BOARD OF COMMISSIONERS OF PUBLIC UTILITIES v. NOVA SCOTIA POWER CORP. et al.

Nova Scotia Supreme Court, Appeal Division, MacKeigan, C.J.N.S., Coffin, Cooper and Macdonald, JJ.A. December 31, 1976.

G.A. Duncan and *S.B. Outhouse*, for appellant.

R.J. Downie, Q.C., and *D.A. Mann*, for respondent, Nova Scotia Power Corporation.

J.H. Dickey, Q.C. and *R.J. Belliveau*, for respondent companies, Nova Scotia Pulp Limited, Canso Chemicals Limited and Gulf Oil Canada Limited.

C.E. Haliburton, for respondent, Digby County Power Board.

The judgment of the Court was delivered by

MACKEIGAN, C.J.N.S.:— The appellant Board has under s. 99(1) of the *Public Utilities Act*, R.S.N.S. 1967, c. 258, stated a case for the opinion of this Court, posing the following question:

> Assuming compliance with the applicable procedural provisions of the *Public Utilities Act*, has the Board of Commissioners of Public Utilities jurisdiction to approve, disapprove, modify, amend, alter, reduce, increase, cancel or make substitution for the rates, tolls, charges or schedules contained in each of the contracts reproduced in the Appeal Book and forming part of this Stated Case.

I shall hereinafter elaborate the reasons for my opinion that the question must be answered in the affirmative. The Legislature has declared the Nova Scotia Power Corporation to be a "public utility". That declaration, effective July 16, 1976, placed the Corporation under the comprehensive control of the Board. The Board has the power, and indeed the duty, to regulate *all* rates, tolls, charges or schedules of a "public utility" with reference to the service supplied, in this case, the production and furnishing of electrical energy to or for the public. The rates under the contracts in question are not expressly or impliedly exempted from Board control by the *Public Utilities Act* or by the 1976 amendment to the Act.

The contracts are in two groups. Five ("municipal contracts") contain the terms on which the respondent Nova Scotia Power Corporation (known prior to 1973, c. 47, as the "Nova Scotia Power Commission") supplies electricity to certain municipal utility bodies, and eight ("industrial contracts") contain the terms on which it supplies electricity to certain industrial companies. All the contracts were made before July 16, 1976, the effective date of the 1976 amendment (1976, c. 32) to the *Public Utilities Act* which repealed s. 112(2), which had previously declared that that Act did not apply and "never applied" to the Nova Scotia Power Commission, and replaced it by new s. 112(2) as follows:

> 112(2) This Act applies to the Nova Scotia Power Corporation and the Nova Scotia Power Corporation is a public utility within the meaning of this Act.

The 1976 amendment also deleted s. 112(3) which had excluded from the Act's application any electric power company 75% or more of whose shares were owned by the Commission or by Her Majesty, and substituted for it a new s. 112(3), namely:

> 112(3) The power and authority conferred upon or vested in the Nova Scotia Power Corporation by Chapter 233 of the Revised Statutes 1967, as amended by Chapter 47 of the Acts of 1973 shall continue to be so conferred or vested, and with the exception of Section 15 of said Chapter 233 as enacted by Section 1 of said Chapter 47, shall be subject to and shall be read and construed as subject to the provisions of this Act and where there is a conflict between this Act and the provisions of any other Act in respect of the Nova Scotia Power Corporation, the provisions of this Act prevail.

The municipal contracts were made from time to time, three of

them over 50 years ago, under Part II of the *Power Commission Act*, R.S.N.S. 1967, c. 233, which by the 1973 amendment, *supra*, is now the *Power Corporation Act*. They were made by, respectively, the respondents Digby County Power Board (1958), Lunenburg Gas Company (1921), Riverport Electric Light Commissioners (1922), Town of Mahone Bay (1926) and Town of Canso (1967). They were approved by Orders in Council under what is now s. 50(1) of that Act.

