1961

*Jan. 31
Feb. 1
Apr. 25

CITY OF EDMONTON, TOWN OF JASPER PLACE, CITY OF RED DEER AND TOWN OF VEGREVILLE (*Respondents*) ..... APPELLANTS;

AND

NORTHWESTERN UTILITIES LIMITED (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Public utilities—Jurisdiction of Board in fixing rates to allow for transitional losses between date of application and date of decision—Meaning of statutory phrase "undue delay"—Jurisdiction to approve of purchased gas adjustment clause—The Public Utilities Act, R.S.A. 1955, c. 267, as amended by 1959 (Alta.), c. 73.

In June 1958 the respondent utility company applied to the Public Utilities Board to fix a new schedule of rates. The hearing of the application commenced in the following December and continued intermittently until February 26, 1959. The Provincial Legislature amended *The Public Utilities Act* on April 7, 1959, to provide by s. 67(8) as follows: "It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application".

Effect was given to this amendment in an order of August 28, 1959, by which the Board approved an increase in the utility's rates as of September 1, 1959. An application was then made on behalf of the appellants under s. 49 of the Act for leave to appeal from the Board's order on the grounds that (i) the Board erred in law and had no jurisdiction to fix rates enabling the respondent to collect through its rates an additional amount for transitional losses during 1959, and that

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

(ii) the Board erred in law and had no jurisdiction to approve the principle of a purchased gas adjustment clause. Another question raised was as to whether there had been "undue delay" within the meaning of the amendment to s. 67. Leave to appeal was granted and the Appellate Division, by a majority decision, dismissed the appeal on the first ground. The appeal on the second ground was allowed unanimously. The appellants appealed to this Court on the first question and the respondents cross-appealed on the second.

Held: The appeal should be dismissed. The cross-appeal should be allowed, and in lieu of the answer made by the Appellate Division to the second question, judgment should be entered declaring that the Public Utilities Board did not err in law and had jurisdiction to approve the principle of a purchased gas adjustment clause.

Per Kerwin C.J. and Cartwright J.: It was not necessary to express an opinion on the contention of the respondent that the question whether there had been undue delay in the hearing and determination of the application to the Board was not open to the appellants. On the assumption that the question was open the Board had decided it correctly.

Per Locke, Abbott and Judson JJ.: The language of subs. 8 of s. 67 of the Act, which gave the Board power to provide for transitional losses, made it clear that the amendment was intended to be retroactive. *Sussex Peerage* case (1844), 11 Cl. & Fin. 85 and *Vacher v. London Society of Compositors,* [1913] A.C. 107, referred to. It is only, however, such losses as have been due to undue delay in the hearing and determining of the application which may be permitted to be recovered. In the decision to authorize the utility to collect an additional amount for 1959 it was implicit that the Board held that the delay after December 31, 1958, was undue within the meaning of that expression in the subsection. It was clear that the Board attributed to the expression the meaning "more than was reasonable in the circumstances", and it was correct in doing so. As to whether the delay after December 31 was more than was reasonable, this was a question of fact as to which there could be no appeal under the statute.

The proposed order, with respect to the purchased gas adjustment clause, would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in s. 67(2) and to comply with the Board's duty to fix just and reasonable rates to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine.

APPEAL and cross-appeal from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing in part a decision of the Alberta Board of Public Utility Commissioners. Appeal dismissed and cross-appeal allowed.

A. F. Macdonald, Q.C., and *W. R. Sinclair,* for the City of Edmonton.

G. J. Bryan, Q.C., for the Town of Jasper Place.

[1] (1961), 34 W.W.R. 241, 25 D.L.R. (2d) 262.

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J. W. Beames, for the City of Red Deer.

W. H. Hurlburt, for the Town of Vegreville.

George H. Steer, Q.C., and *B. V. Massie, Q.C.,* for the applicant, respondent.

THE CHIEF JUSTICE:—Subject to the same reservation expressed in the reasons of Mr. Justice Cartwright and on the same assumption that he makes, I agree with the reasons of Mr. Justice Locke.

The judgment of Locke, Abbott and Judson JJ. was delivered by

LOCKE J.:—The respondent is the owner and operator of a natural gas transmission and distribution system serving large numbers of domestic, commercial and industrial consumers in the City of Edmonton, the Town of Jasper Place, the City of Red Deer and the Town of Vegreville and some 55 other municipalities or places in the Province of Alberta. The respondent is a public utility within the meaning of *The Public Utilities Act,* R.S.A. 1955, c. 267, as amended.

