and Nelson Burns & Company Limited, claiming under them, will have judgment for infringement of the patent in suit and, of course, may elect to have their damages determined either by an accounting for the profits made by the defendant Gratham on the Diplomat desk calendar, or by an assessment of damages and must elect within the prescribed period before the master at Toronto, to whom these matters are referred, begins his deliberations. An order will go enjoining this defendant from manufacturing and distributing the Diplomat calendar and requiring delivery up to the plaintiff Weldo of all existing stocks. The plaintiffs succeeding in the action for infringement shall have the usual right to discovery if not satisfied with the evidence already led. No action can be maintained, in my view, by the plaintiff Unicorn. Except as provided in these reasons all claims are dismissed. Since success has been divided there will be no costs to any party except those to which the plaintiff Weldo may be entitled of the reference to the master for an accounting or assessment of damages arising out of the infringement of its patent.

Judgment accordingly.

[COURT OF APPEAL]

Re Dow Chemical Canada Inc. et al. and Union Gas Ltd. et al.

ZUBER, WEATHERSTON AND GOODMAN JJ.A. — 16TH AUGUST 1983.

Public utilities — Rates — Retroactivity — Ontario Energy Board empowered to fix "just and reasonable rates" for sale of gas by distributor — Whether board can order recovery of past expenses in future rates — Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 19.

Pursuant to s. 19(1) of the *Ontario Energy Board Act*, R.S.O. 1980, c. 332, the Ontario Energy Board is empowered to fix "just and reasonable rates and other charges for the sale of gas" by a gas distributor, subject to the regulations. By a series of accounting orders the board authorized Union Gas Ltd. to charge the cost of synthetic natural gas ("S.N.G.") to a separate inventory account because of difficulty of estimating the net cost of future S.N.G. purchases. In rate applications the costs associated with S.N.G. were excluded from consideration. Subsequently, the board approved the closing of the separate inventory account and directed that the S.N.G. premium be amortized over four years and surcharged on regular rates to customers. An appeal by a customer on the ground that this was a retroactive rate increase not authorized by the Act was dismissed by the Divisional Court. On further appeal to the Court of Appeal, **held**, the appeal should be dismissed.

Until the natural gas represented by the separate inventory account was withdrawn from inventory it could not be a factor in the rate approval process. The order of the board approving the closing of the separate inventory account and

directing the surcharge on regular rates was, therefore, prospective in effect. The S.N.G. premium was not a "crystallized loss" which was sought to be recouped out of future rates.

Public utilities — Rates — Applicability — Contract providing that rates will be changed only in specified circumstances — Ontario Energy Board granting rate increase — Whether increase applicable to contracting party — Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 19(8).

A provision in a contract for the supply of natural gas providing that a consumer will pay increased rates only in specified circumstances, which do not include an Ontario Energy Board order, does not prevent the Ontario Energy Board from ordering the consumer to pay a rate increase, since s. 19(8) of the *Ontario Energy Board Act*, R.S.O. 1980, c. 332, provides that the board is not bound by the terms of any contract. A board order directing that a consumer should not be excluded from a rate increase is valid, provided the board had regard to relevant considerations in making that order.

Cases referred to

Guardians of Bradford Union v. Clerk of Peace for County of Wilts (1868), L.R. 3 Q.B. 604; *City of Edmonton et al. v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392, 28 D.L.R. (2d) 125, 34 W.W.R. 600, 82 C.R.T.C. 129; *Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 23 N.R. 565

Statutes referred to

Ontario Energy Board Act, R.S.O. 1970, c. 312
Ontario Energy Board Act, R.S.O. 1980, c. 332, ss. 19, 27

Rules and regulations referred to

R.R.O. 1970, Reg. 628, s. 2(1)
R.R.O. 1980, Reg. 702, Account Nos. 152, 627

APPEAL from a judgment of the Divisional Court, 141 D.L.R. (3d) 641, dismissing an appeal from an order of the Ontario Energy Board.

G. D. Finlayson, Q.C., and *D. I. Hamer*, for appellant.
J. F. Howard, Q.C., and *L. D. Robinson*, for respondent.
R. L. Falby, Q.C., for Ontario Energy Board.