The contracts set rates and other terms on which the Corporation is to supply electricity to the municipal utilities, which then resold the electricity to consumers in their areas at rates fixed by the Board. The contract rates were presumably fixed by a cost formula under s. 57(1) of the *Power Corporation Act* (including s. 14, which, although nominally repealed in 1973, was preserved in full force as a power of the Corporation by s. 3 of the 1973 amendment). The formula required all costs to be recovered, including interest on money borrowed by the Power Corporation, capital amortization, and an appropriate share of the cost of operating the Corporation's whole undertaking, a formula which if observed, would come close to the standards applied by a regulatory body such as the Board. The controls also provided that the rates be reviewed and adjusted annually.

The industrial contracts are with the respondent companies Nova Scotia Pulp Limited (1970 and 1975, Point Tupper), Canso Chemicals Limited (1968, Abercrombie Point) and Gulf Oil Canada Limited (1970, refinery, Point Tupper), and with four other companies — Atomic Energy of Canada Limited (two contracts: 1972 re heavy water plant, Glace Bay, and 1975 re plant, Point Tupper); Bowaters Mersey Paper Company Limited (1965, Queens County); Masonite Canada Ltd. (1972, hardboard plant, East River); Scott Maritimes Pulp Limited (1965, Abercrombie); Sydney Steel Corporation (1973, Sidney); Dominion Textile Limited (1973, textile mill, Yarmouth), and Minas Basin Pulp and Power Company Limited (1973, for its plant and that of Canadian Keyes Fibre Company Limited).

The industrial contracts vary widely in terms. The Masonite contract, for a 5,000 kw. demand load, fixes rates only until December 31, 1977. The others provide for demand loads of from 12,000 to 40,000 kw. or kv.a., set fixed rates for power plus "fuel adjustment allowances", and run for periods ranging respectively from 10 to 25 years. For purposes of this opinion, we shall assume that each was approved by a provincial Order in Council, presumably under s. 61(1) of the *Power Corporation Act*, which gave the Commission (now the Corporation) capacity to contract with any person, firm or corporation for the supply of power but provided that:

> 61(1) .. where a contract provides for initial installed transformer capacity

in excess of five hundred kilovolt amperes the contract shall not be binding upon the parties to it until it has been approved by the Governor in Council.

The industrial contracts, except with Masonite, are lengthy and cover not only rates for electricity supplied, but also many matters incidental thereto, such as, escalation clauses, metering and billing provisions, terms of payment, guarantees of power loads, clauses as to transmission facilities supplied by each party, stand-by arrangements, responsibility for damages or interruption, etc.

The rates under these contracts undoubtedly were set, as indirect industrial development subsidies, at levels below the rates which might be now set by applying the cost standards of ss. 14 and 57 referred to above. Section 61(2) [am. 1969, c. 67, s. 2] of the *Power Corporation Act* seems to assume that these standards should be applied when industrial contracts are made; it provides that any "net profit" made in supplying power under contracts "after making provision for the cost of supplying such electric power and energy in the same manner as provided in Section 57 for adjusting and fixing such cost" and after setting aside sums sufficient for the purposes of s. 14, "may ... be applied to reduce the cost" of other "undertakings" of the Corporation. Section 63 [am. 1969, c. 67, s. 3] also seems to imply that these standards should apply to such contracts, although it in terms applies only to contracts "entered into previous to the passing of this Act" (1928, c. 3, s. 45); it states that, "in fixing the cost to the Commission" under any such contract, "the Commission shall from the date of any such contract include all items set out in Section 57, whether or not the terms of any such contract so provide".

The issue raised in this case is whether, now that the Power Corporation has by statute become a "public utility", the Board's powers and duties to supervise public utilities and to make orders as to the rates to be charged by them give the Board jurisdiction over the rates henceforth to be charged by the Power Corporation to the municipal and industrial corporations which are parties to the contracts described above. Or, are the rates for electricity fixed by such contracts expressly or impliedly excluded from Board control for the duration of the respective contracts?