On June 13, 1958, the respondent applied to the Public Utilities Board, constituted under the said Act, for an order:

> fixing and approving as of the return date of this motion, or such other date as the Board may deem proper, such new rates as are necessary to meet the applicant's costs, including its return.

The hearing of the said application commenced on December 9, 1958, and continued intermittently until February 26, 1959.

On June 29, 1959, the Board rendered its decision fixing a rate of depreciation, working capital allowance and estimated expenses of operation, and held the respondent entitled to a rate of return of 7.5 per cent upon its property used or required to be used in its service to the public within Alberta as determined and that the respondent was entitled to an increase in its revenue of $2,817,929 for the year 1959 and $3,019,792 for 1960, and directed that the respondent file schedules of rates for the approval of the Board, indicating how it suggested such amounts should be obtained.

The value of the properties of the respondent upon which it was permitted the annual return above stated was fixed for the year 1959 at $48,568,892 and for the year 1960 at $51,412,702. The respondent has large natural gas reserves of its own but, in addition, purchases large quantities, for use in the operation, from the owners of other gas wells and operators of oil wells. The Board's estimate of its expense for this purchased gas for the year 1959 was $3,825,690 and for the year 1960 $3,722,300.

Section 67(*a*) of the Act reads:

> The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested,
>
> (*a*) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation, mileage and other special rates, which shall be imposed, observed and followed thereafter by any proprietor.

During the lengthy proceedings before the Board it was contended on behalf of the respondent that the Board had power to make provision for the loss sustained by the respondent between June 13, 1958, the return date of its motion, and the date of the coming into effect of new rates. This loss referred to in the proceedings as "transitional loss" was the difference in the revenue of the respondent under the old rates, which remained applicable throughout the time consumed by the hearings and until the new rates became effective, and the amount which would have been received had the new rates to be authorized been in effect throughout this period. It was contended by the present appellants that the Board was without jurisdiction to make any such order, a contention which was upheld by the Board. As to this, the decision made in March 4, 1959, read in part:

> The board has no doubt that the application of the principle of transitional loss is in effect fixing rates retroactively. The principle results in rates which are determined being dated back to the time of the application. The board can find no authority for it to do this either in The Public Utilities Act or elsewhere. The language used in The Public Utilities Act is prospective rather than retrospective. The authority of the board in this regard is limited to fixing rates for the future. The board accordingly has come to the conclusion that it cannot give effect to the principle of transitional loss.

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On April 7, 1959, the Legislature amended section 67 of the Act by, *inter alia,* adding thereto the following:

(8) It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

The amendment and the matter of the delays which had occurred between the filing of the application and the date of the Board's decision were dealt with in the following terms in the decision of June 29, 1959:

Counsel for the consumers have asked that the decision upon transitional loss given by this board respecting the application of Canadian Western Natural Gas Company Limited be applied to this case. In the Canadian Western case this board came to the conclusion that it could not give effect to the principle of transitional loss as it could find no authority for it to do so either in The Public Utilities Act or elsewhere. Since that decision The Public Utilities Act has been amended and Section 67(8) now provides:—(reciting the above amendment).

In this case, as has been pointed out above, the company's motion was returnable June 13, 1958. The hearing commenced December 9, 1958. There were unavoidable adjournments from December 19, 1958 to January 15, 1959, and from January 24, 1959, to February 24, 1959, and the hearing finally concluded February 26, 1959. There has been an inevitable delay from that date to the date of this decision and it appears that it will not be possible to have the new rates effective until August 1 at the earliest. It is apparent that the losses due to undue delay in the hearing and determining of the application have been considerable. The Board considers that it is only fair, in the circumstances, to reserve this question until the hearing of the second phase of this application.

It was impossible in the circumstances disclosed by the evidence for the respondent to determine with certainty in advance the amounts it would expend for purchased gas from year to year, and the figures above mentioned were, of necessity, estimates only. The respondent, accordingly, asked that the order to be made by the Board should contain what was called a purchased gas adjustment clause, a provision which, it was said, was approved by public utility boards in various states of the Union. The practical effect of such a clause would be that, assuming by way of illustration that the estimate of the cost of purchased gas for the year 1959 should prove to be $800,000 less than the actual expenditure for that purpose, this amount would be recouped by the company by an increase in the price of gas to consumers for the year 1960.

