Utility argument

The Panel finds that SSL is not entitled to the benefit of the Municipal exclusion and is therefore a public utility as defined in the UCA. SSL is subject to regulation by the BCUC and not the City. The Panel agrees with FEI that the object of the UCA is the protection of the public interest by regulating public utilities to ensure that they provide safe and reliable service at reasonable prices. Public utilities tend to operate in monopolistic circumstances which could lead to monopolistic abuse of ratepayers. The BCUC regulates public utilities to ensure that the prices they charge to customers, who are often captive, are reasonable for the level of service provided.

The scheme of the UCA acknowledges that there may be circumstances where an entity is caught by the definition of public utility yet the rationale for regulation is not compelling because the public utility has little or no ability to exercise monopolistic behaviour to the detriment of ratepayers and the public interest. In those situations, the UCA allows the BCUC, with the advance approval of the responsible Minister, to grant exemptions in whole or in part from regulation under the statute.

The Panel will address the interpretation of the Municipal exclusion with its findings on the object and scheme of the UCA. The Panel finds that when the words of the Municipal exclusion are read in their entire context and in their ordinary and grammatical sense, the only entities that can benefit from the Municipal exclusion are municipalities and regional districts. In making this finding, the Panel agrees with the submission made by FEI. The initial words of the Municipal Exclusion make it clear that only a municipality or regional district is entitled to this exclusion in respect of services provided by them. SSL is a corporate entity and is not a municipality or regional district.

To find, as the City and SSL submit, that SSL should be entitled to the benefit of the Municipal exclusion because SSL has entered into a partnering agreement with the City and the City is thereby providing the service through SSL as a vehicle, requires a finding that the City is providing the service. However, the Panel has already found as a fact that SSL owns and operates the equipment and facilities to provide the public utility service. The City has entered into an agreement with SSL to provide the service but that does not grant SSL the same legal status as a municipality. SSL is a separate corporate entity. To find otherwise would require the Panel to ignore the initial words of the exclusion restricting the exclusion to municipalities and regional districts. Therefore the Panel cannot make the finding that SSL can benefit from the Municipal exclusion.

The Panel also agrees with FEI that whether a public utility should be regulated for public policy reasons is not relevant to whether a person meets the definition of a public utility. The scheme of the UCA provides for a consideration of that issue elsewhere and is beyond the scope of this proceeding.

Further, the Panel also finds that a harmonious, coherent and consistent reading of the UCA and the Community Charter supports this conclusion. Section 10(1) of the Charter expressly provides that a municipal bylaw has no effect if it is inconsistent with a Provincial enactment. Section 121 of the UCA provides that nothing in or done under the Community Charter impair a power conferred on the BCUC. There is nothing unharmonious, incoherent or inconsistent about the interpretation made regarding the Municipal Exclusion as both the Charter and the UCA expressly recognizes that where an action taken by a municipality is contrary or in conflict with the action taken by the BCUC pursuant to the UCA then the lawful actions of the BCUC prevail.

3.0 Other issues

3.1 Regulatory requirements

During the proceeding, many of the arguments made by the City and SSL relate to the regulation needs of SSL. However, the appropriate form of regulation for SSL is beyond the scope of this proceeding. As a public utility,

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City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 4

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ORDER NUMBER
G-80-19

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

FortisBC Energy Inc.
Application for Use of Lands under Sections 32 and 33 of the *Utilities Commission Act* in the City of Coquitlam for the Lower Mainland Intermediate Pressure System Upgrade Projects

BEFORE:
D. A. Cote, Panel Chair
W. M. Everett QC, Commissioner

on April 15, 2019

ORDER

WHEREAS:

A. On October 16, 2015, the British Columbia Utilities Commission (BCUC) issued Order C-11-15 approving a Certificate of Public Convenience and Necessity (CPCN), which granted FortisBC Energy Inc. (FEI) approval for the Lower Mainland Intermediate Pressure System Upgrade Projects (LMIPSU Project). A component of the LMIPSU Project is a new Nominal Pipe Size (NPS) 30 Intermediate Pressure (IP) gas line, operating at 2070 kilopascals, that starts at the Coquitlam Gate Station and proceeds in a westerly direction through the cities of Coquitlam, Burnaby and Vancouver, and ends at the East 2nd Avenue Woodland Station in Vancouver (Coquitlam Segment of the LMIPSU Project);