The *Public Utilities Act* vests in the Board comprehensive regulatory powers and duties in respect of public utilities. Such utilities include (s. 1(e)) any person that operates an urban bus line, a telephone system, a water distribution system, or "any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy ... either directly or indirectly to or for the public". Such industries are peculiarly charged with a public interest. Economic efficiency requires that such an industry be assured a monopoly of its market, but the consequent lack of competition dictates that the monopoly be controlled in the interest of

consumers. George Farquhar, former member of the Board said in an article, "Public Convenience and Necessity", in *Canadian Boards at Work*, John Willis (1941), pp. 93-4:

> It is clear that in most cases one system would serve the community more efficiently and at less cost than two or more. This would mean, of course, the elimination of competition and the creation of a monopoly, but if the monopoly were left without regulation it might give what service it chose and charge what rates it would and the community might find itself paying exorbitant rates for unsatisfactory service. It was these considerations which brought about the passage of public utility Acts placing public utilities under regulation.

The Power Corporation, on becoming a public utility on July 16, 1976, could not thereafter continue to supply electricity to its customers, until it first obtained Board approval of *all* its rates. The Corporation was thus driven to the Board by s. 60 of the *Public Utilities Act* which states:

> 60. No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof. Thereafter, the schedule of rates, tolls and charges so approved shall be filed with the Board and shall be the only lawful rates, tolls and charges of such public utility, until altered, reduced or modified as provided in this Act.

The Corporation accordingly applied to the Board for approval of all its then current rates and charges ... including those fixed by the municipal and industrial contracts. The Board by order of July 16, 1976, effective that day, gave "interim approval" to such rates and charges, presumably acting under s. 65(1), which provides:

> 65(1) When a public utility has submitted for the approval of the Board a schedule of rates, tolls and charges ... which applies only in respect of a service for which no rates, tolls or charges have been previously approved, the Board may at any time before finally approving or disapproving of such schedule or charge, grant an interim approval thereof, with or without modification, and thereafter the existing schedule of rates, tolls and charges of such public utility as amended by such schedule of charges, interim approval of which with or without modification, as the case may be, has been so granted by the Board, shall be the only lawful rates, tolls and charges of such public utility until the Board shall express its final approval or disapproval thereof, with or without modification or amendment.

I pause to note that I am respectfully unable to accept the contention of counsel for the respondent companies, that the words "final approval or disapproval" mean that the Board has power only to accept or reject any rates or schedules submitted for approval and has no power to change a schedule. My inability to do so results not only from the last words of s. 65(1), *viz.*, "with or without modification or amendment", but more especially from the sweeping strength of the Board's general rate-making power expressed in s. 41, as follows:

> 41. The Board may make from time to time such orders as it deems just in

> respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders, or make new orders in substitution therefor.

In the present case the Board has not yet completed the task of investigating the schedules filed, including the contract rates, and is awaiting the opinion of this Court. It thus has not granted "final approval" with or without modification or amendment. By s. 65(2) the schedules when "so fully approved ... shall be the only lawful rates, tolls and charges" of the utility.

The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined — that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects — that a public utility give adequate service and charge only reasonable and just rates.

The service requirement is expressed in s. 48, as follows:

> 48. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

This general requirement is supplemented by provisions such as s. 25 respecting pole-line standards, s. 52 prohibiting electric voltage and frequency variations of more than 4% and ss. 49-51 respecting abandonment or duplication of service, and by rules and regulations made by the Board for each utility's operation. Compliance with this requirement is accomplished by the Board's continuing supervision of a utility (s. 19), by requiring a utility to submit to the Board detailed reports and accounts, "to show completely and in detail the entire operation of the public utility in furnishing its product or service to the public" (s. 33; also ss. 26, 45, 46 [am. 1976, c. 32, s. 3], 47). The Board may investigate the adequacy of service on its own motion (s. 18) or on complaint (s. 78(1)), and by its staff may inspect books of a utility (s. 75) and make tests or examinations to determine the safety and adequacy of service (s. 77).

Rates must be "just" (s. 41) and must not be "unreasonable or unjustly discriminatory" (s. 18 and 78(1)), or "unjust, unreasonable, insufficient or unjustly discriminatory, or ... preferential" (s. 82(1)). The "justness" of rates has two aspects — rates of a utility as a whole must be "reasonable" and just for the public it serves and just and "sufficient" for the utility itself — and the rates for the various customers and classes of customer of a utility must not as between each other be "unjustly discriminatory" or "preferential".

The control of the overall level of rates has its keystone in s. 42(1) which states:

> 42(1) Every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base as fixed and determined by the Board ...