Should, however, the estimated figure for this cost, used in approving the rates for the year 1959, be greater than the actual expenditure, the rates fixed for the year following would be reduced to give to the purchasers of gas the benefit of the saving. The details of the manner in which this would, in practice, be worked out was given by the witness Wilson, the executive vice-president of the respondent, and was explained in Exhibit 3 filed before the Board. It is unnecessary for the disposition of this aspect of the matter to examine these details in any more particularity.

In its decision of June 29, 1959, the Board said:

> The evidence disclosed that the company faces a serious problem in estimating, with any degree of accuracy, the volumes of oil field gas which it will be required to purchase in any particular year. Added to this is the problem resulting from the fact that contracts between producers and exporters contain escalation and favoured nations clauses which affect future prices. In view of these problems the company led evidence as to a possible purchased gas adjustment clause which might be inserted in the board's order. Counsel for the company point out in argument that the company's proposal at no time involved, and does not now involve, rate changes without board approval.

After pointing out that a further amendment had been made to the Act as s. 42(*a*) which might affect the matter, the Board reserved judgment until further representations might be made to it.

As to the transitional losses, the company was, as above stated, given permission to file rate schedules for the approval of the Board, calculated to produce an increase in its revenue for the calendar year 1959 of $2,817,929. In preparing these schedules the respondent company proceeded on the basis that the Board had decided that the delay in disposing of the application from January 1st onward had been undue delay within the meaning of s. 67(8), since the figure of $2,817,929 included, according to the respondent's computation, $1,845,000 as the transitional loss from January 1st to August 31, 1959. The schedule of rates filed proposed that this amount should be recouped from the rates to be imposed during the four and one-third years immediately succeeding September 1st, 1959. After further hearings for the purpose of hearing objections to the rates proposed, the Board rendered its decision on August 26th.

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In dealing with the question of transitional loss, the Board quoted that portion of its decision of June 29th, above referred to, and said:

> The board in its decision of June 29 last quoted above, after citing the many adjournments and delays held that there had been undue delays and is still of the same opinion.

After saying that the amendment to s. 67 permitted it to allow for losses sustained before the amendment was passed, the decision read in part:

> In its decision of June 29th the Board held:
>
> > Subject to the above the board finds that the additional revenue to meet the deficiency as set out in detail in Schedule "B" amounts to $2,817,929.00 for 1959 and $3,019,792.00 for 1960. The company may now file schedules of rates for the approval of the board indicating how it suggests such amounts should be obtained.
>
> It will be noted that there is no mention of transitional loss in Schedule "B" which gives the details of the computation of the deficiency. It is considered clear that the board by this finding authorized the company to collect an additional $2,817,929.00 for the year 1959. The manner of collecting that amount was not broken down by months, the intention, which appears obvious, being that an additional amount of $2,817,929.00 would be collected for the entire year. Since new rates cannot be made effective until September 1 at the earliest it is apparent that to recover such an amount in the four remaining months of the year would result in very high rates for those months. The company accordingly designed its rates to recover the amount over a period of several years and this commends itself to the board.

Dealing with the proposed purchased gas adjustment clause and the objections raised to the application of any such principle, the Board said in part:

> The board undoubtedly has jurisdiction to fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof as well as other special rates which shall be imposed, observed and followed thereafter by any proprietor. It appears to the board that it has jurisdiction to say that the rate would be a certain amount per MCF. or per therm plus the cost of purchased gas or a certain rate plus or minus an adjustment for any variation in the cost of purchased gas which is in effect what is done by the adoption of a purchased gas adjustment clause.

After pointing out that the cost of purchased gas was one of the main items of expense of the company and that it was obvious that it is entitled to recover this expense through the rates charged, the Board said:

> After reviewing very carefully all the evidence in this respect and giving consideration to what was said in argument this board is convinced that a provision for purchased gas adjustment is in the best interests of the consumer and is essential to the company if its financial integrity is to

be maintained, which of course is also in the best interests of the consumer. The detailed provisions of the necessary order need not be discussed in this decision as these can be worked out between representatives of the consumers and the company subject to the approval of the board. The right is reserved to the company to file revised estimates of its purchased gas expense if for any reason it is found to be impossible to make such order effective.

By a formal order dated August 28, 1959, the Board approved the proposed rates as interim rates, to become effective on and after September 1, 1959, and dealt with the proposed purchased gas adjustment clause in the following terms:

> The principle of a purchased gas adjustment clause as proposed by the Applicant is approved and the form of Order submitted in evidence by the Applicant is referred to the Applicant and the Respondents to consider whether agreement can be reached among them as to the wording of such a clause to be submitted to the Board for its approval. Failing such agreement the Applicant on ten (10) days' notice to the communities or persons who appeared on the said hearings may submit for the approval of the Board a form of Order providing that the rates as shown in Schedule "A" may be increased or decreased by Order of the Board to reflect changes in the average cost to the Applicant of gas and to reflect surpluses or deficiencies in revenue which have accrued to the Applicant due to the over or under provisions in the said rates for such average cost of gas.