B. On June 28, 2018, FEI filed an application with the BCUC pursuant to sections 32 and 33 of the *Utilities Commission Act* (UCA) for orders setting the terms for FEI's use of lands in the City of Coquitlam (City) for the Coquitlam Segment of the LMIPSU Project (Application);

C. In the Application, FEI also states that, despite agreement in principle to the "Terms Agreed To", the traffic management plans and engineering drawings attached thereto as documented in confidential Appendix E-2 to the Application ("Terms Agreed To"), the City has declined to provide formal approval for the Coquitlam Component of the LMIPSU Project's engineering drawings unless FEI first agrees to two conditions:

   1. FEI repaves the entire width of a 5.5 kilometre segment of Como Lake Avenue, at an estimated cost of $5 million, despite FEI's construction only disturbing primarily two out of four lanes; and

   2. FEI removes, at its own cost (estimated at $5.5 million), approximately 380 metre segment of the NPS 20 Pipeline that is authorized to be abandoned in place, despite the operating agreement between the parties dated January 7, 1957;

D. FEI requested that the BCUC establish a two-phase review process for the Application, with phase one addressing the approval to proceed with the Coquitlam Segment of the LMIPSU Project in the City, in

accordance with the "Terms Agreed To" (Phase One) and phase two addressing the City's two conditions (Phase Two);

E. By Order G-144-18A dated August 1, 2018, the BCUC established a two-phase review process;

F. By Order G-158-18 dated August 22, 2018, the BCUC made its determination on Phase One, granting approval for FEI to proceed with the Coquitlam Segment of the LMIPSU Project, according to the Terms and Conditions jointly agreed by FEI and the City during Phase One;

G. FEI and the City filed evidence for Phase Two on October 31, 2018. BCUC and the parties submitted Information Requests (IR) on the City and FEI's Phase Two evidence on November 15, 2018. FEI and the City filed their final arguments on December 19, 2018, CEC filed its final argument on January 10 2019, and FEI and the City filed reply arguments on January 17, 2019; and

H. The BCUC has reviewed the evidence and makes the following determinations and authorizations.

NOW THEREFORE the BCUC orders as follows:

1. Pursuant to section 121 of the UCA, it is affirmed that FEI is authorized to abandon the decommissioned NPS 20 Pipeline in place.

2. Pursuant to section 32 of the UCA, upon request by the City in circumstances where it interferes with municipal infrastructure, the costs of removal of any portion of the decommissioned NPS 20 Pipeline shall be shared equally between FEI and the City.

3. The City's request that FEI should be required to repair and repave the whole 5.5 kilometre section on Como Lake Avenue curb to curb is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 15th day of April 2019.

BY ORDER

Original Signed by:

D. A. Cote
Commissioner

Attachment

FortisBC Energy Inc.

Application for Use of Lands under Sections 32 and 33 of the *Utilities Commission Act* in the City of Coquitlam for the Lower Mainland Intermediate Pressure System Upgrade Projects

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Phase 2 Reasons for Decision

April 15, 2019

Before:
D. A. Cote, Panel Chair
W. M. Everett QC, Commissioner

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Page no.

