Case Name:

Consumers' Assn. of Canada (Manitoba) Inc. v. Manitoba Hydro Electric Board (Manitoba Hydro)

Between
The Consumers' Association of Canada (Manitoba) Inc.
and The Manitoba Society of Seniors Inc. (CAC/MSOS)
(intervenors) applicants, and
The Manitoba Hydro Electric Board (Manitoba Hydro)
(applicant) respondent)
(Docket No. AI04-30-05963)
And between
Manitoba Industrial Power Users Group (MIPUG)
(intervenor) applicant, and
Manitoba Hydro (applicant) respondent
(Docket No. AI04-30-05969)

[2005] M.J. No. 142

2005 MBCA 55

195 Man.R. (2d) 12

138 A.C.W.S. (3d) 990

Docket Nos. AI04-30-05963 and AI04-30-05969

Manitoba Court of Appeal

Monnin J.A.
(In Chambers)

Heard: February 23, 2005.
Oral judgment: May 5, 2005.

(70 paras.)

Administrative law -- Judicial review and statutory appeal -- When available -- Leave to appeal -- Standard of review -- Natural resources law -- Hydro-electricity -- Rates.

Application for leave to appeal by the Consumers Association of Canada, the Manitoba Society of Seniors and the Manitoba Industrial Power Users Group from a decision of the Public Utilities Board approving rate increases for all classes of customers of the Manitoba Hydro Electric Board. Hydro sought to increase its rates and proposed a rate increase varying according to the class of customers. The Public Utilities Board approved an identical rate increase for all classes of customers on the basis that Hydro's retained earnings were low as a result of a drought and that the shortfall should be borne by all consumers. The applicants argued that the rate increase was not just and reasonable. They claimed that the Board did not use the standard method for calculating rate increases, that it failed to conclude that Hydro's operations were cost-efficient before approving the rate increases and that certain classes of customers were already paying more than the reasonable rates calculated by Hydro. The applicants argued that the Board exceeded its jurisdiction by failing to sufficiently examine Hydro's costs and revenues before approving the rate increase.

HELD: Application dismissed. The applicants' argument that the Board failed to establish a just and reasonable rate was not a matter of law but a difference of opinion about the Board's conclusion. The Board's reasons indicated that it considered extensive financial information and used its discretion to set the rate increase. The fact that the Board did not use the financial tools discussed by the applicants did not lead to the conclusion that its decision was not just and reasonable. The Board's decision to build retained earnings faster than proposed by Hydro in order to protect Hydro's financial health was within the Board's jurisdiction. The Board did not rely on irrelevant evidence or fail to consider relevant evidence. The Board did not use inappropriate tests or make its decision arbitrarily. There were no questions of pure law to be decided. The applicants failed to convince the court that the matters were of public importance.

Statutes, Regulations and Rules Cited:

The Crowns Corporations Public Review and Accountability Act, C.C.S.M. c. C336 s. 26

The Manitoba Hydro Act, C.C.S.M. c. H190

The Public Utilities Board Act, C.C.S.M. c. P280 s. 44(1), s. 58(1), s. 58(2), s. 77(a)

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P.J. Ramage for the Respondents

R.F. Peters and A. L. Southall for the Public Utilities Board

1 **MONNIN J.A.** (orally):-- In both of these actions, the applicants, The Consumers' Association of Canada (Manitoba) Inc. and The Manitoba Society of Seniors Inc. (CAC/MSOS), and Manitoba Industrial Power Users Group (MIPUG), seek leave to appeal orders made by the Public Utilities Board (the PUB) following a rate increase hearing for Manitoba Hydro (Hydro).

2 Although each group of applicants have commenced their own separate application for leave to appeal, I am releasing but one set of reasons in disposing of these applications as the subject matter of each application is derived from the same PUB hearings, the leave applications were heard as one, and the matters in issue are relatively similar.

Introduction

3 Following 13 days of hearings, the PUB, on July 28, 2004, released its Order 101/04. It provided for rate increases of five per cent to all Hydro customer classes as of August 1, 2004, and conditionally provided for two subsequent rate increases. The PUB also indicated that there would be a subsequent order that would provide further rationale for its directives regarding rates, as well as direction with respect to certain outstanding matters arising out of Hydro's application.

4 On November 18, 2004, the PUB released its Order 143/04. The release of that order came after both of these applications for leave to appeal had been filed.

5 In its first rate increase application since 1997, Hydro had been seeking approval of new rates that would generate a three per cent increase in annual revenue over the period April 1, 2004, to March 31, 2005. Hydro also requested that the average percentage rate increase be greater if an order approving the application was delayed past April 1, 2004. In its application, Hydro was seeking different rates of increase for certain customer classes, including MIPUG, for which it was only seeking increases of 1.95 per cent and 1.4 per cent.

6 The PUB's authority is derived from The Public Utilities Board Act, C.C.S.M. c. P280 (the Act). Section 44(1) states:

> Power to order partial or other relief 44(1) Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief

7 Section 77(a) provides:

> Orders as to utilities
>
> 77 The board may, by order in writing after notice to, and hearing of, the parties

interested,

(a) fix just and reasonable individual rates, joint rates, tolls, charges, or schedules thereof, as well as commutation, mileage, and other special rates that shall be imposed, observed, and followed thereafter, by any owner of a public utility wherever the board determines that any existing individual rate, joint rate, roll, charge or schedule thereof or commutation, mileage, or other special rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential;

8 Sections 58(1) and (2) of the Act deal with appeals from PUB orders. They provide:

Grounds of appeal
58(1) An appeal lies from any final order or decision of the board to The Court of Appeal upon

(a) any question involving the jurisdiction of the board; or
(b) any point of law; or
(c) any facts expressly found by the board relating to a matter before the board.

Leave to appeal
58(2) The appeal shall be taken only

(a) by leave to appeal obtained from a judge of The Court of Appeal;
(b) within one month after the making of the order or decision sought to be appealed from, or within such further time as the judge under special circumstances shall allow; and
(c) after notice to the other parties stating the grounds of appeal.