The "rate base" of a utility is established by the Board (s. 39) determining the "value" of the "physical assets" of the utility which are "used and useful in furnishing, rendering or supplying a particular service to or for the public" (s. 29(1)). The value is on the basis of "prudent original cost" or, added in 1976, "such other method as the Board may from time to time prescribe", deducting accrued depreciation as determined by the Board (s. 29(2) and (3)). Many provisions of the Act (*e.g.*, ss. 30-32, 34-37, 40) affect the valuation process. General principles have have been established over many years in this and other jurisdiction, especially in the United States, as to the meaning of the valuation, depreciation and accounting concepts involved.

The 1976 amendment of the *Public Utilities Act* also significantly amended s. 39(5). Appreciating that the very involved and difficult task of a completely new valuation of a rate base of a utility such as the Power Corporation might not be necessary and in any event could not be instantly carried out, the Legislature inserted the words "or accepted" in the following:

> 39(5) Until a rate base is determined by the Board for any public utility ... the present rate base for such public utility as from time to time revised *or accepted* by the Board shall continue in effect and shall be the rate base for such public utility ...

[Italics added.]

The concept of a utility securing a reasonable return on its rate base automatically makes specific the apparently vague standard that rates be "just". The utility's economic health and its ability to supply adequate service and to finance capital expansion are assured by giving it a "just and reasonable" return. Overall rates must thus be sufficient to produce that return after allowing operating expenses and other "just allowances" (s. 42(2)). The rates must thus be "sufficient" to produce that return, no less and no more.

The public interest charges the Board with the duty of ensuring no extravagance by a utility in either capital or operating expenditure. The rate base is to include only assets "used and useful" in providing service (s. 29(1)). Additions to it are controlled by the requirement that Board approval be secured for any new construction project of more than $5,000 (s. 34 as amended [1970, c. 65]). The expenses for rate-making purposes are only those the Board allows "as reasonable and prudent and properly chargeable to operating account" (s. 42(2)). Other "just allowances" are prescribed by the Act and Regulations, *e.g.*, annual depreciation charges (ss. 35-38).

A rate base, of course, constantly changes, as plant depreciates, is withdrawn from service, or is extended or improved. For rate-making purposes its value must be determined or "accepted" as of a date relevant to the rate revision process. As it changes through the years, rates as a whole must from time to time be checked by the Board to ensure that the utility's earnings are within the prescribed limits, and to see that its expenses are "reasonable and prudent".

The Board has on occasion summarized its duty in terms which, accurately I believe, emphasize the comprehensive nature of its control of the rates and services of a utility. Its decision of February 25, 1970, in respect of an application of Maritime Telegraph and Telephone Company Limited, contains the following at p. 25 of the Board's report for 1970:

> A public utility is obligated to provide services that are reasonably safe and adequate and is entitled to compensation therefor by the charging of rates that are not unjustly discriminatory and will provide the public utility with sufficient revenue to enable it to pay its operating expenses including depreciation and income taxes, and have net earnings sufficient to enable it to obtain and service normal and needed capital requirements. It is expected to meet reasonable demands for additional services and to conduct its affairs with efficiency. When an application is made to this Board for approval of revisions in rates, tolls and charges designed to produce additional revenue the public utility is required to produce evidence showing the needs and purposes for which such additional revenue is required. And upon any such application the Board inquires into and examines the adequacy and reasonableness of existing services, the efficiency of the public utility, the nature and extent of the needs and purposes upon which the application is grounded and the propriety of the proposed rate changes.

The "propriety" of the rates involves not only the propriety of their overall level as adjudged by rate base return, but also their propriety for the various classes of customer. The Board's twofold duty is to ensure that the rates as a whole are reasonable and that they are reasonable to all customers *inter se*. This latter aspect of its duty is imposed by the various provisions prohibiting unjust discrimination and requiring equal rates in substantially similar circumstances.

Section 63(1) sets forth the general guide which the Board must observe in classifying customers of a utility:

> 63(1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

Section 102 makes it an offence for a public utility to be guilty of "unjust discrimination" which is defined as charging greater or less compensation for a service than is prescribed by an approved schedule or greater or less compensation:

> 102. ... than it charges, demands, collects or receives from any other person, firm or corporation other than one conducting a like business for a like and contemporaneous service ...