The City's Reply Argument

The City submits that the 2015 CPCN did not order or imply that FEI could construct and operate the new NPS 30 pipeline, if, and only if, FEI obtains the necessary property rights and abandon the NPS 20 Pipeline in place. If that was the BCUC's intention, the 2015 CPCN order and decision would have made that eminently clear.[59] The City also submits that the Operating Agreement does not provide FEI with the right to abandon the NPS 20 Pipeline in place and the City's request that it be removed by FEI from the City's property is not a request pursuant to section 4 of the Operating Agreement and the cost allocation formula in section 5(a) is not applicable in the circumstances.[60]

The City further addresses FEI's submission, that even if sections 4 and 5(a) of the Operating Agreement do not apply in this circumstance, the City, having requested the removal of the NPS 20 Pipeline, should be required to pay the entire costs of the removal. The City submits FEI's position has no basis in law because the NPS 20 Pipeline is not being used to supply gas to the public, its abandonment without any property rights to be there constitutes a trespass and therefore, its removal should be at FEI's expense.[61] The City applies the same argument to FEI's alternative submission, that it would be fair and reasonable for the BCUC to adopt the cost allocation methodology under section 5(a) of the Operating Agreement pursuant to section 32 of the UCA.

2.4 Panel Determination

2.4.1 Abandonment of the NPS 20 Pipeline

The Panel finds that FEI is authorized to abandon in place the NPS 20 Pipeline in the City's public space, subject to FEI's acknowledgement that the abandoned NPS 20 Pipeline will remain its property and responsibility after it is decommissioned, and that FEI will remove it at the City's request if it interferes with municipal infrastructure.

FEI has established its right to enter and place its distribution equipment, including the NPS 20 Pipeline, in the City's public spaces pursuant to the 1955 CPCN and the deemed CPCN pursuant to section 45(2) of the UCA. Further, FEI's authority to construct the Coquitlam Component of the LMIPSU Project, including the new NPS 30 Pipeline is authorized by the 2015 CPCN. The BCUC, in its 2015 CPCN decision, clearly approved FEI's plans to abandon in place the decommissioned NPS 20 Pipeline and stated in part, "…The steps FEI plans to take to minimize environmental and social impacts are appropriate as they are both cost effective and result in a minimum of disruption." In addition, the Panel notes that FEI consulted with the City in the lead up to the 2015 CPCN application and, despite having every opportunity, the City chose not to participate in the proceeding and make its position known, nor did the City seek a reconsideration of the decision.

The City purported exercise of its power under the *Community Charter* or *Local Government Act* to require the NPS 20 Pipeline be removed, is, in the Panel's view, precluded by section 121 of the UCA, which provides that nothing done under the *Community Charter or Local Government Act* supersedes or impairs a power conferred on the BCUC or an authorization (CPCN) granted to a public utility. Section 121 of the UCA is also an answer to

[59] City Reply Argument, p. 3.
[60] City Reply Argument, p. 3.
[61] Ibid., p. 4.

the City's position that the abandonment of the decommissioned NPS 20 Pipeline (given that it is no longer used or useful in carrying gas) is beyond the BCUC's authority as it cannot grant FEI property rights to store an abandoned pipeline or it constitutes a trespass on the City's property. On this issue, the Panel agrees with FEI that the BCUC's authorization to abandon the NPS 20 Pipeline as part of the Project goes to the core of the BCUC's role as a public utility regulator as it had significant economic implications for ratepayers as well as social and environmental implications.

The Panel agrees with FEI's submission that abandoning the NPS 20 Pipeline is the least impact solution because removal would result in significant logistical and construction challenges being faced, given the urban location and development that has occurred since it was installed, environmental impact in parks and sensitive areas, traffic impacts, disruptions to homes and businesses, noise and dust disturbances and significantly higher costs than abandonment. The potential effect of the City's argument based on the abandoned NPS 20 Pipeline constituting a trespass, is that the City and other municipalities, in the absence of agreed terms to the contrary, would have the right to require all decommissioned gas lines to be removed regardless of whether there is any operational reason or need to request such removal. The cost implications of removing abandoned gas lines throughout municipalities would be very significant for customers of any gas utility in the province and would not serve the broader public interest.

The Panel also disagrees with the City's assertion that the NPS 20 Pipeline has to be removed at some point and that it is more cost effective to remove the entire 5.5 kilometres once decommissioned, rather than later, as it is not supported by the evidence. The City has stated that, "while it is reasonable to assume that some of these works can happen with sections of the NPS 20 pipe left in place, it is also reasonable to assume that at some point large sections of the NPS will be obstacles to future projects undertaken by either the City or another third party utility company." The Panel agrees with FEI, that this evidence is vague and imprecise and fails to provide sufficient justification for incurring the very significant costs of removing the entire NPS 20 Pipeline (estimated at $77.5 million), which may never be necessary and would represent a significant waste of money.