9 In 1379025 Ontario Ltd. v. Winnipeg (City) Assessor, [2005] M.J. No. 99, 2005 MBCA 46, a recent chambers decision from this court dealing with an application for leave to appeal from a decision of the Municipal Board of Manitoba, Freedman J.A. summarized the test to be applied on a leave application (at para. 2):

> For leave to be granted, the applicant must raise a question of law or jurisdiction. If there does exist a genuine question of law, it must be one of some importance, meriting the attention of the court. Leave will not be granted on mixed questions of fact and law. The methodology used by the Board to determine assessed value

> is a question of fact. See, among many cases establishing or affirming these principles, Manitoba (Provincial Municipal Assessor) v. Ducks Unlimited Canada, [1998] M.J. No. 547 (C.A.), West-Man Culvert & Metal Co. v. Provincial Municipal Assessor (Man.) (1992), 81 Man.R. (2d) 112 (C.A.), and Norwood Hotel Co. v. Winnipeg (City) Assessor, [1999] M.J. No. 96 (C.A.). See also Briarwood Investment Corp. v. Winnipeg City Assessor (2004), 187 Man.R. (2d) 316, 2004 MBCA 103 ... .

10 The provisions for an appeal from a decision of the Municipal Board are somewhat different than the appeal provisions under the Act, but what Freedman J.A. stated in the above-noted case remains applicable to this one especially so as in this case where the application for leave is brought pursuant to ss. 58(1)(a) or (b) of the Act.

11 Furthermore, even though a question of jurisdiction or a point of law is raised, the granting of leave remains discretionary. See Green Acres Memorial Gardens (1969) Ltd. v. Public Utilities Board (1984), 28 Man.R. (2d) 224 (C.A.).

Standard of Review

12 Although the issue of the applicable standard of review is not specifically before me in addressing a leave application, consideration of the applicable standard cannot simply be set aside. The standard of review to be applied in an appeal is a factor for consideration on a leave application.

13 The PUB argues that a high degree of curial deference must be given to it and, therefore, the standard should be one of patent unreasonableness. The PUB takes the position that there will be no question of pure law or jurisdiction reviewable by the court, and that the matters raised by the applicants are questions of fact or mixed fact and law. The PUB therefore argues that a high degree of curial deference should be shown to its decisions.

14 Hydro takes the position that the standard of review could be as argued by the PUB, or reasonableness simpliciter. More particularly, Hydro takes the position that given the PUB's expertise, the legislative framework under which it gains its wide discretion with respect to rate approval and the need to obtain leave, the patently unreasonable standard should apply to errors of fact or mixed law and fact. On the other hand, because of the specialized environment in which the PUB operates, Hydro argues that with respect to pure errors of law, the standard of review should then be reasonableness simpliciter.

15 Both group of applicants argue that the applicable standard should be that of correctness or reasonableness simpliciter. They argue that a lack of privative clause and the nature of the problem under consideration militate against the highest standard of patent unreasonableness as being the appropriate standard. They further argue that the PUB has departed from past practice in arriving at its present decision, and that because of that, the deference owed to it should be reduced.

16 Without making a definite finding on this issue, I am inclined to accept that the position advanced by Hydro is in fact the correct one. However, because this is but a leave application, I am prepared to grant to all applicants every possible advantage and will therefore consider their applications against the less stringent standards of correctness and reasonableness simpliciter.

CAC/MSOS Position

17 According to CAC/MSOS, what is at issue in this leave application is the appropriate regulatory treatment of almost $300 million in expenses associated with Hydro's operating, maintenance, and administration budget for the 2004/05 fiscal year. CAC/MSOS assert that by the manner it dealt with Hydro's expenses, the PUB failed to arrive at a rate that was just and reasonable, and therefore exceeded its jurisdiction.

18 In its leave application, CAC/MSOS set out four grounds on which it was seeking leave. In its motion brief, it has distilled those four grounds into two. They are:

> In discharging its duty to ensure that the rates for service of Manitoba Hydro are just and reasonable, did the Board err in law or fail to exercise its jurisdiction by declining to consider whether the current and projected OM&A [Operating, maintenance and administration] costs of Manitoba Hydro were necessary and prudent and whether as a consequence the projected revenue requirement and rates were reasonable?
>
> Given its rejection of the "bottom up" methodology for determining OM&A costs and its confirmation that an $11 million arithmetic error took place in the top down calculation, did the Board err in law by determining the reasonableness of projected revenues and rates based upon a projected OM&A cost of $307 million?

19 CAC/MSOS's application finds its genesis in an error that was found in the operating, maintenance, and administration costs (OM&A) that Hydro submitted as part of its application materials. The OM&A represents Hydro's "out-of-pocket" expenses for items such as labour, travel, consulting and administration. For well over a decade, the PUB has focussed on these costs because they are particularly amenable to management control. In prior decisions, it has held that before Hydro can seek rate relief from its ratepayers, it must demonstrate that it has employed "all reasonable cost efficiencies." It was from this fundamental principle that CAC/MSOS argue the PUB departed, and that such a departure was fundamental to a proper exercise of its jurisdiction.

20 CAC/MSOS allege that in determining the revenue requirements and rates of Hydro, the PUB departed from its own practice and long-standing regulatory principle in failing to consider whether Hydro was making "reasonable efforts" to control its own expenses or to maximize internal efficiencies. CAC/MSOS argues that the PUB appears to have simply "passed through" Hydro's

projection for OM&A expenditures despite explicitly rejecting the "bottom-up" methodology by which Hydro eventually came to justify the proposed $307 million expenditure.

21 CAC/MSOS during the course of the hearings demonstrated that the OM&A being relied upon by Hydro contained an error of $11 million. The issue then becomes whether Hydro's $307 million projected OM&A for the year 2004/05 was $11 million too high due to either a failure to employ reasonable cost efficiencies, or due to the double counting of certain expenditures. This in turn, argues CAC/MSOS, brings into question whether the PUB properly applied the standard of a just and reasonable rate. At the heart of that standard is the recognition that a precondition for the calculation of a just and reasonable rate is a determination of whether the current and projected costs of the corporation are reasonable and necessary.