The Board's general rate-making power is conferred, as noted above, by s. 41, by which it may make "such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility" and may "amend or rescind such orders". This power is referred to in slightly different terms in s. 65(1) as to interim and final approval of rate schedules, in s. 68 whereby the Board may "rescind, alter or amend any order fixing any rate", in s. 78(1) where it may investigate a complaint as to rates and may "order such rates, tolls, charges or schedules reduced, modified or altered", and in s. 82(1) where, if "upon any investigation the rates, tolls, charges, or schedules, are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or . . . preferential", the Board has "power to cancel such rates, tolls, charges, or schedules", and to "fix" other rates, etc., in substitution for them.

I cannot look upon these alternative phrasings as limiting the wide generality of the Board's power conferred by s. 41 — especially bearing in mind the admonition of s. 111(1), *viz.*:

> 111(1) This Act shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Board by the provisions of this Act, the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this Act conferred on the Board.

Markedly absent from the *Public Utilities Act*, including the 1976 amendment making the Power Corporation a public utility, is any provision specifically immunizing the special contracts or the rates fixed thereunder from Board control after July 16, 1976. Only two references to contracts appear in the Act, both of which in my opinion confirm rather than detract from Board jurisdiction over such contract rates.

Section 82(1), to which I have referred, empowers the Board, "upon *any* investigation" however launched, to "cancel" any rates found to be unjust, etc., and to "*declare null and void all contracts* or agreements in writing or otherwise, to pay or touching the same". Section 23 provides in part:

> 23. Subject to this Act, the powers, rights, privileges and obligations secured to or imposed upon any public utility by any statute, or by any contract or agreement made under the authority of any statute, shall not be subject to the provisions of this Act, and nothing in this Act contained shall authorize the Board to alter, enlarge or diminish such rights, powers, privileges or obligations or to impair the obligations of any contract, *except any contract or agreement relating to rates, tolls, charges or schedules which the Board is authorized by this Act to regulate and control.* ...

(Emphasis added.)

Counsel for the respondent companies contended that these sections should be construed as confirming Board jurisdiction over

contract rates only in respect of rates under contracts which dealt exclusively with rates, and that the industrial contracts of his clients dealt not just with rates but also with other incidental matters, and thus did not deal exclusively with rates and were accordingly excepted from control.

I respectfully cannot accept that argument. It is difficult to conceive of a contract dealing with rates and nothing else; ancillary provisions, as in the present contracts, are normally necessary. The Legislature, in referring to a "contract . . . *relating* to rates . . . which the Board is authorized by this Act to regulate and control", and in referring in s. 82(1) to a contract to pay rates or "touching the same", must surely have meant at least any contract, such as the industrial contracts here, which primarly, substantially and essentially sets rates to be charged by a utility for a regulated service.

This view is strengthened by the fact that when a public utility submits its rate schedules for approval by the Board (ss. 60 and 65), it also must (s. 61) submit for approval any rules and regulations which "relate to such schedule". Such rules and regulations would apparently cover ancillary matters such as those dealt with in the allegedly "mixed" contracts of the respondents. Section 82 also seems to recognize that rates cannot be isolated from incidental or ancillary rules relating to rates. After (s. 82(1)) empowering the Board "upon any investigation" to cancel unjust rates and to declare null and void contracts "to pay or touching the same", s. 82(2) states:

> 82(2) If upon such investigation it shall be found that any regulation, time schedule, act or service complained of is unjust . . . the Board shall have the power to determine and substitute therefor such other regulations, time schedules, service or acts and to make such orders respecting and such changes in such regulations, time schedules, services or acts as shall be just and reasonable.

Mr. Dickey's argument as to "mixed" contracts, which I have discussed, is merely one facet of his much broader and stronger contention that two presumptions of statutory interpretation prevent construction of either the original *Public Utilities Act*, or the 1976 amendment declaring the Power Corporation a public utility, so as to impair the contractual rights of his clients under the subject contracts. The first presumption is against the retrospective operation of statutes; the second is the presumption against interference with vested rights.