FEI acknowledges that the City has identified a 380-metre section of the NPS 20 Pipeline (referred to above) that needs to be removed for installation of a new water main and sanitary sewer. With respect to the removal of the 380 metre section of the NPS 20 Pipeline and any future required removal, the Panel agrees with FEI's and the City's submissions and urges the parties to coordinate such removals with future infrastructure installations as such coordination could potentially provide some net advantages to overall efficiency and cost effectiveness and lessen the impact to residents, commuters, businesses and FEI's customers.

2.4.2 Allocation of Costs of Removal of the NPS 20 Pipeline

The Panel determines the public interest is safeguarded by specifying a term pursuant to section 32 of the UCA that provides the costs of removal of all, or a portion of, the abandoned and decommissioned NPS 20 Pipeline, upon request by the City, in circumstances where it interferes with municipal infrastructure, shall be shared equally between FEI and the City.

Briefly stated, section 32 provides, in circumstances where a public utility has the right to enter a municipality and place its distribution equipment on municipal public spaces, but cannot come to an agreement with the

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City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 5

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ORDER NUMBER
G-20-19

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

FortisBC Energy Inc.
Application for Reconsideration to Exclude Employee Information from 2015 Data Order G-161-15

BEFORE:
D. J. Enns, Panel Chair/Commissioner
R. I. Mason, Commissioner

on January 30, 2019

ORDER

WHEREAS:

A. On May 23, 2018, FortisBC Energy Inc. (FEI) submitted an application with the British Columbia Utilities Commission (BCUC) seeking the following:

- an order pursuant to section 99 of the *Utilities Commission Act* (UCA) that Order G-161-15 be varied so as to exclude "Employee Information" as defined in that order; or alternatively,
- an order pursuant to section 88(2), exempting from Order G-161-15 all "Employee Information" or, at minimum, particular employee data (Pension Data) held by FEI's pension actuaries, Willis Towers Watson (WTW) (Application for Reconsideration).

B. On October 13, 2015, the BCUC issued Order G-161-15, permitting FEI to store Customer Information, Employee Information and Sensitive Information on servers outside of Canada where (i) the data is encrypted or de-identified and (ii) the encryption keys and de-identification keys are located within FEI's data centres that are located in Canada;

C. FEI advised in its May 23, 2018 filing that the Chief Privacy Officer, in a recent internal review, identified that WTW has held the employee information regarding employees who participate in pension plans on US-based servers (Pension Data), without encryption or de-identification, for more than 30 years. This includes former and current employee information. In its filing, FEI stated that it wishes to apprise the BCUC of the issue, and to apply to the BCUC for an order that will determine how FEI proceeds;

D. FEI submits that the BCUC's jurisdiction under the UCA does not extend to employee data, or alternatively the BCUC should not exercise its jurisdiction in respect of Employee Information;

E. On July 12, 2018, the BCUC issued order G-125-18, establishing a regulatory timetable to include submissions on BCUC jurisdiction by FEI and registered interveners;

F. In their submission on August 10, 2018, registered intervener MoveUP requested to suspend the regulatory timetable to afford FEI an opportunity to consult with MoveUP and explore the possibility of finding an adequate resolution to the underlying issue of employee information protection. On September 24, 2018, after considering submissions by registered parties on MoveUP's request, the BCUC issued Order G-174-18, denying MoveUP's request to suspend the proceeding and establishing a regulatory timetable to include final arguments on BCUC jurisdiction by FEI and registered interveners. On September 26, 2018, the BCUC issued Order G-183-18 which replaced and rescinded Order G-174-18 to provide clarification on the next steps in the regulatory timetable;