22 CAC/MSOS further argue that at the heart of the PUB's jurisdiction lies the duty to consider whether rates are just and reasonable. In order to do so, the PUB has to make all inquiries necessary to obtain complete information with respect to matters before it. From this basic premise, CAC/MSOS argue that by failing to properly consider the errors in the OM&A submitted by Hydro, and by failing to give proper weight to those errors, the PUB committed an error that goes to its jurisdiction.

23 CAC/MSOS assert that all that the PUB did was basically rubber stamp the cost projections that Hydro submitted, and failed to examine the reasonableness of Hydro's control of its expenditures.

24 In advancing its argument, CAC/MSOS rely on a decision of this court in Brandon Transit Consumers Association Inc. v. Brandon (1985), 34 Man.R. (2d) 36. In that case, when dealing with the concept of just and reasonable, O'Sullivan J.A. wrote (at paras. 16-17):

> For an interpretation of the meaning of "just and reasonable" in this context, counsel referred us to the decision of the Supreme Court of Canada in British Columbia Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia et al., [1960] S.C.R. 837. In that case, Martland J., spoke for the majority at p. 856:
>
> > I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas ... and to provide extensions to these services when, in the opinion of the Commission, such are necessary.

> The Nova Scotia Supreme Court Appeal Division dealt with a similar issue in City of Dartmouth (1977), 17 N.S.R. (2d) 425 at 432, approving what had been said by the Nova Scotia Board of Commissioners:
>
> > In determining a just and reasonable rate, the objective of the Board is to protect both the customer and utility, and to safeguard the overall public interest. The actual determination of rates is a complicated exercise. One must keep in mind the "cost of service" concept as far as the utility is concerned. The concepts of "value of service" and "quality of service" are both of importance to the customers of the utility.

25 In simpler terms, CAC/MSOS argue that the PUB, by insufficiently looking at Hydro's projected costs and revenues in fixing the rates it was approving, did not exercise its statutory mandate in the manner required by the enabling legislation which, it argues, includes The Manitoba Hydro Act, C.C.S.M. c. H190, The Crown Corporations Public Review and Accountability Act, C.C.S.M. c. C336, (the Accountability Act) and the Act itself.

MIPUG Position

26 MIPUG's leave application consists of allegations of six errors which, in its motion brief, it consolidates into three issues as follows:

> The Board exceeded its jurisdiction in finding that a 5% increase in rates for all customer classes, and for the industrial class in particular was "just and reasonable", when there was no evidence to support this conclusion. ...
>
> The Board exceeded its jurisdiction in finding that the rates requested by Hydro were "insufficient" for the utility in the absence of evidence that a greater increase was required to sustain the financial health of the utility, and in the face of evidence to the contrary.
>
> The Board declined jurisdiction to fulfil its legislative mandate in declining to review and critically assess Hydro's operating and capital expenditures, and the impact of Hydro's payments to ratepayers in order to determine whether its stated revenue requirement was reasonable and should be recovered in rates paid by domestic consumers.

27 As did CAC/MSOS, MIPUG bases its application on the premise that in arriving at its order, the PUB failed to ensure that the rate it fixed for its share of the increase was just and reasonable as there was insufficient evidence before it to justify the conclusion it arrived at. This, MIPUG argues,

is even more evident in respect to the increase to its class as Hydro was seeking only a reduced rate of increase as opposed to other classes of customers.

28 MIPUG alleges that in arriving at its order, the PUB failed to rely on a Cost of Service Study (COSS), which is an instrument that the PUB had relied on in prior hearings.

29 The COSS is a tool used by Hydro to assist in evaluating and setting rates for each customer class. The COSS analyzes the components of Hydro's revenues and costs, making allocations to the various customer classes. The intent of the COSS is to evaluate the relative fairness of rates between customer classes. Revenue to Cost Coverage Ratios (RCC) are determined from the COSS, and indicate the proportion of costs recovered from the revenue arising from each customer class. A Zone of Reasonableness (ZOR) concept has been developed to assist in evaluating the RCC ratios.

30 MIPUG further alleges that there was no evidence, expert or otherwise upon which to conclude that an across-the-board rate increase of five percent was reasonable or just with respect to all customer classes and the industrial class in particular. The only available evidence according to either established or even preliminary COSS approaches that were discussed was that the industrial class has paid and continues to pay costs that exceed the Board defined ZOR.

31 MIPUG argues that the industrial class was already paying rates that exceeded their costs by 14 percent, pursuant to the COSS relied upon by Hydro which incorporated the approach that the PUB directed in its previous rate orders such as discussed in Order 7/03. The Board erred, MIPUG alleges, in dismissing this evidence in the absence of a complete COSS that suggests otherwise.

32 In addition, MIPUG asserts that what is of even greater concern from a public interest perspective is the fact that the decision was made without relying on any cost of service methodology, let alone cost-causation principles that have been established in the regulatory context in Manitoba. This amounts to an abandonment of regulatory practice that has existed in Manitoba since Hydro's rates fell under the PUB's jurisdiction.

33 Lastly on this issue, MIPUG argues that there was no justifiable and principled basis that could justify the PUB's across-the-board identical rate increase for all customer classes and in so doing failed to address each customer class on an individual basis as it should have.

34 MIPUG also endorses CAC/MSOS's argument that the PUB exceeded its jurisdiction by arriving at its order without properly reviewing and considering the revenues and costs submitted by Hydro.

The PUB Orders

35 In its initial Order 101/04, at pp. 21-22, the PUB acknowledged that there were difficulties with some of Hydro's proposed expenses and set out the need in future hearings to address that issue. It stated:

> The Board accepts the CAC/MSOS comments with respect to arithmetical errors in MH's [Manitoba Hydro] integrated financial forecast. Nonetheless, the Board accepts the overall forecast for net income for 2004/05 and 2005/06 provided by MH as being reasonable, having been based on macro assumptions. While the costs pointed out by CAC/MSOS may be over estimated, there may be offsetting items in the IFF [Integrated Financial Forecast]. As well, the Board is of the view that there is a need for MH to rebuild retained earnings, particularly depressed as a result of the drought and required to meet on-going risks.
>
> The Board has reasonable confidence in MH's efforts to project expenses. That being said, one of the goals of the hearing process is to best ensure that such confidence in the Corporation's forecasting is also shared by the Intervenors.
>
> The Board finds that a more detailed examination of MH's cost experience and forecasts in future rate hearings would be in the public interest. The Corporation is engaged in a number of concurrent activities, projects and research initiatives, all requiring a substantial investment in personnel and consultants.
>
> Cognizant of the necessity for the Corporation to meet its challenges effectively, managing the export activities being a prime example, the Board is reluctant, in fact unable on the record of this proceeding, to provide critical judgement on the appropriateness of the current and projected departmental and functional personnel complement and cost levels.
>
> The Board acknowledges that it is not alone in its oversight of the Corporation, and that its jurisdiction is limited. Accordingly, the Board finds it necessary and reasonable to rely upon the Corporation's Board, the Government, and Crown Corporations Council with respect to administrative oversight of MH's operating and capital expenditures.
>
> Nonetheless, noting the ongoing and substantial increases in MH's operating, maintenance and administration expenses, and observing the continuing material negative differential between the costs per customer between MH and BC Hydro (as reported during the hearing), a more detailed examination of costs at future rate hearings represents a reasonable objective.

36 The PUB in that same order, at pp. 26-27, went on to deal specifically with the reliability of the COSS and why it was uniformly increasing rates for all class of customers in this fashion:

During the hearing, persuasive evidence was presented that indicated the cost of service study (COSS) used to assess and recommend rates was in need of amendment.

Notwithstanding this, the rate differentiation sought by MH reflected the use of existing COSS methodology that does not segregate the revenues and costs associated with exports and imports, resulting in flawed results. As well, the current methodology does not meet the Board's interpretation of the intent of the uniform residential rate legislation.

Therefore, the Board agrees that the cost of service methodology requires further analysis and amendment. This further analysis should include a thorough consideration of the NERA [National Economic Research Associates] recommendations, along with offsetting the financial impact of uniform rates by a first charge on net export revenues.

. . . . .

Because the COSS methodology is in a current state of flux, and, in the Board's view incomplete, the Board is not prepared to adopt the current methodology in assessing the revenue to cost ratios of each customer class.

The process to address the fairness of the COSS and the appropriate revenue to cost ratios for the Manitoba customer classes is acknowledged to be lengthy. However, it is important that in the end the methodology be correct, appropriate, and supported.

As further hearings occur, there will be ample opportunity to further consider the ratios and the appropriate use of the ratios in rate setting, after the Board has accepted and confirmed the COSS methodology. Presumably this can be achieved by the time of consideration of the first conditional rate increase, as the Board prefers to begin the process of utilizing the COSS in rate setting at that time.

In the interest of fairness and recognizing the unusual severity of the effects of the recent drought, the Board has determined that the impacts of the drought should be borne by all the rate classes, and that sharing should be reflected in all customer classes receiving the same percentage rate increase on August 1, 2004.

As indicated, future rate increases may differentiate between classes.

37 In its more detailed Order 143/04, which is in fact the full-blown reasoning for its earlier decision and covers in detail some 100 pages, every aspect of the hearing and its decision the PUB deals with the issues raised by MIPUG in its introduction, at pp. 1-2, 96-98 as follows:

> The 5% rate increase directed by the Board was and is supported by the fact of the drought experienced in full force during MH's 2003/04 fiscal year. The drought drastically reduced MH's retained earnings. This account had been built up over the years primarily through net export revenues, which provided for below cost rates for all customer classes. All customer classes benefited from net export revenue, and all classes had to share in the rate increase ordered to start the replenishing of MH's retained earnings.
>
> The drought was not a "cost" that was caused by only one customer class; hence, all customer classes were afforded the same treatment and received a 5% rate increase. MH's "Cost of Service" methodology, which seeks to establish differential rates by customer class, is in a state of flux. It could not be relied upon for the purpose of the recent 5% rate increase. Recent issues related to the methodology require the Board's further consideration, and the Board sought information related thereto from the Corporation in directing the 5% rate increase.
>
> The Board heard evidence from the Corporation and some of the Intervenors that the COSS presently employed by MH requires further review and amendment as it produces distortions in the cost allocation process. The hearings raised questions regarding determination and allocation of net export revenue, the treatment of the uniform rate policy, and differentiation between new and old generation facilities.
>
> Because the COSS methodology is in a current state of flux, and in the Board's view incomplete, the Board can no longer rely on the current methodology in assessing the revenue to cost coverage rates for each customer class. It is imperative that further analysis be completed before a COSS methodology can be established. Therefore, in Order 101/04 the Board directed MH to file by no later than January 31, 2005 three separate COSS models, to reflect

(a) MH's existing methodology;
(b) The implementation of the NERA recommendations; and
(c) MH's preferred approach and methodology, including supporting rationale.

. . . . .

> In addition, MH is to provide a report on the utilization of the Zone of Reasonableness concept, where all customer classes are moved to "unity" (allocated revenue equals allocated expenses) within five to seven years using MH's amended COSS model.
>
> The Board understands that this matter is significant and expects that the COSS issues can be addressed prior to the next GRA [General Rate Averaging].
>
> In Order 101/04, the Board approved the same rate increases for all rate classes. It would be imprudent for the Board to make rate changes to customer classes based on a COSS methodology that is in a state of flux, known to create distortions, and which is unacceptable to the Board. In addition, as the prospective 2004 COSS study reflects forecast information it does not take into consideration the additional shortfall created by the drought.
>
> The 2003/04 shortfall was over and above the expenditures allocated to the various classes, and the revenue earned was insufficient from every class. Therefore, it is appropriate at this time to apply the approved rate increases equally to all customer classes. The Board understands that this treatment is a change from the past. However, the Board is of the view that sharing the rate increases by all classes is just and reasonable when the significance of the drought is considered.

38 In that same order, the PUB dealt further with CAC/MSOS's concerns with respect to the erroneous OM&A. It says the following with respect to the OM&A (at pp. 89-90):

> During the hearing, issues relating to operating results and financial projections were thoroughly canvassed. Intervenors joined with the Board in active cross examination, provided expert witness testimony, and submitted strong final argument with respect to this area. The Board has considered all the evidence provided during the hearing, and considered the CAC/MSOS comments with respect to unreconciled differences in MH's integrated financial forecast.

