In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2009 ABCA 246

Date: 20090630
Docket: 0701-0325-AC
0801-0244-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Utilities Commission and Alberta Energy and Utilities Board

Respondents

-and-

Utilities Consumer Advocate

Respondent

Corrected judgment: A corrigendum was issued on November 10, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of the Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Elizabeth McFadyen
Concurred in by The Honourable Madam Justice Patricia Rowbotham

Appeal from the Decisions of the Alberta Utilities Commission
(formerly, Alberta Energy and Utilities Board)
Dated November 6, 2007 and July 30, 2008

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté

A. Introduction and Facts

[1] The argument in this case ranged over a number of interesting topics, and disclosed some degree of friction or mistrust between the opposing parties (not their counsel). However, I have concluded that some of that discussion is either academic, or *res judicata*, and so I will not address here all the arguments which we heard.

[2] ATCO has been granted leave to appeal two decisions; the first, issued by the Alberta Energy and Utilities Board on November 6, 2007, and the second issued by the Alberta Utilities Commission, its successor, on July 30, 2008 on three grounds:

> (a) Do the Alberta Utilities Commission and the Alberta Energy and Utilities Board have the jurisdiction or authority to compel the owner of a gas utility to use assets neither used nor required to be used in utility service and include the related costs in an application for new rates?
>
> (b) Did the Alberta Utilities Commission and the Board err in directing that the use of the Salt Cavern assets and the inclusion of asset costs based on a prior rate base calculation, for a prior period, require that those assets must continue to be included in future rate base determinations?
>
> (c) Did the Alberta Utilities Commission err in determining that a change in use of the Salt Cavern assets is a disposition requiring Alberta Utilities Commission approval under s. 26 of the *Gas Utilities Act*?

[3] A brief history will suffice. The appellant filed a general rate application with the Alberta Energy and Utilities Board, seeking the approval of its revenue requirements for the 2008 and 2009 test years. In that application, the appellant identified certain assets (called the "Salt Cavern" Assets) which, historically had been included in its rate base. It stated that those assets were not being used in its regulated transmission service, and would not be used in the foreseeable future. So it indicated that it proposed to exclude those assets in its rate calculations.

[4] By letter dated November 6, 2007, the Board directed the appellant to include the assets in its application and rate calculations, on the grounds that the Board considered that any removal from rate base constituted a disposition which required prior Board approval pursuant to s. 26(2)(d) of the *Gas Utilities Act*. The appellant complied.

[5] In February, 2008, the appellant sought the Commission's approval of a proposed transfer of the assets to a related company, pursuant to s. 26(2)(d). In April, the Commission placed the application on hold, pending an industry-wide consideration of the effects of the Supreme Court of Canada decision in "***Stores Block***": ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293.

[6] When attempts to resolve a timing issue created by the delay failed, the appellant company cancelled the transaction and withdrew its approval application. The appellant advised the Commission that, in light of the recently-issued decision of this Court in "***Carbon***" it intended to resubmit its rate application and to exclude the assets in its rate calculations: ***ATCO Gas and Pipeline v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183.

[7] The Commission, in a letter dated July 30, 2008, referred to this Court's decision in "***Carbon***", and concluded that "***Carbon***" had not resolved the question whether removal from rate base constituted a disposition under s. 26 of the Act, and essentially repeated the reasons and the directions set out in its November 6 letter, stating in part:

> "Accordingly, the Commission considers the above direction by the Board and the finding by the Board in Decision 2007-005 with respect to the unilateral withdrawal of assets from utility service by a utility remain valid and continue to be appropriate. Therefore, [the utility company] is directed not to re-file the relevant GRA schedules in its Phase I compliance filing to reflect the withdrawal of the Identified Salt Cavern Assets without first obtaining the consent of the Commission as required by section 26(2)(d) of the *Gas Utilities Act* and section 101(2)(d) of the *Public Utilities Act*. Such an application would allow the Commission and interested parties to adequately examine the merits of the application and assess whether or not the Identified Salt Cavern Assets are used or required to be used to provide service to the public within Alberta."

[8] The appellant sought leave to appeal both orders.