No agreement was reached as to the wording of such a clause and the record does not indicate that the Board made any further order thereafter dealing with the question.

Section 49 of *The Public Utilities Act* provides that leave to appeal to the Appellate Division of the Supreme Court of Alberta upon a question of jurisdiction or upon a question of law may be obtained from a judge of the Court of Appeal upon application within a defined time. Such an application was made to Johnson J.A. who, by order dated October 20, 1959, gave leave to appeal upon the following grounds:

(*a*) That the said Board erred in law and had no jurisdiction under the provisions of The Public Utilities Act or otherwise to fix rates enabling the Respondent to collect through its rates an additional $2,817,929 for the year 1959, as provided in the said decision;

(*b*) That the Board erred in law and had no jurisdiction to approve the principle of a purchased gas adjustment clause as referred to in the said decision and order.

The questions upon which leave to appeal was granted are, according to the reasons delivered by the learned judge, those proposed on behalf of the City of Edmonton. Another question raised on the argument before him was as to

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whether there had been "undue delay" within the meaning of the amendment. This would appear to be a question which would arise in considering the first question upon which leave was granted. Whether the applicants proposed that a separate question should be submitted as to this is not clear. Johnson J.A. said that the question was not a question of law but, at the highest, a mixed question of fact and law. I mention the matter because it was contended by the respondent that the question of whether there had been undue delay within the meaning of that expression in the amendment was not open to the appellants, a contention with which I do not agree.

The Appellate Division, by a decision of the majority of the court, dismissed the appeal on the first ground, Porter J.A., with whom Milvain J. agreed, dissenting. The appeal upon the second ground was allowed by a unanimous judgment of the court.

The appellants have appealed to this Court from the judgment on the first question and the respondent has cross-appealed from the judgment dealing with question (*b*).

A public utility, such as the respondent, in Alberta may not change a rate theretofore fixed by the Public Utility Board without its approval (s. 83(1)). The rates, we are informed, had last been fixed several years earlier. The Board was empowered at the time of the application to require the utility to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so (s. 67(*d*)(ii)) and to make extensions to its facilities when, in the judgment of the Board, to do so was reasonable and practicable (s. 67(*d*)(iii)). These powers were continued in the 1959 amendments to ss. 66 and 67. The utility was further under the obligation to supply and deliver gas at such rates and upon such terms as the Board might direct (s. 67(*d*)(viii); s. 67(1)(*e*) as amended). The rates thus to be fixed from time to time were such as the Board considered to be just and reasonable.

Unlike the British Columbia Act, considered by this Court in *B.C. Electric Railway Company v. Public Utilities Commission*[1], the expression "unjust and unreasonable rates" is not defined. Section 66(*b*), however, as it read prior

[1] [1960] S.C.R. 837, 25 D.L.R. (2d) 689.

to the 1959 amendment, empowered the Board to value the property of the public utility, and the purpose of these powers was explained and they were amplified in the amendment of 1959. This required the Board, in fixing just and reasonable rates, to determine a rate base for the property of the proprietor that is used or required to be used in his service to the public within Alberta and to fix a fair return thereon.

There is no explanation in the record of the delay in considering the respondent's application between June 13, 1958, and December 9, 1958. While the respondent might have applied for an interim order increasing the rates under s. 41(2), this was not done, presumably because in a matter involving so many varied interests this was deemed impractical. A further delay occurred between the conclusion of the main hearings on February 26 and the rendering of the decisions of June 29 and August 26 and, as shown, the new rates did not come into effect until September 1, 1959.

The right of the consumers to require the respondent to supply them with gas, conferred by the statute, would, in my opinion, even in the absence of any statutory provision, impose upon them an obligation at common law to pay for the service on the basis of a *quantum meruit*. In such circumstances, I consider that the position of the utility would be similar to that of a common carrier upon whom is imposed, as a matter of law, the duty of transporting goods tendered to him for carriage at fair and reasonable rates (*Great Western Railway v. Sutton*[1]). Here the duty of determining what rates are fair and reasonable is imposed upon the Board. In the result, in the present matter the consumers paid less than a fair price for a period of something more than a year.