G. On September 26, 2018, FEI applied, pursuant to section 88(2) of the UCA, for temporary relief requesting that, pending the BCUC's final order in this proceeding, FEI is temporarily exempted from Order G-161-15 as it relates to "Employee Information" sent to FEI's pension actuaries, WTW, for the purpose of performing analysis for the preparation of FEI's 2018 year-end audited external financial statements;

H. On November 6, 2018, after considering submissions by registered parties on FEI's request, the BCUC issued order G-210-18, approving FEI's request for temporary relief for financial reporting until December 31, 2018; and

I. The BCUC has reviewed FEI's Application for Reconsideration and final and reply arguments of the parties and considers it appropriate to vary Order G-161-15.

NOW THEREFORE pursuant to section 99 of the UCA and for the reasons attached as Appendix A to this order, FEI's request for reconsideration and variance of Order G-161-15 (Application for Reconsideration) is approved. Recitals D(b) through D(d) of Order G-161-15, to the extent to which they reference "Employee Data" as that term is defined in Order G-161-15, are rescinded.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of January 2019.

BY ORDER

Original signed by:

D. J. Enns
Commissioner

Attachment

FortisBC Energy Inc.

Application for Reconsideration to Exclude Employee Information from 2015 Data Order G-161-15

Reasons for Decision

January 30, 2019

Before:
D. J. Enns, Panel Chair/Commissioner
R. I. Mason, Commissioner

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Decision accompanying Order G-161-15, the BCUC states that "Section 44 of the *Utilities Commission Act* is the only section of the statute that addresses the location of public utility records…"[44].

The Panel has not identified any other provision of the UCA which it considers provides the basis to explicitly direct how and where a utility should store copies of Employee Data. The Panel agrees with FEI's submissions that the purpose and intent of section 44 is to ensure that records are available to the BCUC to allow it to regulate the public utility but not to protect employee privacy or dictate where electronic copies of "accounts or records" may be stored. This interpretation is further supported when one considers the purpose and intent of utility regulation, which, as stated by the Supreme Court of Canada in ATCO Gas is: "…to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service..."[45]

The Panel agrees with the parties that section 44 of the UCA is a broadly worded provision, which must not be interpreted in isolation but must be examined within the context, purpose and scheme of the legislation.[46] As set out in ATCO Gas, a utility regulator's main function is "…fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system."[47] The principal function of the BCUC is therefore the determination of rates and any supervisory power over a public utility's "accounts or records" is incidental to fixing rates.[48]

As described earlier, the powers provided by the UCA include not only the express grants of power but also those required which are practically necessary to accomplish the BCUC's main function of rate setting and maintaining the integrity of the system. In the present case, the Panel does not find the regulation of the location of copies of Employee Data to be necessarily incidental to the legislative purpose and object of the UCA but rather is a matter for utility management.

Finally, although FEI consented to the initial Order G-161-15, it does not confer on the BCUC any power to act beyond its jurisdiction where none previously existed.

The Panel therefore finds that directing how and where employee data is to be stored as set out in Order G-161-15 goes beyond the jurisdiction of the BCUC and was an error of law. For these reasons, the Panel directs that recitals D(b) through D(d) of Order G-161-15, to the extent to which they reference "Employee Data" as that term is defined in Order G-161-15, are rescinded.

[44] FortisBC Energy Utilities Application for Removal of the Restriction on the Location of Data and Servers Providing Service to the FEU, currently Restricted to Canada, Order G-161-16 and Decision dated October 13, 2015, p. 2.
[45] ATCO Gas, para. 3.
[46] Ibid., para. 48.
[47] Ibid., para. 7.
[48] Ibid., para. 60.

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City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 6

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June 16, 2017

Sent via email/eFile

Mr. Fred James
Chief Regulatory Officer
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bchydroregulatorygroup@bchydro.com

Re: British Columbia Hydro and Power Authority– Salmon River Diversion Ceasing of Operations – Project No. 3698907 – Decision and Order G-96-17

Dear Mr. James:

Further to your March 7, 2017 filing of the above-noted application, please find enclosed British Columbia Utilities Commission Decision and Order G-96-17.