The two presumptions are of a very different nature, but are frequently not clearly distinguished: see Driedger on *Construction of Statutes* (1974), pp. 140-8.

The presumption against retrospectivity is a strong *prima facie* presumption which applies unless it is rebutted by clear and spec-

ific language. Only if a statute specifically says so, or must by overwhelming necessity be deemed to have said so, is it to be given retrospective effect "if it is applied so as to impose a new duty or attach a new disability in respect of events that took place before the statute was enacted": Driedger, at p. 144.

Here it is not and could not be suggested that anything done before July 16, 1976, by the Power Corporation or by any respondent violated the *Public Utilities Act*. What is in issue is the legality of rates to be charged or collected in future after that date. Accordingly, the retrospective presumption has no possible application.

The presumption as to vested rights is quite different. It was stated in *Spooner Oils Ltd. et al. v. Turner Valley Gas Conservation Board and A.-G. Alta.*, [1933] 4 D.L.R. 545 at p. 552, [1933] S.C.R. 629 at p. 638, by Duff, C.J.C., as follows:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main v Stark* (1890), 15, App. Cas. 384, at p. 338) unless the language in which it is expressed requires such construction.

Lord Radcliffe for the Privy Council in *A.-G. Can. et al. v. Nolan et al.*, [1952] 3 D.L.R. 433 at pp. 446-7, [1952] A.C. 427 at p. 450, 6 W.W.R. (N.S.) 23, said:

> It is fair to say that there is a well-known general principle that statutes which enroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the Court may properly lean in favour of an interpretation that leaves private rights undisturbed.

Driedger, at p. 139, after quoting Lord Radcliffe, as above, states:

> The result would appear that what is known as a presumption against interference with rights is not a prima facie presumption, but only a presumption that may be invoked when the statute is reasonably susceptible of two meanings. Where that is the situation, then, in the absence of any other conclusive indication of Parliamentary intent, the courts may make a choice on the assumption that Parliament did not intend to disturb existing rights.

I am respectfully unable to identify in the *Public Utilities Act* or in the 1976 amendment any provision or phrase, relevant to the present issue, that is "inconclusive or ambiguous" or "reasonably susceptible of two meanings", so as to permit or require application of the vested rights presumption. On the contrary, I find the references to contracts in ss. 23 and 82 to be very clear directions to the Board to concern itself with rates established by prior contracts. Indeed the contracts there referred to must be contracts made by a utility before it became subject to the Act; rates charged by it in contracts made afterward would be illegal unless the rates were first approved by the Board under s. 60 which forbids a utility to charge any compensation for any service without such prior approval.

The strongest reason why the presumption should not be applied is that its application would defeat the presumed primary purpose of making the Power Corporation a public utility. The *Public Utilities Act* establishes a comprehensive overall control of the operations and rates of a public utility. Regulation of rates compels regulation of *all* rates. If some customers and their rates were exempted from control, the rates of all other customers would be necessarily higher than they would otherwise be, because only thus could the utility be assured of the return on rate base which the Act guarantees it, or even be assured of recovery of its total costs of operation. In result, the special concessions given to contract customers would be paid by all other customers. We must assume that the Legislature did not so intend to perpetuate such unjust discrimination.

I have grave doubts in any event whether the "rights" under the contracts are "vested rights" within the meaning of the presumption. *Maxwell on Interpretation of Statutes*, 11th ed. (1962), at p. 275, limits the presumption's application to "statutes which encroach on the rights of the subject, whether as regards person or property". *Craies on Statute Law*, 6th ed. (1963), at p. 118, states: "There is a presumption that existing rights . . . are not taken away, at least without compensation." Certainly most, if not all, of the cases where the presumption has been applied have related to proprietary rights, legal or equitable. Such were, for example, the agreements to lease land in a national park, involved in *The Queen v. Walker* (1970), 11 D.L.R. (3d) 173, [1970] S.C.R. 649 (especially Martland J., at p. 186 D.L.R., p. 667 S.C.R.).