As shown by the decision of March 4, 1959, while on various earlier occasions the Board had made provision for the recovery of transitional losses in fixing rates, this had apparently been done by consent of the parties. When its power to do so was questioned in the present matter, the Board came to the conclusion that its powers were limited to fixing rates to apply in the future. While the reasons given do not explain the grounds upon which the Board proceeded, it may, I think, be fairly assumed that it was

[1] (1869), L.R. 4 H.L. 226 at 237, 38 L.J. Ex. 177.

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based upon the language of s. 67(*a*) which speaks of rates which shall be imposed, observed and followed thereafter by any proprietor. The amendment adding subs. (8) to s. 67 was passed in the following month and the Board acted upon the powers which it considered were given to it.

There has been much discussion in argument before the Appellate Division and in this Court as to whether the amendment was retroactive, or whether it was simply declaratory of the law as it stood before its enactment. In my opinion, it is unnecessary to determine this question since, in agreement with the majority of the learned judges of the Appellate Division, I consider that the language of the amendment is perfectly clear.

Under the decision approving the new rate schedule made on August 26, 1959, authority was given to add to the rates over a term of years the amount by which the revenue of the company fell short of what it would have been, had the new rates been in effect throughout the year 1959. No doubt, the vast majority of the consumers who purchased gas from the utility during the first eight months of the year 1959 continued as customers thereafter. Those persons had paid the rates approved by the Board during this period and, while they were less than what was fair and reasonable, it is clear that in the absence of an order of the Board the utility had no enforceable claim against them for any difference. The new rates while prospective created a new obligation in respect of transactions already past in the case of these consumers and, in that respect, were retroactive (Craies on Statute Law, 5th ed. 357).

This, however, is exactly what the amendment authorized since it empowered the Board to give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates, to the extent that the Board may determine these to have been due to undue delay in the hearing and determining of the application. The amendment applies to both losses and gains and, if during the prescribed interval it were shown that the proprietor had earned amounts in excess of what were determined to be fair and reasonable, the continuing consumers might be given the benefit in the rates to be fixed. Since in the interval between the return date of the application and

the going into effect of the new rates the customers would be required to pay the existing rate on the former date, of necessity an order made under the subsection would be retroactive in its effect, whether the proprietor had suffered losses or realized excess revenues in the sense that these expressions are used.

In the *Sussex Peerage* case[1], Tindal C.J. said that:

> the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

In *Vacher v. London Society of Compositors*[2], where the question was as to the interpretation of a section of the *Trade Disputes Act,* of 1906, Haldane L.C. said (p. 113) that he proposed:

> to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

Section 9 of *The Interpretation Act of Alberta,* R.S.A. 1955, c. 160, declares that every Act shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In my opinion, the language of the subsection makes its meaning perfectly clear and it is unnecessary to resort to any outside aid to interpretation. If, however, it were otherwise, as the evidence shows, the state of the law as of March 5, 1958, was considered by the Public Utility Board to be that it was without power to provide for transitional losses, a state of affairs which the amendment passed so soon thereafter was clearly and obviously designed to remedy.

It is only, however, such losses as have been due to undue delay in the hearing and determining of the application which may be remedied. As to this, it must be said that the finding of the Board might have been expressed

[1] (1844), 11 Cl. & Fin. 85 at 143, 8 E.R. 1034.
[2] [1913] A.C. 107, 82 L.J.K.B. 232.

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with greater clarity. The passage from the decision of June 29, 1959, above quoted recites the various delays, referring particularly to the adjournments after December 19, 1958, and the delay in giving the decision following the conclusion of the hearings on February 26. As has been shown, however, at the same time the Board held that there would be a deficiency of revenue for the years 1959 and 1960 and authorized the company to file rates for the approval of the Board, suggesting how such amounts should be obtained. In referring to this in its final decision the Board said that it was clear that it had by this finding authorized the company to collect an additional amount of $2,817,929 for the year 1959. In my opinion, it is implicit in this decision that the Board held that the delay after December 31, 1958, was undue within the meaning of that expression in the subsection. I think it is clear that the Board attributed to the expression the meaning "more than was reasonable in the circumstances" and, in my opinion, it did not err in doing so. As to whether the delay after December 31 was more than was reasonable, that is a question of fact as to which there can be no appeal under the statute.