> The Board is of the view that the issues brought forth by CAC/MSOS serve to call into question MH's detailed practices with respect to forecasting. The Board cautions MH that one of the goals of the hearing process is to instil confidence with the Board and Intervenors with respect to MH's forecasting ability. As such, the Board expects that MH will take more care in ensuring its "bottom up" forecasts reconcile with its "top down" forecasts for future applications, and suggests that a more detailed examination of MH's costs and forecasts at future rate hearings can be expected.
>
> . . . . .
>
> The Board's statement in Order 101/04 which drew the attention of the Intevenors in their Motions for Leave to Appeal indicated that the Board was "reluctant, in fact unable on the record of this proceeding, to provide critical judgement on the appropriateness of the current and projected departmental and functional personnel complement and cost levels."
>
> To clarify and to reiterate, this comment by the Board was made with reference only to the detailed cost forecasts. The Board concluded that MH provided sufficient evidence on overall costs and staff levels on which the Board based its rate increase decision. The Board relied on a top down view, one that considers actual and trend expense levels and increases in staff complement. Bottom up expense forecasting is a good test of the correctness of the top down forecast, but it does not replace the other approach and is only intended to be complementary to it. When a difference exists, as it does in this case, a choice has to be made. The Board chooses caution with respect to the financial integrity of MH, and reliance on actual and trend expense development.

The PUB Position

39 In response to both leave applications, the PUB takes the position that neither application has a reasonable prospect of success nor do they present a matter of importance that ought to engage the court.

40 The PUB argues, that based on the decision of the Federal Court of Appeal in British Columbia Hydro and Power Authority v. Westcoast Transmission Co. Ltd. et al., [1981] 2 F.C. 646, the issues raised in both leave applications are matters of methodology, and that it has complete discretion over the methodology to be employed in a rate hearing. In that decision, Thurlow C.J. cited with approval the reasoning of Jackett J.A. in Consumers' Assn. (Can.) v. Ontario Hydro [No. 1], [1974] 1 F.C. 453 (C.A.) as follows (at p. 657):

> In Consumers' Association of Canada v. The Hydro-Electric Power Commission

of Ontario [No. 1], Jackett C.J., on an application for leave to appeal under section 18 of the National Energy Board Act, outlined the scope of the review which the Court may make under that provision as follows [at pages 457-458]:

> Section 83(b) calls for a determination by the Board as to whether the price to be charged is "just and reasonable" in relation to the public interest. Generally speaking, as it seems to me, where Parliament leaves it to a tribunal to decide "fair and reasonable" or "just and reasonable" rates or prices or public convenience and necessity, the tribunal has a discretion to decide in what manner it will obtain information and the Courts have no right to review the Board's opinion based on the facts established before it. See Northwest Utilities Ltd. v. The City of Edmonton ([1929] S.C.R. 186), Union Gas Company of Canada, Limited v. Sydenham Gas and Petroleum Company, Limited ([1957] S.C.R. 185) and Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company ([1958] S.C.R. 353). ...

41 Further, the PUB argues that the record shows that it extensively reviewed the evidence and submissions of Hydro, and all intervenors, including the present applicants, and then gave clear considered reasons supporting its findings.

42 The PUB also argues that notwithstanding the calculation error in the OM&A, there was additional, sufficient evidence before it to conclude that the OM&A costs were reasonable. In addition, the PUB states that the rate order did not derive solely from one forecasting tool, but was arrived at by considering many factors of which the key factor was a timely recovery of monetary reserves for Hydro to assure its current and future financial stability that had been seriously compromised by the drought conditions it had to deal with.

43 The PUB further submits that pursuant to s. 44(1) of the Act, it had the jurisdiction to impose the rate it opined was just and reasonable, and to substitute its own specified rate for the rate sought by Hydro. Orders 101/04 and 143/04 disclose the detailed review of evidence and considerations of the PUB. The PUB was satisfied on all of the evidence that the rate sought by Hydro would be insufficient to provide enough retained earnings in fiscal 2004/05 to begin the rebuilding of Hydro's reserves to an adequate level in an acceptable time period.

44 The PUB further argues that in the exercise of its discretion, there were a number of different conclusions that it could reach. It did reach certain conclusions within its jurisdiction, which is very broad by legislative direction and necessary implication. Such conclusions ought not to be subject to judicial review or reconsideration.

45 The PUB takes the position that what the applicants are in fact seeking in their appeals is that the PUB be directed by the court as to how it should arrive at a specified rate. On this point it argues

that if such specific criteria are considered warranted, they are to be defined by legislators in our system of administrative law, and not by the court. The PUB made a decision based on broader needs and interests, and grounds more extensive than those contemplated by the applicants.

46 The PUB finally takes the position that the legal principles that govern the exercise of its jurisdiction are already established. The PUB has been rate setting to establish just and reasonable charges for the services of various public utilities since its creation in 1926. This court has already ruled on the PUB's purpose in regulating rates set by public utilities and on the purpose and jurisdiction granted by ss. 26(1) of the Accountability Act. This court has determined that the words "just and reasonable" and "public interest" are to be defined by the PUB, in any given circumstance, to address the specific facts and issues before it.

47 The PUB bases its conclusions upon the weighing of evidence, and the determination of relevant factors guiding the exercise of its discretion, are matters of fact or mixed fact and law, and are within its jurisdiction. It argues its decisions are not patently unreasonable and ought not to be subject to reconsideration on appeal to this court.

Hydro's Position

48 Hydro's response to the leave applications is based on the premise that the PUB's jurisdiction to set its rates is derived from the Accountability Act, and that such authority is affected by neither the Act nor The Manitoba Hydro Act. Specifically, it argues that the whole of the rate-setting authority is derived from s. 26 of the Accountability Act. The relevant portions of that s. are as follows:

> Hydro and MPIC rates review
> 26(1) Notwithstanding any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under The Public Utilities Board Act and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.
>
> Definition, "rates for services"
> 26(2) For the purposes of this Part, "rates for services" means
>
> . . . . .
>
> (b) in the case of Manitoba Hydro, prices charged by that corporation with respect to the provision of power as defined in The Manitoba Hydro Act;

. . . . .