The judgment of the court was delivered by

WEATHERSTON J.A.:—In 1974, fearing an impending shortage in the supply of natural gas from its usual suppliers, Union Gas Limited ("Union") entered into a long-term agreement with Petrosar Limited for the delivery of synthetic natural gas ("SNG") at a price substantially greater than the going rate. Delivery actually commenced in December, 1977, but before that date new gas fields were discovered in western Canada and Union's management realized that the SNG was not needed to meet the demands forecast for the next several years. Union therefore

entered into an agreement with Northern Natural Gas Co. for the export to the United States of equivalent volumes at a sale price
a that would yield a slight profit. Approval of this transaction was denied by the U.S. authorities, and finally a new agreement was negotiated with Transcontinental Gas Pipe Corporation ("Transco") for the sale at a loss of all SNG to be delivered by Petrosar. That agreement was approved, and gas began to flow in late 1980.

b Because of the pending agreement for the resale of the SNG to the United States, it was impossible to estimate the net cost of future SNG purchases, so as to include it as a "cost of service" in rate applications. So, by a series of accounting orders, the Ontario Energy Board directed Union to keep the entire cost of the SNG
c in a special inventory account. The SNG was notionally stored underground, but it was in fact mixed with other supplies. By December, 1980, the special inventory account had grown to the point where it exceeded, or would soon exceed, the value of the actual inventory. So, on December 31, 1980, without a further
d order of the board, Union transferred the reserves of SNG from the special inventory account to its regular inventory account, at a value, after adjustment for heat content, equal to the average cost of other supplies of gas, and retained the extra cost in an account called the SNG Premium account. The continuing losses on the sale of SNG to Transco would be added to this account. It is this
e SNG Premium, which I have described simplistically if not with perfect accuracy, that was the subject of the special board order now under review.

In June, 1980, before Union had transferred the inventory account, it made an application to the board for a final determi-
f nation of the accounting treatment of the SNG purchases. The board order was made December 24, 1981, and it authorized Union to recoup the net amount of the SNG Premium accumulated up to October 31, 1981, by amortizing it over a period of four years, and surcharging the ordinary approved rates to customers.
g That SNG Premium was calculated by Union at $31,259,000 when the special inventory account was closed on December 31, 1980, but the board directed a recalculation and that figure has been revised, as of October 31, 1980, to $24,544,000.

The appellant, Dow Chemical Canada Inc. ("Dow"), has an
h agreement with Union for the purchase of large quantities of natural gas over a 20-year term commencing in 1972, at a price governed by the price paid by Union to its principal supplier, Trans Canada Pipe Lines Limited. Notwithstanding that agreement, a proportionate part of the surcharge for the SNG Premium

is authorized by the board's order to be added to the contract price.

The Divisional Court dismissed Dow's appeal from the board's order. On this appeal, Mr. Finlayson for Dow has advanced two main arguments:

1. The SNG Premium was a loss incurred by Union before the board's order was made, and it was beyond the board's power to order the recoupment of that loss through future rate increases;
2. The board exceeded its jurisdiction in authorizing an increase in the rates charged to Dow, contrary to the express terms of the contract.

Recoupment of the SNG Premium

By s. 19 of the *Ontario Energy Board Act*, R.S.O. 1980, c. 332, the board:

> 19(1) ... may make orders approving or fixing just and reasonable rates and other charges for the sale of gas ...

In *Guardians of Bradford Union v. Clerk of Peace for County of Wilts* (1868), L.R. 3 Q.B. 604 at pp. 616-7, Cockburn C.J. said as to legislation authorizing the making of an order for the public maintenance of a lunatic:

> Primâ facie this language is prospective, there is nothing which treats of past maintenance, and we start with the proposition, that in all such cases the rate must be prospective and not retrospective, so that the expenses shall fall on the ratepayers who are ratepayers at the moment of the expenses being incurred; whereas by doing what in effect would amount to the same thing as making a retrospective rate, the expenses of past years are made to fall on the ratepayers of the present year. That being a principle adopted long ago and long acted on, whenever the legislature has thought it expedient to authorize the making of restrospective rates or orders, it has fixed the period as to which the rate or order may be retrospectively made ...

And in *City of Edmonton et al. v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at p. 402, 28 D.L.R. (2d) 125 at p. 133, 34 W.W.R. 600, a gas rate case, Locke J. said that although 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, nevertheless, the new rates approved in August of that year, while prospective, created a new obligation in respect of transactions already past in the case of these consumers, and, in that respect, were retroactive.