Porter J.A. has criticized the manner in which effect was given to the Board's order permitting the recovery of the transitional loss for the year 1959, in various respects. The schedule approved by the Board appears to have capitalized the actual net deficiency of revenue after income tax, and added the income tax which would have been paid by the company if the new rates had been applicable for the year 1959. I think there is much to be said for these views but the questions are not those in respect of which leave to appeal was granted, and it is, no doubt, for that reason that they were not raised before the Appellate Division. The question is whether the Board erred in law and was without jurisdiction to fix rates enabling the respondent to collect the transitional loss for the year 1959, and not as to whether, granted the Board had power to do this, the method approved to carry the decision into effect was authorized by the statute. In these circumstances, I express no opinion upon these matters.

The respondent cross-appeals from the judgment of the Appellate Division by which the decision of the Board upon the purchased gas adjustment clause was set aside, on the ground that there was no jurisdiction to make such an order.

As I have pointed out, no formal order was made by the Board, the order of August 29 simply approving the principle of such a clause as proposed by the utility but referring the settlement of the form of the order to the parties in the hope that they could agree. Failing such agreement, permission was given on ten days' notice to submit an order for the approval of the Board. The respondent contends that since no formal order was made there was no right of appeal to the Appellate Division. Section 49(2) reads that leave to appeal may be obtained from a judge of the Court of Appeal within one month after the making of the order, decision, rule or regulation sought to be appealed from. I agree with the learned judges of the Appellate Division that there was such a decision from which the appeal was properly taken.

In approving rates which will yield a fair return to the utility upon its rate base, it is, of course, essential for the Board to estimate the expenses which will necessarily be incurred thereafter in rendering the service. The fair return permitted is, after deducting from the gross revenue these necessary estimated expenditures and such necessary outgoings as taxes, including income taxes. The Board can only come to a conclusion as to what rates should be approved by determining as closely as may be done in advance the probable amount of these expenditures.

Upon the application in the present matter, the expense which would be incurred for purchased gas in the year 1959 was estimated by the applicant as an amount which, as of August 1959, appeared to be approximately $800,000 less for that year than the amount which would necessarily be expended. For the year 1960, in respect of which an estimate had been given for the use of the Board in considering the application, the amount that would be expended for this purpose had been underestimated, in the opinion of the executive vice-president of the applicant, by $1,300,000. The reason for these inaccurate estimates was explained at length in the evidence of this witness.

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That, in determining what was a fair return and deciding what rates should be authorized to earn such a return, the expenses of operation must be estimated as accurately as is reasonably possible is not questioned by anyone. The Board was apparently satisfied that, in the circumstances, it was not possible to estimate for years in advance the cost to which the respondent would be put for purchased gas from year to year, and concluded that such a provision as was proposed was in the best interests of the consumers and essential to the company if its financial integrity was to be maintained.

What was proposed was that the utility should submit to the Board, and to such other interested parties as the Board might direct should be notified, not later than November 1st in each year, the figures as to its cost for purchased gas during the first nine months of the year and its estimate of the amounts required for such purpose during the months of October, November and December. Dependent upon whether these costs were in excess of or less than the amount estimated, in approving the rates the Board would be asked to make such adjustments in the rates for the following year to carry out the purpose above explained.

Macdonald J.A., with whom the Chief Justice and Johnson J.A. agreed, was of the opinion that in adopting the proposed clause the Board intended to fix gas rates without compliance with s. 67(2) of the 1959 amendment which reads:

> In fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed thereafter by a proprietor, the Board shall determine a rate base for the property of the proprietor that is used or required to be used in his service to the public within Alberta and fix a fair return thereon.

With great respect, however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

As pointed out by Porter J.A., s. 67(5) does not touch the matter and this the respondent concedes, but the Board has not assumed to act under that subsection. Rather did it propose to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

I would dismiss the appeal with costs. I would allow the cross-appeal with costs and direct that, in lieu of the answer made by the Appellate Division to the second question, judgment be entered declaring that the Public Utility Board did not err in law and had jurisdiction to approve the principle of a Purchased Gas Adjustment Clause, as referred to in the said decision and order.

CARTWRIGHT J.:—I agree with the reasons of my brother Locke subject only to one reservation. I do not find it necessary to express an opinion on the contention of the respondent that the question whether there had been undue delay in the hearing and determination of the application to the Board was not open to the appellants and I wish to reserve my opinion on that contention.

On the assumption that the question was open I would agree, for the reasons given by my brother Locke, that the Board decided it rightly.

I would dispose of the appeal and the cross-appeal as proposed by my brother Locke.

Appeal dismissed with costs, cross-appeal allowed with costs.

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Solicitors for the City of Red Deer: Kirby, Murphy, Armstrong & Beames, Red Deer.

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