Application of Public Utilities Board Act 26(3) The Public Utilities Board Act applies with any necessary changes to a review pursuant to this Part of rates for services.

Factors to be considered, hearings 26(4) In reaching a decision pursuant to this Part, The Public Utilities Board may

(a) take into consideration

(i) the amount required to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,
(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,
(iii) interest on debt incurred by the corporation,
(iv) reserves for replacement, renewal and obsolescence of works of the corporation,
(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,
(vi) liabilities of the corporation for pension benefits and other employee benefit programs;
(vii) any other payments that are required to be made out of the revenue of the corporation,
(viii) any compelling policy considerations that the board considers relevant to the matter,
(ix) any other factors that the board considers relevant to the matter; and

(b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the board, have an interest in the matter.

49 On this basis, Hydro argues that the Accountability Act gives the PUB its jurisdiction and does not mandate or direct a particular level of review or methodology be employed when approving rates. Accordingly, the meaning of these words and the methodologies used are not questions of statutory interpretation and are not questions of jurisdiction.

50 Hydro expands its argument on this point by relying on a decision of the Federal Court of Appeal in Trans Mountain Pipe Line Co. Ltd. v. National Energy Board, [1979] 2 F.C. 118, where it is stated (at p. 121):

> Whether or not tolls are just and reasonable is clearly a question of opinion which, under the Act, must be answered by the Board and not by the Court. The meaning of the words "just and reasonable" in section 52 is obviously a question of law, but that question is very easily resolved since those words are not used in any special technical sense and cannot be said to be obscure and need interpretation. What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.

51 In addition, Hydro also relies on British Columbia Hydro and Power Authority as authority for the wide discretion that the PUB has in fixing a just and reasonable rate. That decision states (at pp. 655-56):

> There are no like provisions in Part IV of the National Energy Board Act. Under it, tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the broadest of terms to make orders with respect to all matters relating to them. Plainly, the Board has authority to make orders designed to ensure that the tolls to be charged by a pipeline company will be just and reasonable. But its power in that respect is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved. In particular, there are no statutory directions that, in considering whether tolls that a pipeline company proposes to charge are just and reasonable, the Board must adopt any particular accounting approach or device or that it must do so by determining cost of service and a rate base and fixing a fair return thereon.
>
> In Trans Mountain Pipe Line Co. Ltd. v. National Energy Board, Pratte J., with whom the other members of the Court agreed, described the function of the Board and of this Court on an appeal from the Board's decision as follows [at p. 121]:
>
> > Under sections 50 and following of the Act, the Board's duty was to

> determine the tolls which, in the circumstances, it considered to be "just and reasonable."

52 Relying on those basic principles, Hydro then goes on to argue, as did the PUB, that there is no requirement for the PUB to rely on a COSS to fix a just and reasonable rate, and that such a study is but one of the elements that the PUB could or could not rely upon in arriving at its order. The same argument also applies to the manner in which the PUB dealt with the mathematical error in the OM&A.

53 Hydro takes the position that the PUB's decision should not be read in isolation, but should be considered in light of the totality of evidence and arguments presented at the hearing to determine if important issues or arguments were missed. The fact that evidence may not be specifically referred to in the PUB's reasons does not lead to the conclusion that it failed to consider it. Provided such evidence is in the record, it is for the PUB to weigh its reliability and cogency along with the other evidence in the case.

54 Finally, Hydro argues that in any event, the applicants have not presented an arguable case of substance. Hydro asserts that the errors alleged by the applicants are properly characterized as errors of mixed fact and law to which the standard of patent unreasonableness applies. The Board's decision was not "clearly irrational" and as such leave to appeal the decision ought to be denied. It goes on to say that it is apparent on the face of the decision that the Board's line of analysis is reasoned and based on the evidence before it. There is no basis in the legislation to support the argument that the Board is required to focus on pure cost causation in approving a fair rate, or that a particular tool or methodology, notably the COSS, must be used in order to fairly allocate costs amongst customer classes.

Analysis and Decision

55 In analyzing the position of the parties in this application, I am guided by two decisions of this court dealing with a right of appeal from a decision of the PUB.

56 In Centra Gas Manitoba Inc. v. Manitoba (Public Utilities Board), [1997] 6 W.W.R. 301 (Man. C.A.), Scott C.J.M. determined the proper approach to a leave application in the context of a similar case. He said initially in dealing with the right to appeal (at para. 20):

> Furthermore, by virtue of its very terms the right of appeal under sec. 58(1) of the Act is not unlimited. In Portage la Prairie (City) v. Inter-City Gas Utilities Ltd. (1970), 12 D.L.R. (3d) 388 (Man. C.A.), Freedman J.A. (as he then was) said (at pp. 391-92):
>
> > Manifestly the right of appeal permitted by the statute is broad and comprehensive. But it is not unlimited. It does not extend, for example, to

matters of policy decided by the Board in the exercise of its discretion. In such areas an appellate Court will not substitute its discretion for that of the Board. Whether this result follows from a strict construction of the statute or from a policy of judicial self-restraint is not now the important thing. What is important is the settled jurisprudence on the subject. Our highest Court in Canada, in the case of Union Gas Co. of Canada Ltd. v. Sydenham Gas & Petroleum Co., Ltd., 7 D.L.R. (2d) 65, [1957] S.C.R. 185, 75 C.R.T.C. 1, has charted the proper course for us on the subject. What was involved in that case was an order of the Ontario Fuel Board refusing to approve a by-law under which Sydenham Gas would have acquired a franchise to construct works for the transmission of natural gas to the premises of one company in the Town of Wallaceburg. The Fuel Board concluded that in terms of public convenience and necessity the by-law should not be approved. On appeal - there being a right of appeal "upon any question of law or fact" - the Court of Appeal reversed the decision of the Board and ordered that a certificate of approval issue. On further appeal to the Supreme Court of Canada the order of the Court of Appeal was set aside and that of the Fuel Board was restored. Kerwin C.J.C., for himself and Abbott J., declared, at p. 68, that the issue

> ... is not merely a matter of procedure; it goes to the jurisdiction of the Court of Appeal, and that jurisdiction does not include the substitution of that Court's views as to public convenience and necessity for those of the Board ...