Thus, if rates are approved that enable a utility to recoup past losses, the rates are retrospective in two senses; first, in that they impose an obligation on new customers to pay for losses incurred

before they become customers; and, second, they impose an obligation on continuing customers to pay more than what would be a fair rate based on current costs. In either case there is a measure of unfairness to the customers; and if new rates are approved that are retrospective in either sense, the statute must be scrutinized to see if the Legislature has authorized the approving body to approve such rates.

The rate approval provisions in the *Ontario Energy Board Act* are similar to those in the *Gas Utilities Act*, an Alberta statute that was considered by the Supreme Court in *City of Edmonton et al. v. Northwestern Utilities Ltd., supra*, and *Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, 7 Alta. L.R. (2d) 370. In the later case, Estey J. said at pp. 690-1 S.C.R., p. 163 D.L.R.:

> While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application (*vide City of Edmonton et al. v. Northwestern Utilities Limited*, [1961] S.C.R. 392, *per* Locke J. at pp. 401, 402).

and at p. 691 S.C.R., p. 164 D.L.R.:

> The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

and at p. 699 S.C.R., p. 170 D.L.R.:

> It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. It is quite a different thing to design a future rate to recover for the utility a "loss" incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.

The *Ontario Energy Board Act* provides by s. 19 as follows:

> 19(1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (2) In approving or fixing rates and other charges under subsection (1), the Board shall determine a rate base for the transmitter, distributor or storage

company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.

(3) The rate base to be determined by the Board under subsection (2) shall be the total of,

(a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;

(b) a reasonable allowance for working capital; and

(c) such other amounts as, in the opinion of the Board, ought to be included.

. . . . .

(8) Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

What Estey J. said as to the Alberta statute is equally applicable to the *Ontario Energy Board Act*, but I do not believe that the prospective nature of the Act inflexibly circumscribes the power of the board so as to limit it to the consideration only of future costs and expenses. Its primary duty under s. 19(1) is to "make orders approving or fixing just and reasonable rates and other charges". In *City of Edmonton et al. v. Northwestern Utilities Ltd.*, *supra*, the court approved a "purchased gas adjustment clause" in a board's order approving rates. Because it was impossible in the circumstances disclosed by the evidence in that case for the utility to determine with certainty in advance the amounts it would expend for purchased gas from year to year, that clause reserved to the board the power to adjust rates each year up or down according to the actual costs, and to either enable the utility to recoup the following year the amount by which it had underestimated costs, or, if it had overestimated costs, to give to customers the following year the benefit of the saving. Such a clause was undeniably retrospective, but Locke J. said at p. 406 S.C.R., p. 137 D.L.R., that how the utility should from year to year be enabled to realize, as nearly as may be, a fair return was an administrative matter for the board to determine.

In the present case, the Ontario Energy Board was faced with a situation where, in 1974, Union had entered into a contract which at the time was thought to be for the benefit not only of Union, but also of its customers. Although the contract appears in retrospect to have been improvident, the board has expressly found that Union was not imprudent in entering into it. When the SNG began to be delivered in 1977, the board could, on a rate application, have directed that its cost and that of natural gas

purchased from other sources be averaged, and included in the Union's cost of service for rate approval purposes. But that would have been unfair to customers because it was then expected that the entire supply of SNG would be sold to Northern Natural Gas Co. at a profit. So, by a series of accounting orders, the board authorized Union to charge the cost of the SNG to a separate inventory account No. 152 until the matter would be finally determined. The board had that power under s. 27 of the Act, which reads in part as follows:

> 27(1) Subject to the approval of the Lieutenant Governor in Council, the Board may,
>
> . . . . .
>
> (*d*) prescribe a uniform system of accounts applicable to any class of distributors, transmitters or storage companies.
>
> (2) Any uniform system of accounts prescribed under clause (1)(*d*) may require the approval, consent or determination of the Board in respect of any of the matters provided for in such system.

Regulation 628 [of R.R.O. 1970], under the *Ontario Energy Board Act*, R.S.O. 1970, c. 312, provides:

> 2(1) . . . every . . . gas utility shall . . . keep its accounts in accordance with such uniform system of accounts and with the approvals, consents or determinations of the Board . . .