[9] The parties subsequently settled the rate application without including the "Salt Cavern" assets in rate base. The Commission approved the settlement, and cancelled the scheduled rate hearings.

B. Issues

[10] In argument before us, counsel for the appellant utility company modified its initial position that the utility decides unilaterally what assets will be included in rate base as assets used or required to be used in providing the regulated service to the public. He conceded that, in the context of the general rate application, the Commission has jurisdiction, in determining the rate base, to decide

what assets are used or required to be used in providing the utility service to the public, and to require proof when the utility seeks to add or remove assets from rate base.

[11] Although leave to appeal was granted on three grounds (listed above), counsel for the Commission suggested that the only live issue before this Court is as follows:

> Is the unilateral withdrawal of assets from utility service and rate base out of the ordinary course of business a "disposition" under s. 26(2) (d) of the *Gas Utilities Act* requiring approval from the Commission?"

[12] The argument of the Utilities Consumer Advocate is also based on the question of whether the withdrawal of assets from utility service and rate base is a disposition under s. 26(2)(d).

[13] Both respondents argue that removal from rate base is a "disposition" requiring Board approval under s. 26. Neither respondent advanced any argument suggesting that the Commission had jurisdiction to require the gas utility to use assets which it was not using in providing the regulated service, or to include those costs in rate base. Neither respondent suggests that the inclusion of an asset in rate base in prior years gives the Commission jurisdiction to continue the inclusion of that asset in rate base.

[14] In any event, to the extent to which the answers to the legal issues raised in the first and second questions on which leave was granted are not premature, they are largely resolved by this Court's recent decision in "***Carbon***" where the Court held that the Board had no jurisdiction to include in rate base, assets which were not being used or required to be used in providing service to the public, in an operational context. Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system. See ***ATCO Gas and Pipelines v. Energy and Utilities Board***, 2008 ABCA 200, 433 A.R. 183. If any snippets remain, they would turn entirely on s. 26's applicability.

C. Mootness: First Part

[15] It is arguable that the rate settlement has rendered this appeal moot. But all parties agree that this Court should answer the last question of law on which leave was granted, (c). It is whether the Commission erred "in determining that a change in use of the Salt Cavern assets is a disposition requiring [the Commission's] approval under s. 26 of the *Gas Utilities Act*".

[16] The reasoning stated in the two orders under appeal does suggest that the Commission relied on s. 26 (or related sections in other Acts). And the orders under appeal here, like many orders of the Commission, combine in one document both reasons and formal decision or order. But it is not clear whether the two orders appealed say that s. 26 is the only way that the Commission gets jurisdiction to decide whether given assets should be inside or outside the rate base.

[17] In any event, any appeal is from the actual disposition (order) by the court or tribunal appealed, not from its reasons, and a clearly correct disposition will not be overturned because of flaws in the reasons stated. So a question arises as to whether it is necessary to decide question (c) (whether s. 26 applies), if it cannot affect the result of this appeal. Why?

[18] There is a simpler more basic reason, apart from s. 26, why the Commission has jurisdiction to decide this question of what is or is not in the rate base. I must now explain it, both to lay a foundation for the question of mootness, and for the merits of question (c). Then I will return to this question of whether question (c) is academic.

D. Commission's Jurisdiction to Fix Rate Base

[19] Neither the Supreme Court of Canada in the "***Stores Block***" decision, nor the Alberta Court of Appeal in the "***Carbon***" decision, held that the utilities company alone fixes the rate base and that the Commission cannot. Those two decisions are properly cited as follows: ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293; ***ATCO Gas and Pipeline v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183.

[20] It is elementary public utilities law that a regulatory commission fixing fair and just tolls, rates or charges does so in two components:

(i) current expenses and taxes, and

(ii) an annual amount constituting a just and proper return on capital invested in the utility.