Original signed by Katie Berezan for:

Patrick Wruck
Commission Secretary

/ad
Enclosure

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British Columbia Hydro and Power Authority

Salmon River Diversion Ceasing of Operations

Decision
and Order G-96-17

June 16, 2017

Before:
W.M. Everett, QC, Panel Chair
B.A. Magnan, Commissioner
R.D. Revel, Commissioner

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consideration of an application, BC Hydro submits that in a section 41 proceeding in which project alternatives have very similar economics, as in the instant case, it is appropriate and indeed proper for the Commission to give significant weight to non-economic factors including, most particularly, stakeholder support for the alternative with the most attractive environmental, social and First Nation attributes.[11]

Intervener arguments

CEC and BCOAPO essentially agree with BC Hydro, that considerations in respect of section 41 evaluations are similar to considerations for CPCN applications, and where the economics of alternatives are similar, environmental and social factors should be considered.[12] CEC also suggests the relative weights the Commission should apply to these and other factors in its assessment of the Application.[13] Landale does not refute BC Hydro's view of placing weight on non-economic factors.[14]

BC Hydro reply

In its reply argument, BC Hydro submits that it does not think there is a great deal of value in the more granular approach advocated for by CEC. BC Hydro argues that identifying and weighing discrete elements of the cost effectiveness test beyond the high-level economic/non-economic distinctions BC Hydro has drawn, risks giving those elements more significance than they can lawfully bear, particularly in the more usual project approval proceeding where economic considerations would properly dominate the cost-effectiveness assessment.[15]

Panel discussion

The Panel agrees with BC Hydro, CEC and BCOAPO that factors similar to a CPCN application should be considered and weighed in reviewing a section 41 application. It is the Panel's view that in proceedings in which project alternatives have very similar economics, environmental and social factors should be considered and weighed. The Panel is of the view the specific factors and relative weighting depend on the unique circumstances of each application.

2.0 Need and justification

In this section the Panel will consider the need and justification of BC Hydro's Application to cease operations and decommission specific components of the Salmon River Diversion, including the timber-crib dam and spillway; the Canal and Patterson Creek flume (Flume); the fish screen; and the fishway.

2.1 Timber-crib dam and spillway

BC Hydro submits that the timber-crib dam and spillway (Dam) is in poor condition, as the upper structural timbers and spillway facing boards are deteriorating due to rot.[16] However, BC Hydro explains that the Dam is a low consequence dam under the B.C. Dam Safety Regulations and provides little risk in the event of failure. That said, BC Hydro is of the view that the reputational consequences of failure are considered high.[17]

[11] BC Hydro Final Argument, pp. 3, 5.
[12] BCOAPO Final Argument, pp. 8–9; CEC Final Argument, p. 2.
[13] CEC Final Argument, pp. 3, 4, 5, 14, 15, 16.
[14] Landale Final Argument, pp. 1–5.
[15] BC Hydro Reply, p. 3.
[16] Exhibit B-1, p. 5.
[17] Exhibit B-1, p. 15.

BC Hydro
Power smart

City of Coquitlam Application for Reconsideration and Variance of BCUC Order No. G-80-19

Tab 7

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FortisBC Energy Inc. and City of Surrey

Applications for Approval of Terms for an Operating Agreement

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Decision
and Order G-18-19

January 29, 2019

Before:
R. I. Mason, Panel Chair
W. M. Everett, QC, Commissioner
B. A. Magnan, Commissioner

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The CEC

The CEC does not agree that a commercially reasonable agreement is the appropriate test under section 32 of the UCA, because it fails to consider the gravity of the BCUC's jurisdiction and duty to facilitate the imposition of natural gas service in city streets and other locations as a matter of law and as provided for in the CPCN enabling a utility to provide service in the community.[34]

The CEC submits the appropriate test is the public interest in implementation of the convenience and necessity for the natural gas service and that the only sensible approach is for the entire New Operating Agreement to provide a contract for both Parties to implement the public interest in a natural gas service.[35]