Account No. 152 prescribed by the board by its Regulation 702 [R.R.O. 1980], is:

> 152. *Gas Stored Underground — Available for Sale*
>
> This account shall include the cost of gas purchased or produced and stored in depleted or partially depleted gas or oil fields or other underground reservoirs, and held for use in meeting gas service requirements of customers.
>
> Gas included in this account shall be valued at cost on a consistent basis. Transmission expenses for company facilities used in moving gas to the storage area and expenses of storage facilities shall not be included in the inventory of gas except as may be authorized by the Board.
>
> That portion of the stored gas in excess of the amount properly includible in account No. 458, "Base Pressure Gas" shall be included in this account.
>
> Amounts debited to this account for gas placed in storage shall be credited to account No. 628, "Gas Delivered to Underground Storage (Credit)". Amounts credited to this account for gas withdrawn from storage shall be debited to account No. 627, "Gas Withdrawn from Underground Storage".
>
> In the operation of storage projects the company shall maintain such procedures of verification as will disclose and result in prompt accounting recognition of significant losses.

The effect of these accounting orders was that the cost of SNG was kept separate from the cost of gas purchased from other sources. In the several rate approval applications made by Union before the present order of the board was made, all costs in any

way associated with the SNG were excluded from consideration, either as a component of the rate base, or of the cost of service. Customers were not affected by this account, nor could they be until Union was authorized to debit amounts to account No. 627, "Gas Withdrawn from Underground Storage". Since the gas was required to be valued at cost, the debits to account No. 627 would also be at cost, and they would then, and only then form part of Union's cost of service.

It makes no difference that the SNG was in fact mixed with gas purchased from other sources — the fact is that there was an inventory of gas, the cost of which was carried in a separate account. Until delivery of SNG to Transco commenced in late 1980, volumes of gas equivalent to the entire supply of SNG were stored underground, and were carried in Union's accounts at the cost of SNG.

It does not offend me that there is an element of artificiality in giving importance to the fact that the SNG costs were kept in a separate account. Banks have always been allowed to keep separate accounts with their customers, so as to circumvent the rule in Clayton's case, or for other purposes. In the present case, the board had power to authorize a separate account, and Union did in fact maintain a separate inventory account until December 31, 1980. Until the gas represented by that account was withdrawn from inventory it could not be a factor in the rate approval process. The present order of the board, approving the closing of the separate inventory account and directing that the SNG Premium be amortized over four years and surcharged on the regular rates, is therefore, prospective in effect. The SNG Premium was not a "crystallized loss" which is sought to be recouped out of future rates.

The Dow contract

The Dow contract was to purchase only natural gas, and the price paid by Dow would not, by its terms, be affected by the cost of SNG. It was tied to the price paid by Union to Trans Canada Pipe Lines Limited. The proposition put to us is that the board erred in law and exceeded its jurisdiction in ignoring the express provisions of the contract, and, in effect, setting aside or rewriting the contract.

I have already quoted s. 19(8) of the Act, by which it is provided that the board is not bound by the terms of any contract. The Dow contract was made before Union agreed to buy SNG from Petrosar. In the ordinary commercial world, Union would be

obligated to honour its contract with Dow, whatever the cost. Mr. Finlayson makes the point that the exercise of the statutory power to override the express terms of a commercial contract can be justified only if the result would be to otherwise cast an excessive burden onto a utility's other customers, or if the resulting burden is one that cannot be fairly borne by the utility's shareholders, or would be so large as to impair the utility's financial integrity and hence the public interest.

I agree with these general propositions. It is true that they were not discussed in the board's reasons for its decision in the present case, the board merely directing Union "to submit its proposals for uniform rate increases to all customers, including Dow". But in an application by Union for a general rate increase, initiated January 7, 1981, E.B.R.O. 380, at which Dow was represented and made submissions to the same effect as those advanced on this appeal, the board said, at p. 97 of its reasons for an interim order made September 14, 1981:

> The board has directed that Dow Chemical should not be excluded from the rate increases and should make its contribution towards the revenue deficiency.

I cannot conclude that the board failed to have regard to the relevant considerations and that its decision should be set aside on this account.

Mr. Finlayson further submits that Dow contracted only for natural gas, and that the board has, in effect, required Dow to pay a surcharge, not for the gas contracted for, but for SNG purchased by other customers. But the SNG was in fact mixed with natural gas purchased from other customers. It is possible that Union's distribution lines are so laid out that Dow received only natural gas, but the evidence is not clear as to that. Assuming, as the board found, that the contract with Petrosar for the supply of SNG was not an imprudent one in the circumstances, but was made to ensure a sufficient supply of gas for all customers, then Dow benefited by it as well as the others, and should bear its share of the burden.

In my opinion, Dow's appeal fails on all grounds, and should be dismissed with costs.

Appeal dismissed.