[21] One cannot even begin to compute (ii) without knowing how much capital is invested in the utility. Regulatory commissions always determine that, using a number of traditional criteria developed in North America for over a century. That calculation of capital invested and properly attributable is called the "rate base". See 1 Priest, *Principles of Public Utility Regulation* 139, 183 (1969). Even if the legislation were silent on the topic, it would not only be permissible, but probably mandatory, for a regulatory commission to enter into some such analysis. See ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293 (paras. 65-66); ***Edmonton (City) v. Northwestern Utilities*** [1961] S.C.R. 392, 401-2. And the legislation is not silent here. For example, s. 37 of the *Gas Utilities Act* provides that

> "In fixing just and reasonable rates, tolls or charges . . . the Commission shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta . . ."

Similar is the *Public Utilities Act*, s. 90 (R.S.A. c. P-45).

[22] Despite some contrary suggestions in its factum, the appellant company properly conceded in oral argument that it cannot unilaterally and conclusively decide what is inside or outside the rate base, nor bring items in and take them out at will. The company's counsel conceded that during a rate hearing, the Commission could direct that the utility company prove an assertion that assets previously included in the rate base were not now being used and were not required to be used in the utility service.

[23] Any conclusive unilateral power by the utility company to define its rate base would be contrary to the reasoning in the preceding paragraph but one, indeed contrary to all the case law. Though many rate base cases are about how to value items admittedly in the rate base, many others are about what items should or should not be in the rate base.

[24] It is for that precise purpose that regulatory commissions in North America have developed and so long used the "used or required to be used" test for rate base (recited by the July 30 order under appeal), or variants on the test, such as "used or useful." Any textbook or index of cases on rate regulation contains a host of cases on that topic. See, for example, Phillips, *The Regulation of Public Utilities*, especially at pp. 301, 302, 325, 326, and associated notes (citations) at the end of its Chapter 8 (second printing 1988); Priest, *op. cit. supra*, at 174.

[25] Nothing in this judgment is intended to suggest different criteria for inclusion or exclusion of assets in the rate base, than those traditional tests.

[26] If each public utility company could unilaterally decide what was in or out of the rate base, or what was or was not used or useful, each year, then why did all those regulatory commissions and courts spend all that time and ink on such topics?

[27] Nor is one limited to looking at the textbooks or even the words of Alberta's legislation. One can also see a binding decision of this Court. In that case, the utilities wished to have expensive items in the rate base, and the Commission's predecessor held that they should not (yet) be in the rate base. The Court of Appeal affirmed the regulatory decision: ***Alberta Power v. Public Utils. Bd.*** (1990) 102 A.R. 353 (C.A.). So plainly the Commission has jurisdiction to decide that topic, and to disagree about it with the utility company being regulated.

[28] Can it be reasonably argued that this regulatory power is confined to ruling on adding new items to the rate base, but inapplicable to excluding old or unused items? No. Phillips, *op. cit supra*, at 302 quotes another established textbook and lists items which regulatory commissions may exclude from the rate base. They include obsolete property, property to be abandoned, overdeveloped property and facilities for future needs, and property used for non-utility purposes.

[29] If any of this were not so, any company with both a regulated utility business and another business could shuffle assets in and out of the rate base at will. A host of games could be played to maximize the rates charged by the monopoly utility business to the public.

[30] It is true that regulatory commissions pay some attention to decisions of management, who commonly have a good deal of experience, and do not always second-guess every management decision, especially on doubtful topics. So a typical rate hearing does not spend much, if any, time justifying inclusion in the rate base of every item of capital or equipment, nor even every big item. Rate hearings would go on forever otherwise. But the final decision is the regulator's, not the utility company's. See Phillips, *op. cit supra*, at 302. A regulatory commission has the expertise to know which items to examine closely, and how often. And they have statutory powers to call for information and to make their own investigations, and to direct hearings with evidence.

[31] The paragraphs above show that the rate-regulation process allows and compels the Commission to decide what is in the rate base, i.e. what assets (still) are relevant utility investment on which the rates should give the company a return. The traditional test is whether they are used or required to be used, and (as will be seen below) nothing in the legislation changes that. (Whether s. 26 is relevant is discussed below.)

E. Mootness and Academic Questions: Second Part

[32] Now I return to whether the Court of Appeal should answer question (c) put to it, whether s. 26 of the *Gas Utilities Act* applies.