And Rand J., writing for himself and Kellock J., expressed the matter thus at p. 69:

> What the Court did was to exercise an administrative jurisdiction and to substitute its judgment on the application for that of the Board. In this I think it exceeded its powers.

That a Court should leave matters of policy and of administration to the Board appears to make good sense. This is more than a matter of modest self-denial. It springs from a recognition that the Court is not a rate-making body; that a public utilities board of trained personnel and with expert assistance in technical areas has been specifically created for that purpose; and that in general it can perform such tasks much better than the Court.

> That does not mean that the Court should hesitate to assert all the powers which it lawfully possesses on appeal. It means only that it should not seek to extend those powers into questions of administrative policy or discretion.

57 He then went on (at paras. 30-33):

> Thus, the proper approach to the interpretation of legislation, such as the provisions under review here, is obvious. In this respect I can do no better than to refer to several passages of the leading American authority of Consolidated Edison Co. of New York v. Public Service Commission of New York, 390 N.E. (2d) 749 (U.S. N.Y. 1979), reversed on other grounds, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. (2d) 319 (U.S. N.Y. 1980), and Central Hudson Gas & Electric Corp. v. New York (Public Service Commission) (1980), 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. (2d) 341 (U.S.S.C. 1980). Chief Judge Cooke stated (at p. 752):
>
> > It is, of course, a fundamental postulate of administrative law that the Public Service Commission, like other agencies, is possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication [citations omitted]. Nevertheless, the absence of explicit statutory authorization need not be fatal to a given assertion of regulatory power by the commission. For, as we have recognized previously, the Legislature on occasion broadly declares its will, specifying only the goals to be achieved and policies to be promoted, while leaving the implementation of a program to be worked out by an administrative body (see, e.g. Matter of Sullivan County Harness Racing Assn. v. Glasser, 30 N.Y. (2d) 269, 276, 332 N.Y.S. (2d) 622, 625, 283 N.E. (2d) 603, 606; cf. Matter of Bates v. Toia, 45 N.Y. (2d) 460, 464, 410 N.Y.S. (2d) 265, 267, 382 N.E. (2d) 1128, 1130). In such cases, the sheer breadth of delegated authority precludes a precise demarcation of the line beyond which the agency may not tread. What is called for, rather, is a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment (cf. Matter of Broidrick v. Lindsay, 39 N.Y. (2d) 641, 646, 385 N.Y.S. (2d) 265, 267, 350 N.E. (2d) 595, 597).
>
> After referring to the provisions of the appropriate New York statutes (in essence the equivalent of secs. 74(1) and 77 of the Act), he went on to say (at p. 754):

> This construction becomes all the more reasonable when viewed in the context of the entire regulatory scheme. Rather than restricting the PSC's [Public Service Commission] authority, the Legislature has invested that agency with all powers needed to carry out the purposes of the Public Service law, as well as power to supervise generally the operation of electric and gas corporations and electric and gas plants.

To similar effect is the pronouncement of our Supreme Court in Bell Telephone Co. v. Canadian National Railway, [1932] S.C.R. 222 (S.C.C.), affirmed (1933), [1934] 1 D.L.R. 310 (Canada P.C.), in which Rinfret J., writing for the Court, in considering the authority of the Dominion Railway Board which had been given a broad supervisory mandate with respect to inter alia the "safety and convenience of the public," said (at pp. 229-30):

> The primary concern of Parliament in this legislation is public welfare, not the benefit of railways. With that object in view, almost unlimited powers are given the Board to ensure the protection, safety and convenience of the public. It may prescribe such terms and conditions as it deems expedient.

Thus the proper approach in this matter is to adopt the procedure suggested by Chief Judge Cooke in Consolidated Edison Co. of New York [390 N.E. (2d) 749 (U.S. N.Y. 1979)], which is to make a "realistic appraisal" of the facts and issues in order to determine whether the administrative order complained of "reasonably promotes" or transgresses the legislative intent, after having examined the legislative scheme as a whole. Once this is done, the answer on the facts of this case is inevitable.

58 In Centra Gas Manitoba Inc. v. Public Utilities Board (Man.) (1998), 131 Man.R. (2d) 287 (C.A.), Huband J.A. stated the following with respect to the right of appeal (at para. 4):

> While the legislation gives a judge a broad scope to grant leave, some caution is to be exercised. The Board is an administrative body with expertise in the entire field of establishing appropriate rates for public utilities. Many of its decisions flow from the development of a historic pattern of policies which evolved over the years. Where the issue upon which leave is sought relates to a discretionary decision based on factual matters, it is not ordinarily the stuff that should engage the attention of the Court of Appeal.

59 The PUB orders being appealed from must therefore be considered in the light of the directions set out in those two decisions. The underlying basis for the rate increase that the PUB

authorized can initially be found at p. 22 of Order 101/04:

> On an overall basis, the Board finds the financial impact of the drought on MH to have been extremely significant, and, combining this with other factors results in the requested rate increases being insufficient.
>
> Additional revenue is immediately required to begin the rebuilding of MH's retained earnings, towards the broadly accepted debt to equity ratio target of 75:25. The Board will expect MH to maintain vigilance over its costs, so that the additional revenues contribute as they are intended to move towards achieving the debt to equity target more quickly than suggested in MH's 2003 Integrated Financial Forecast.
>
> Accordingly, and after careful reflection and realizing the additional burden that will [be] placed on the economy, the Board has determined to vary MH's rate increase requests.

60 In its order 143/04, the PUB expands on the concerns that drove it to the decision it arrived at, and it is clear that in arriving at its order, the PUB was concerned with the overall financial stability of Hydro as that stability had been affected by the drought of the previous years. The PUB wrote (at pp. 85-88):

> Beginning in the fall of 2002, and particularly into the 2004 fiscal year, MH experienced severe financial losses primarily due to drought, resulting in the Corporation reporting an audited annual loss of $428 million for its 2003/04 fiscal year. This drought also highlighted the increased risks faced by MH in the export market, and the resulting need for MH to build and maintain adequate reserves in advance of further significant investments in generating and transmission facilities.
>
> The Board recognizes the concerns of the Intervenors that MH's revised estimate of over $2 billion for the impact of a five year drought was not fully substantiated or tested during the hearing process. However, when the single year loss for fiscal 2004 was greater than $400 million, and occurred despite successful initiatives undertaken by MH to restrain the loss, MH's $2 billion plus estimate may be reasonable when considering a [sic] the prospects of a 5-year drought. The Board will look to MH to provide further support for its loss estimate when the Corporation's risks are quantified as part of its risk management process.