The CEC agrees with FEI that the BCUC must consider the impact on rates and that the entire New Operating Agreement should be examined holistically.[36]

The CEC also agrees with FEI that the BCUC should determine these Applications without wading into historical disputes between FEI and the City because they have different interpretations of past events and the New Operating Agreement should not seek to compensate for any perceived historical imbalances. The CEC, however, does acknowledge that it is important to recognize and account for historical sources of friction to avoid repetition of the same by making very clear determinations as to responsibilities and obligations in a New Operating Agreement.[37]

In its reply to the CEC, the City confirms that it did not submit information about its historical disputes with FEI to seek redress. It states, for the most part, the information was requested by the BCUC to get a better understanding of the nature and magnitude of the issues that need to be addressed in the New Operating Agreement. The City agrees with the CEC that the BCUC should consider the causes of historical disputes as they need to be clearly addressed in the proposed terms of the New Operating Agreement in order to avoid further disputes in the future.[38]

2.4.2 Panel discussion

The Panel finds the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is to safeguard the public interest. To be clear, whenever the Panel makes a finding, specification or determination under section 32 of the UCA in the remainder of this decision, it has done so because it is satisfied that such finding, specification or determination safeguards the public interest.

The passage from the decision in the Supreme Court of Canada cited above makes it clear that the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is grounded upon the BCUC's duty to safeguard the public interest. This includes the public interest in the convenience and necessity of the delivery of natural gas services in the community and the public interest in safeguarding the interests of the

[34] CEC Final Argument, p. 4, para. 21
[35] Ibid., paras. 22, 24.
[36] Ibid. ,para. 23
[37] Ibid., p. 5 paras. 28–31.
[38] City Reply to Final Arguments of Interveners, pp. 7–9.

municipalities and their inhabitants to the extent they may be affected by the operations of public utilities. This is also made clear from the following passage from the above cited Supreme Court decision:

> The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission.[39]

The BCUC, in considering the public interest test under section 32 of the UCA, must decide how to balance the public interest in a public utility's authorization to use and occupy municipal public spaces pursuant to a CPCN or otherwise, with the competing interests of the municipality and its inhabitants in order to achieve a fair and balanced agreement.

FEI submits that balancing these interests is best achieved through successful good faith negotiations by imposing commercially reasonable terms. However, the Panel does not agree that the public interest test is met by imposing commercially reasonable terms. That approach to the test is too narrow and limiting. It fails to consider the gravity and scope of the BCUC's jurisdiction under section 32 of the UCA to facilitate the imposition of a public utility's service in municipal public spaces. Such considerations are not limited to simply determining commercially reasonable terms. It would be impossible to set out the potential public interest matters the BCUC may have to consider that are not purely commercial in nature. However, some clear examples are set out above in the City's submission which may include, but should not be understood as limited to, sharing of public spaces between the public utility, the municipality and others, the public's use and enjoyment of such spaces, transportation needs in the municipality and the protection of public safety and the environment in the municipality.

Submissions were also made that the legal test to be applied under section 32 of the UCA should include specific guidance as to whether the BCUC should:

a) examine the impact of the Disputed Items and the proposed New Operating Agreement holistically;

b) not take into consideration the historical differences between the Parties, but rather, make its determination on a prospective basis with a view to improving the Parties working relationship; and

c) follow its previous decisions by not taking into account standard forms of operating agreements between FEI and municipalities and instead, consider the circumstances in each municipality and determine the manner and terms of use on that basis.

In the Panel's view, the matters referred to above are evidentiary in nature. In applications under section 32 of the UCA, the BCUC may determine whether to consider such evidence in its application of the test of safeguarding the public interest. The broad nature of the test should not be fettered by introducing such potential evidentiary matters as part of the test.

3.0 Operating Fee

Both FEI and the City have proposed terms in the New Operating Agreement for an operating fee (Operating Fee) to be collected from ratepayers. However, the two Parties differ on the level and the method of calculating the Operating Fee.

[39] *Surrey v. BC Electric Company Limited,* [1957] SCR 121