[33] There is no ideal solution as to how much this Court should say or decide in this appeal. On the one hand (as noted) the Commission did not decide whether the assets in question here belonged in the rate base or not. And it will not and cannot decide that, as this rate hearing is over, and the result of it given (by consent) is likely not appealable, and no one wants to object to these rates. So the Court of Appeal lacks the evidentiary record and concrete facts and arguments usually so helpful to deciding any appeal. There is a danger of vagueness or abstraction in any answers which we may give.

[34] But on the other hand, here there are very evident on-going uncertainty, differences of opinion, misunderstanding, ambiguity, and even mistrust. The parties' factums seemed to suggest one position for the parties. But oral argument clarified and even changed their positions, and in places brought them closer together. In one place, they almost traded positions. Certainly the issues became clearer and sharper.

[35] The whole process of getting leave to appeal and running an appeal and writing a decision takes time. No one is completely sure how to handle disputes about allegedly unused assets at or before the next rate hearing. Any appeal then would likely give an answer too late, or would prolong that next rate hearing unconscionably. Answering question (c) now would make the next rate hearing much more effective, and obviate almost inevitable re-litigation of that question.

[36] The distrust and uncertainty are unfortunate, but the rulings of the Commission (or its predecessor) in the "***Stores Block***" and "***Carbon***" cases and "***Harvest Hills***" have done nothing to calm the utility company's fears. A number of those Commission rulings relied expressly on s. 26

(formerly s. 25.1) in dealing with who got the benefits of those no-longer needed assets. One may find such passages in these Board decisions: 2001-78 (Oct. 24, 2001) p. 3 ("***Stores Block***" Part 1); 2002-037 (Mar. 21, 2002), [2002] A.E.U.B.D. #52, pp. 12, 17 (Distribution of Stores Block Net Proceeds); 2005-063 (June 15, 2005) pp. 9, 10, 11 about four preliminary questions (Carbon Storage Preliminary Questions); 2007-005 (Feb. 5, 2007) pp. 33 and 34 (S. Carbon Facilities, Part 1 Jurisdiction).

[37] Nor have the arguments of the Utility Consumers Advocate reassured the utility company. The appellant utility company suggests that if the Commission receives an application under s. 26 as to whether the assets in question should stay in (be in) the rate base, the Commission will try to evaluate harm to the consumers and impose some penalty or remedy on the appellant company quite outside any adjustment in rates. Or the Commission may treat any application about these assets as a s. 26 application, and do the same.

[38] Oral argument showed that at least one respondent suggests that such an approach would be suitable. Therefore, the appellant's fears that the Commission would take that approach have a real foundation. For one thing, the Consumer Advocate is a permanent statutory office (see the *Government Organization Act*, Schedule 13.1, R.S.A. c. G-10). So the topic is likely not hypothetical and not necessarily premature.

[39] Therefore, I would now give a substantive answer to question (c). It is about whether s. 26 (on dispositions) applies, and must be resorted to. It turns out to be the pivotal question, and is a question of pure law, interpretation of the *Gas Utilities Act*.

F. The Scope of Section 26

[40] We are left with question (c), plus a few bits of questions (a) and (b). So I will slightly narrow what I propose to answer, and restate the question as follows:

> If a utility company owns an asset whose price or value in previous rate hearings has been included in the rate base calculation, and the company now alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things, does s. 26 of the *Gas Utilities Act* apply, and does the company need leave under that section?

[41] Section 26, subsections (2)(d), (4), (5) read as follows:

> "(2) No owner of a gas utility designated under subsection (1) shall
>
> . . .
>
> (d) without the approval of the Commission,

> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or
>
> (ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.
>
> (4) The Commission, on its own initiative or on the application of a person having an interest, may, or on the order of the Lieutenant Governor in Council shall, declare that subsection (2) or any part of it does not apply with respect to any transaction or class of transactions specified in the declaration.
>
> (5) Where a declaration is made under subsection (4) in respect of a transaction entered into before the making of the declaration, the transaction,
>
> (a) in the case of a transaction under subsection (2)(d), is deemed to be no longer void and to have been in force and effect from the date of the transaction, and
>
> (b) in the case of a transaction under subsection (2)(a), (b), or (c), is deemed not to have been in contravention of that subsection,
>
> except that the declaration does not affect any other rights that have accrued prior to the declaration."