The Board acknowledges the concerns of the Intervenors regarding MH's forecasts of capital, operating and administrative costs. The Board made a number of comments and directives in Order 101/04 to address these expenditures. However, the Board cannot ignore the significant impact of the drought. The Board remains of the view that it is reasonable for MH to begin recovering from the financial impact of the drought, and to progress towards achieving its debt to equity targets at as fast a rate as reasonably possible. Another drought will occur, and there is no certainty that the next drought will not occur before retained earnings have been sufficiently rebuilt.

MH explained during the hearings that even in the absence of another drought it would not reach its targeted debt to equity ratio by 2013/14, and provided no plan to achieve its target within this 10-year planning horizon. The Board believes that this situation is not reasonable. The current debt to equity ratio of MH is much higher than that of Quebec Hydro and B.C. Hydro.

The approved increases are meant to assist the Corporation to recover from the impacts of the drought and begin re-building reserves for the benefit of all consumers and to provide increased protection from the negative impacts of future droughts.

During the public hearing, MH explained that its IFF represents MH's best estimate of the Corporation's future results. MH added that in some years, MH will achieve greater net income than forecast, and in other years MH will earn less. The main drivers of net income fluctuations are weather, water levels and export prices. Over time, net income results may balance to the averages included in the forecasts, all other things being equal. The Board notes that MH's IFF forecasts have always included assumed rate increases at approximately the rate of inflation over the long term.

Prior to this Application, MH had not sought rate increases since 1997, favourable net export revenues had offset increased and increasing operating costs. Substantial real, after inflation, reductions in rates occurred over this period.

While the Board has considered the impact of the unreconciled difference in the Corporation's detailed 2005 and 2006 expense forecasts related to OM&A

expenditures, as apprehended by CAC/MSOS, the Board's view is influenced by actual cost trends and the risks and financial targets of the future. The Board accepts MH's contention at the hearing that "top down" derived estimates of OM&A are reasonable, even if there is a problem with some aspects of the detailed "bottom up" forecasts.

As was indicated at the hearing, the Board sought and obtained the audited financial results of MH for 2003/04 and the unaudited results for the first quarter of 2004/05. These reports were provided by MH in confidence, as they had yet to be filed with the legislature or publicly issued. Through its review of these results, the Board was further enabled to support its overall view of the Corporation's OM&A expenses.

Budgeting is not a science, it is an art. When considering potential future cost levels, proper budgeting relies heavily on trends, known circumstances, project planning and an assessment of risks. While the unreconciled difference apprehended by CAC/MSOS should have been noted and corrected prior to filing the Application, or addressed by MH at the hearing, the absence of these corrective measures does not eliminate the greater need of recognizing overall cost direction. Ignoring increasing costs, the rapid increases in staff complement and higher levels of organizational activity that is underway within MH would not be appropriate.

The Board is satisfied that MH took reasonable steps to mitigate its loss during the drought, including its actions in the futures market to reduce its export delivery obligations. The Board notes that no Intervenor indicated concern with MH's actions related to export activities during the drought period. However, the Board is of the view that the events and actions of the recent drought created opportunities to learn and prepare for future droughts.

The 2002-2004 drought related experience suggests that:

(a) MH is at risk of sustaining significant losses related to energy pricing when its hydraulic generation falls materially below the long-term mean;
(b) During periodic droughts, when MH is a net importer of electricity, the Corporation may be faced with highly unfavourable import prices;
(c) MH requires somewhere in the order of $200 million per year in export revenue,

net of associated water rental fees and fuel and power purchases, in order to break even; and

(d) There are risks, as well as benefits, associated with MH's practice of seeking total energy sales above its hydraulic generation capabilities.

Therefore, the Board directs MH to file a study by an independent expert on MH's response to the 2002-2004 drought, the study shall assess MH's actions and provide comments and recommendations with respect to future actions and circumstances. This report is to be filed by January 31, 2005.

61 When one sifts through all of the material and arguments put forth by the applicants in support of their positions, it becomes more and more clear that their argument that the PUB failed to reach a "just and reasonable" rate is not a matter of law but a dispute with the opinion at which the PUB arrived.

62 A review of the record demonstrates that the PUB did in fact review extensive financial information and then exercised its discretion. It may well be that the PUB could not, or would not, review the specific financial tools that the applicants argue it should have, but that is insufficient in my mind to justify a finding that, as a whole, the PUB did not fix rates that were just and reasonable.

63 The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer groups with those of the utility. The PUB's decision to build retained earnings more rapidly than proposed in order to better protect the utility and consumers from the financial impact of future drought, clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the Accountability Act.

64 The role of the PUB under the Accountability Act is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understood its role in this regard.

65 The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. These issues were addressed in the PUB's decision.

66 All in all, the PUB addressed the right question, the reasonableness of approved rates. It did not rely on irrelevant evidence or fail to consider relevant evidence. The PUB was alive to the issues and alive to the implications of its decision. It did not apply inappropriate tests or apply appropriate tests or factors incorrectly. It did not make its decision in an arbitrary manner.

67 The setting of rates, and the elements that are to be considered in doing so, require a

specialized knowledge and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at. This is not such a case.

68 When all of the arguments of the applicants are considered in light of the evidence the PUB heard and the decision it eventually made, I have not been convinced that what the applicants are complaining about is anything but the methodology the PUB utilized to arrive at that decision. The PUB then went on to justify that decision in the light of the interests of both the public and Hydro.

69 On whatever standard of review I might consider to be the applicable one, the applicants have not convinced me that leave to appeal should be granted. There are no questions of pure law to be decided. At best, from the applicants' perspective, their applications are grounded on questions of mixed fact and law and those issues are not such that they present a matter of importance that ought to engage the court.

70 I therefore deny the applications for leave to appeal.

MONNIN J.A.

cp/e/qlemo