The rights in the present case are, as I view them, not proprietary or vested rights, but are merely future rights to buy goods, *viz.*, electricity, at prices specified in the contracts. Regulatory interference with these "rights" in the public interest is entirely different in kind from divesting or taking away proprietary rights without compensation. I leave aside and do not decide the question earlier mentioned, whether the legality of the contracts might be questionable if the rates thereunder were not calculated with regard to the standards of s. 57 of the *Power Corporation Act*.

The approach I have adopted seems affirmed by *A.-G. Can. et al. v. Nolan et al., supra*. There the Wheat Board compulsorily acquired barley by Orders in Council under the *National Emergency Transitional Powers Act, 1945*. The Board was to pay compensation at the going rate at the date of expropriation of 64¾¢ a bushel. The owners of the barley challenged the validity of the orders; their practical reason for doing so was that the price of barley had immediately gone up to 93¢ a bushel. They claimed that the Board had no power to divest them of their previously acquired rights to sell the barley as they wished.

Lord Radcliffe, after the section of his speech at pp. 446-7 D.L.R., p. 450 A.C., quoted above, went on to refuse to apply the vested rights presumption, in terms that have clear application to the case before us, at p. 447 D.L.R. pp. 450-1 A.C.:

> But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes and the Court is entitled to read the Act in this way. But then expropriation is altogether capable of being so related. Nor can a Court pause in doubt over the question whether this is an Act by which it is intended to authorize interference with private rights: such subjects as supplies, prices, rentals and wages cannot be controlled without interference on the largest scale. If the rights so historic as a man's right to sell his labour where and at what price he pleases or a man's right to use his own property in his own way are avowedly placed under the Governor in Council as subjects of control and regulation, what peculiar sanctity can the law give to the ownership of consumable goods, so that this particular form of private right is to be exempt from any action in pursuit of the authorized purposes? Certainly there is no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trenched upon where express power is given to do so.

I have been unable to get much help from the decisions of Canadian Courts to which counsel have referred. Only two come close to dealing with the problem before us.

In *R. v. Board of Com'rs of Public Utilities; Ex p. Town of Milltown* (1919), 47 D.L.R. 219, 46 N.B.R. 385 (N.B.C.A.), the Calais Water and Power Co. had a contract to supply water to the Town of Milltown at agreed rates. In issue was whether the contract had expired before the *Public Utilities Act* of New Brunswick had come into force in 1912 or whether it had been renewed. The Court held that it had not been renewed. Grimmer, J., at pp. 222-3, by dicta suggested that if it had been renewed, the Board would have had jurisdiction to modify it and increase rates as requested by the company.

Much less relevant was *Re Public Utilities Act; City of Edmonton v. Northern Alberta Natural Gas Development Co.* (1919), 50 D.L.R. 506, [1920] 1 W.W.R. 31, 15 Alta. L.R. 416 (Alta. C.A.), where the Court, construing an Act less comprehensive than the Nova Scotia Act, held the Board could not increase rates at which a company was to sell gas to the city where the agreement establishing the rates had been specifically validated by a special Act of the Legislature.

Reference was also made to: *City of Winnipeg v. Winnipeg Electric R. Co.* (1920), 54 D.L.R. 445, [1920] 3 W.W.R. 246 (Man. K.B.); *Windsor v. Nova Scotia Textiles Ltd.*, [1948] 3 D.L.R. 476, 63 C.R.T.C. 60, 22 M.P.R. 159 (N.S.C.A.); *Windsor v. Colonial Ferti-*

lizer Co. Ltd., [1948] 3 D.L.R. 635, 63 C.R.T.C. 85, 22 M.P.R. 316 (N.S.C.A.); *Calgary & Edmonton Corp. Ltd. v. British American Oil Co. Ltd.* (1963), 40 D.L.R. (2d) 964, 44 W.W.R. 416 (Alta. C.A.).

I find support for my interpretation of the effect on prior contracts of the supplier becoming a public utility, in the overwhelming authority of American cases based on basically similar public utility legislation. The main principle is expressed in 73 *Corp. Jur. Sec.*, s. 41, p. 1085, as follows:

> Unless otherwise provided by constitution or statute, a general grant of power to regulate rates authorizes a public utility commission to regulate or modify rates fixed by contract, including those specified in franchise agreements, even though such contracts or agreements were executed prior to the passage of the statute by which the power is conferred.