[42] It is true that this section, this Act, and the related Acts (such as *Public Utilities Board Act*, s. 101), should be interpreted broadly and purposively. But the Court also has to read the wording of the statute in context and in its grammatical and ordinary sense harmoniously with the scheme and object of the Act: ***United Taxi Drivers' Fellowship v. Calgary (City)***, 2004 SCC 19, [2004] 1

S.C.R. 485, 494, 318 N.R. 170 (para. 8); ***Kraft Can. v. Euro Excellence***, 2007 SCC 37, [2007] 3 S.C.R. 20, 365 N.R. 332 (para. 2). So words matter.

[43] I have looked at the various legal reference works and cases cited to us on the topic of interpreting s. 26(2)(d). In my view, its key words on scope refer to giving up ownership, in whole or part. They do not refer to starting or stopping a particular use, nor acquiring a need, nor losing a need. Nor do they refer to objects becoming useful or becoming useless. Counsel have not given us any legal authority really on point which would make s. 26 apply to the question posed above.

[44] The only word in s. 26 which could conceivably be relied on to cover merely ending a use, or switching to a different use, is "disposition". That word came up in ***Cie. Immobilière BCN v. M.N.R.*** [1979] 1 S.C.R. 865, 876, 878-9. However, there was a kind of transfer between two companies there, and the context was terminal losses under the capital cost allowance sections of the *Income Tax Act*. I do not find any support there for the present situation's being a disposition.

[45] The other two Supreme Court of Canada decisions on "disposition" involve union successorship in labor legislation: ***W.W. Lester (1978) v. Utd. Assn. of Journeymen etc. Pipefitting Ind.*** [1990] 3 S.C.R. 644, 675-6, 123 N.R. 241; ***Ajax v. Nat. Automobile etc. Union***, 2000 SCC 23, [2000] 1 S.C.R. 538, 253 N.R. 223, affg. (1998) 113 O.A.C. 188, 41 O.R. (3d) 426, 166 D.L.R. (4th) 516 (C.A.). The ***Lester*** case cannot help the respondents or support finding a "disposition" here, as it found no "disposition" on its facts ("double-breasting"). Furthermore, ***Lester*** held that such labour succession legislation should be broadly interpreted, and that there is no "disposition" unless there is a relinquishment of a business (or part of it) and gaining of that business by another separate entity.

[46] The ***Ajax*** decision adopts fairly brief reasons on this topic by the Ontario Court of Appeal, which also looked for a transfer from one entity to another. Hiring a whole skilled set of workers (for a complete municipal bus operation) was held to qualify. Once again, two entirely separate entities were involved, and it was easy to find a transfer between them. The case merely holds that the transfer need not be by way of sale or any formal legal transaction.

[47] Does "disposition" mean "giving up or relinquishment" as suggested by the *Canadian Law Dictionary* 70 (2d ed. Yogis 1990)? Even if it does, there is no second person here to whom these assets were given or transferred.

[48] None of that applies where there is no second entity and a mere change in (or cessation of) use.

[49] "Disposition" can refer to a person's temperament or character, but that is obviously irrelevant here. It can also refer to some tribunal's final settlement or determination, which is equally irrelevant here. The only other meaning of the word given by Black is, "The act of transferring something to another's care or possession, especially by deed or will; the relinquishing of property." See *Black's Law Dictionary* 505 (8th ed. Garner 2004).

[50] Ceasing use was held not a disposition in ***Sealey v. Crystal*** (1987) 39 D.L.R. (4th) 141, 154 (B.C. C.A.), though the case is weakened by a statutory definition.

[51] So I interpret the words of s. 26 as not applying to ending a use. If that produced an absurd result, or crippled the Commission's power to regulate rates, then one might have to look harder at s. 26 and even try to stretch its words.

[52] But I see no *hiatus* here. It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. (See Part F. above.)

[53] Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[54] Nor is there any sound legislative philosophy which forces us or even permits us to expand the scope of s. 26 beyond the normal meaning of its words. It is true that s. 26 is a very useful section. But with or without it, an asset no longer used to operate the utility is no longer part of the rate base, whatever its history or earning capacity: "***Carbon***" decision, ***ATCO Gas and Pipelines v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183, 192-93 (paras. 28-30). And even on a true disposition of a former utility asset (e.g. its sale), the Commission cannot turn over any of the proceeds or worth to the consumers, nor force the company to hold the proceeds for the consumers. So held the "***Stores Block***" decision in the Supreme Court of Canada. See ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293. That decision is lengthy and thorough, and so difficult to quote from without expanding my reasons unduly. But it expressly rejects any power to allocate any part of sale proceeds to the benefit of the consumers, even as a condition of approving a sale of a former utility asset. Similar is our recent "***Harvest Hills***" decision: ***ATCO Gas and Pipelines v. A.E.U.B.***, 2009 ABCA 171, Calg. 0701-0341-AC (May 8) (paras. 29, 32-33).

[55] So the philosophy in those court decisions would not expand the scope of s. 26, and would do a good deal to restrict it. Both sides suggested in argument to us that if s. 26 applied, there is a good chance that the Commission would inquire into whether ceasing use of the asset in question harmed the consumer, and if so, what remedy for the harm could be imposed. Where merely ending use or usefulness (or both) is involved, that inquiry and remedy would be incompatible with the courts' "***Stores Block***" and "***Carbon***" decisions, *supra*, and so not a ground to expand s. 26's application. Indeed, the "***Harvest Hills***" decision, *supra*, discusses that topic in detail. The Supreme Court of Canada's 2006 "***Stores Block***" decision, *supra*, is also very clear on the subject of s. 26. That section does not even apply to non-utility assets (or former utility assets), nor to sales in the

ordinary course of business, and it gives no power to earmark or allocate sale proceeds (paras. 40-46).

[56] Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all. The 2008 "***Carbon***" decision (cited in the previous paragraph) clearly adopts the decisions about the "used or required to be used" test, and defines that as operational use in the utility: see para. 25 for example.

G. Standard of Review of Statutory Interpretation

[57] What is the standard of review for interpreting s. 26 of the *Gas Utilities Act*? The point was little stressed in oral argument, and counsel for the Commission did not touch on it. The factum of the Consumer Advocate suggests review on the reasonableness test. The appellant suggests a correctness test.

[58] Can it be said this is a topic on which the Commission has expertise in interpreting its home statute? When setting the standard of review for legal interpretations by an expert tribunal, that is traditionally an important consideration: see ***Board of Management v. Dusnmuir***, 2008 SCC 9, [2008] 1 S.C.R. 190, 372 N.R. 1 (para. 54). But public utilities commissions are almost unique. For over a century, their rulings (and appeals to the courts from them) have been reported in law reports, and cited by later decisions. Besides those law reports there are well-known specialized textbooks. So the contents and limits of this tribunal-made law are neither mysterious nor hard to find.

[59] I have carefully checked the two leading textbooks, and find that the subject covered by s. 26 does not come up in either. See *The Regulation of Public Utilities: Theory & Practice*, by Charles F. Phillips Jr. (Public Utilities Reports 1988) (2d printing); *Principles of Public Utilities Rates*, by James C. Bonbright, Albert L. Danielson, and David R. Kamerschen (2d ed. 1988) (Public Utilities Reports). This is not a question of law on which public utilities commissions have special expertise; still less is it part of their core competence.

[60] Section 26 of the *Gas Utilities Act* can be traced back to s. 52(1)(g) of Alberta's *Natural Gas Utilities Act*, 1944 (c. 4), though oddly that Act did not apply to retail gas distributors. A very similar provision to s. 26 is s. 101 of the present *Public Utilities Act*, which can be traced back to Alberta's 1922, c. 20, s. 37(g).