Many cases supporting this proposition were cited by counsel for the Board, including *Midland Realty Co. v. Kansas City Power & Light Co.* (1937), 300 U.S. 109, where the United States Supreme Court *per* Butler, J., at p. 112, said:

> But the state has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them.

See also: *May Department Stores Co. v. Union Electric Light & Power Co. et al.* (1937), 107 S.W. (2d) 41 (Mo.S.C.); *Mississippi River Fuel Corp. v. Federal Power Commission* (1941), 121 F. (2d) 159 (C.C.A., 8th C.); *Colorado Interstate Gas Co. v. Federal Power Commission et al.* (1944), 54 P.U.R. (N.S.) 1 (C.C.A., 10th C.).

Counsel for the respondent companies argued that the approval of the contracts by Order in Council, presumably under s. 61(1) of the *Power Corporation Act*, gave the controls validity and a special legislative status so as to require specific statutory language to bring them and their rates under Board control. The acts of approval were not, however, the exercise by the Governor in Council of a legislative power delegated to him by the Legislature. They were administrative acts of control of the kind commonly prescribed by statute to ensure Cabinet supervision of important or unusual action by a Crown corporation. The approvals were like the other Governor in Council approvals which the Power Corporation must obtain before it may issue bonds (new s. 8(2) as enacted 1973), amalgamate with another company (new s. 14(1)), pass certain by-laws (new s. 10(c)), enter into contracts with municipalities (s. 50(4)), or regulate power distribution in the Province (s. 65). The approvals were acts of an executive nature, similar to the thousands of Orders in Council which do not enact laws or regulations but which carry out executive functions by the exercise of the royal prerogative or, more commonly, as authorized by statute. In

his executive role, the Governor in Council appoints officials, approves expenditures, approves contracts, etc.

Here the legal effect of giving approval is merely to give the Power Corporation corporate power to make certain contracts, a power which would be lacking without such approval. Without such approval, a contract requiring it would be *ultra vires* the Corporation. Approval may thus give a contract validity. It does not convert it into an enactment or into a contract made *by* statute. The contract remains a contract between two companies for sale of goods, a contract which at most is a contract "made under the authority of any statute" within the ambit of s. 23 of the *Public Utilities Act*.

The Court raised with counsel whether "An Act Relating to the Supply of Electrical Power to New or Expanding Industries," 1970 (N.S.), c. 3, protected any of the subject industrial contract rates from full Board control. By that Act, a "public utility" is authorized, without Board approval, to agree to supply electricity to a new or expanding industry, having a demand base of at least 2,000 kw., and providing employment for at least one person for each 50 kw. of demand. Such an agreement (s. 3) may fix the rates charged and other terms of supply and may not exceed a term of 10 years. An agreement must not (s. 6) set rates "below the estimated incremental costs to the utility". By s. 7 the expenses and revenues under the agreement shall be taken into account in calculating the utility's return on rate base, and the prudent original cost of the equipment shall be included in the rate base valuation.

Counsel for the appellant Board claimed the 1970 Act was irrelevant because the Power Corporation was not, of course, a public utility when it entered into the contracts, and because the respondents had not shown or even contended that, if the Corporation had been a utility, any of the contracts would have met the conditions of the Act. Casual examination of the contracts suggest that they do not meet the condition of the Act. Many do not comply with the condition that a contract be for not more than 10 years or the condition that employment be provided by the expanded industry for one person for every 50 kw. of demand. None provides for full adjustment of rates from time to time to cover increases in the Power Corporation's incremental costs. We accordingly need not consider whether, now that the Corporation has become a public utility, the Board should treat any previous contract that continues to meet the conditions of the 1970 Act in the same way as it would treat any contract hereafter made under that Act by the Power Corporation with one of the respondent companies or with any other company.

I conclude that the Board has the power and the duty to deal with the rates, tolls, charges or schedules charged by the Power

Corporation to the municipal bodies and companies with whom it has the respective subject contracts, and that the question asked by the stated case should be answered in the affirmative.

There should be no costs on this appeal.

Order accordingly.