[61] Expert tribunals' interpretations of law or legislation do not always get deference on appeal. Sometimes the test is correctness: see ***Boardwalk Reit Partnership v. Edmonton (City) (#2)***, 2008 ABCA 220, 437 A.R. 347, 91 Alta. L.R. (4th) 1 (paras. 20-22), reh. den. 2008 ABCA 284, 437 A.R. 222, 93 Alta. L.R. (4th) 309, leave den. [2008] S.C.C.A. No. 328. And note the cases cited there.

[62] It is important that the disputed words of s. 26 of the *Gas Utilities Act* give the Commission a second power (beyond rate regulation) to control utilities. Therefore, the issue here is not about

how the Commission should do its work. The issue is whether the Commission has power to forbid a cessation of use with no sale. Could the Utilities Commission force a utilities company to keep actually using a piece of plant? It is a question of jurisdiction.

[63] There could be some drawbacks to letting a statutory tribunal set its own powers. The concern could be heightened where (as here) the same legislation gives a right of appeal to the Court of Appeal on questions of law or **jurisdiction**, and where a Justice of Appeal has found the question arguable, and given leave to appeal. If the Consumer Advocate's argument about standard of review were correct, the right of appeal might have limited utility. To some degree a right of appeal is the opposite of a privative clause, especially on legal questions. But I must emphasize that that is only one aspect of one aspect to weigh, and is not a free-standing ground to adopt one standard of review.

[64] We must also recall that the standard of review on appeal is ultimately up to the Legislature, and is not constitutional: Jones & de Villars, *Principles of Administrative Law* (4th ed. 2004) at 454-6; ***Pushpanathan v. Min. of Citizenship & Immigration*** [1998] 1 SCR 982, at 1004-05 (paras. 26-7) (amended at p. 1222).

[65] I do not suggest that the jurisdictional nature of the question, or the right of appeal, is conclusive. But each is relevant and weighty among the various ***Pushpanathan*** factors. See ***Director of Investigation & Research v. Southam*** [1997] 1 SCR 748, 209 NR 20, (para. 46); Jones & de Villars, *op. cit. supra*, at 556.

[66] Here the main question is the meaning of the word "disposition". It is a concept familiar to lawyers and judges in many parts of the law. It is not a concept from engineering or science, nor rate regulation. This is not, for example, a case where the Commission had to interpret words in the *Act* such as "production" or "gathering" referring to the physical or technical aspects of gas distribution.

[67] I mentioned weighty factors. Normally I would perform a ***Pushpanathan*** weighing analysis here, but it is not necessary in this case. The Supreme Court of Canada has already performed it for interpreting s. 26 of the *Gas Utilities Act*, and said that the standard is correctness: (***Stores Block*** case) ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (paras. 25-32). I realize that the strict questions there was allocating profits on sale, but it was the same section in the same Act; and that case and this one both involve the breadth or scope of the powers given by s. 26.

[68] I conclude that the standard of review on this statutory appeal on this precise question, is correctness.

H. Conclusion

[69] Therefore, I would answer question (c), as slightly amended, in the negative.

[70] The rest of what the Commission actually did in the two orders under appeal is moot. I would dismiss the appeal.

[71] Here there were split results, three partially academic questions, and shifts in argument between factums and oral argument. So I would let each party bear its own costs.

Appeal heard on April 9, 2009

Reasons filed at Calgary, Alberta
this 30th day of June, 2009

Côté J.A.

I concur: McFadyen J.A.

I concur: Rowbotham J.A.

Appearances:

H.M. Kay, Q.C.
L.E. Smith, Q.C.
L.A. Goldbach
for the Appellant ATCO Gas and Pipelines Ltd.

B.C. McNulty
for the Respondent Alberta Utilities Commission and
Alberta Energy and Utilities Board

T.D. Marriott
for Utilities Consumer Advocate

Corrigendum of the Reasons for Judgment Reserved

In paragraph [21], the reference to 1 Priest has been corrected to read “Principles of Public Utility Regulation, 139, 183 (1969)”.

In paragraph [61], the Quick Law citation for ***Boardwalk Reit LLP v. Edmonton (City)*** has been corrected to read “[2008] S.C.C.A. No. 328”.