



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Reference re: Section 101 of the Public Utilities Act*,
2017 NLCA 34

Date: May 25, 2017

Docket: 201601H0018

IN THE MATTER OF Section 101 of the
Public Utilities Act, RSNL 1990, c. P-47

AND IN THE MATTER OF a case stated
by the Board of Commissioners of Public
Utilities to the Court of Appeal for its hearing,
consideration and opinion on a question
of law affecting the jurisdiction of the Board
of Commissioners of Public Utilities

Coram: Green C.J.N.L., Welsh and White JJ.A.

Stated Case – Public Utilities Board

Heard: December 7 and December 8, 2016

Opinion Rendered: May 25, 2017

Reasons for opinion on stated case by Welsh J.A.
Concurred in by Green C.J.N.L. and White J.A.

**Counsel for the Innu Nation, Mushuau Innu First Nation, Chief John
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Counsel for Newfoundland and Labrador Hydro: Geoffrey P. Young

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Welsh J.A.:

[1] By means of a stated case, the Board of Commissioners of Public Utilities seeks the opinion of this Court on questions of law regarding the provision of electrical power to the community of Natuashish on the coast of Labrador.

BACKGROUND

[2] Section 101 of the *Public Utilities Act*, RSNL 1990, c. P-47, provides, in relevant parts:

The board may of its own motion or upon the application of a party, ... state a case in writing for the opinion of the Court of Appeal upon a question which in the opinion of the board is a question of law

[3] The stated case, based on an October 26, 2015 resolution of the Board, is supported by an agreed statement of facts. In summary, Natuashish is an isolated community located on the north coast of Labrador. The Mushuau Innu First Nation (the “Innu”) owns the infrastructure necessary to supply electrical service to the community. Newfoundland and Labrador Hydro (“Hydro”) maintains the infrastructure based on an agreement with the federal government. The agreed statement of facts provides:

7. The community of Natuashish, NL is a reserve under the *Indian Act*, RSC 1985, c. I-5, and the Mushuau Innu First Nation, which is a band under the *Indian Act*, RSC 1985, c. I-5, is understood by the Board to be the owner of the electrical assets in Natuashish, NL including the diesel generation plant, the power lines and the fuel tanks. ... NL Hydro described the operations and maintenance services it currently provides in the community of Natuashish, NL in the following terms:

Hydro has been operating and maintaining the plant in the community of Natuashish on behalf of the Federal Government on a cost recovery basis. All costs are charged at bill rates plus overhead to ensure full cost recovery.

...

[4] The Innu made an application to the Board seeking: (1) a declaration setting aside Hydro’s designation of its services in Natuashish as “a non-regulated business unit” on the basis that the designation is incompatible with provincial electrical policy; (2) an order requiring Hydro

to provide electrical services to Natuashish; and (3) inclusion of Natuashish electricity users in the rates charged in the Labrador Isolated System. The Innu also submitted that the Board has jurisdiction to order Hydro to purchase the electrical infrastructure in Natuashish from the Innu. Hydro opposed these requests on the basis that the Board has no jurisdiction to make the declarations and orders.

[5] The stated case concludes with the questions:

13. The Board therefore states a case in writing for the opinion of this Honourable Court of Appeal upon the following questions of law:

Whether the Board has jurisdiction pursuant to the *Act* to make the following orders relating to the provision of electrical services in Natuashish, NL:

(i) A declaration that NL Hydro's current classification of its Natuashish operations as one of its "non-regulated business units" is incompatible with provincial electrical policy under the *Act* and the *Electrical Power Control Act, 1994*; or,

(ii) An order requiring NL Hydro to provide regulated electrical services in Natuashish, NL; or

(iii) An order requiring NL Hydro to acquire title to the Natuashish electrical assets from the Mushuau Innu First Nation.

[6] In addition to the facts set out in the stated case, the parties agree: Hydro tracks production and consumption data in Natuashish; no bills for the provision of electricity are issued to individual users of electricity in Natuashish; Hydro provides electrical service, with the Board regulating the rates charged, to the other two *Indian Act* reserves in the Province, being Conne River and Sheshatshiu, both of which are located near Hydro transmission lines; Hydro provides electrical service to all other isolated communities on the Labrador coast as part of the "Labrador Isolated System" which is regulated by the Board; and Natuashish is the only community in the Province that Hydro lists as a "non-regulated business unit".

[7] It is convenient to begin with Question Two since the conclusions on that question will form the basis for determining the remaining questions.

Question Two: Does the Board have jurisdiction to require Hydro to provide regulated electrical services in Natuashish?

[8] Analysis of this question requires consideration of both explicit and implicit powers that may be exercised by the Board. The nature of these powers is discussed in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140. Bastarache J., for the majority, wrote:

[38] But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers)

[9] Turning to the first of these, explicit powers, the *Public Utilities Act* imposes obligations on Hydro to provide electrical services in certain circumstances. Section 54 of the *Act* is engaged where a potential user of electricity is located within one hundred metres of a transmission line:

(1) A power company shall supply electrical energy to premises situated within 100 metres of a transmission line, main supply-wire or cable suitable for that purpose, on being required by the owner or occupier of the premises to do so.

(2) The power company before taking steps to supply the energy, and before supplying the energy or making a connection, or as a condition of the power company continuing to supply it, may require the owner or occupier to give reasonable security for the repayment of the costs of making the connection when those costs exceed \$50, and for the payment of the proper tolls for electrical energy and the rent of instruments.

(3) In the event of the power company and the owner or occupier failing to agree upon the nature or amount of the security to be given within 14 days from the date upon which the owner or occupier requires the power company to supply electrical energy, the amount of the security and the manner in which it shall be given shall, upon the application of either party, be determined by the board, and the board may make an order for security under this section for other matters that under the circumstances the board may consider just and equitable.

(4) The board may, for good cause and after hearing the interested parties, relieve a power company from the statutory obligation to supply electrical energy upon

the terms and conditions that the board may consider appropriate and in the public interest.

(Emphasis added.)

[10] Section 54 has no application in this case because Natuashish is an isolated community located approximately one hundred and twenty-five kilometres from any of Hydro's transmission lines.

[11] Section 55 of the *Act* applies where the distance is greater than one hundred metres:

Upon the application of a person whose premises are situated at a greater distance than 100 metres from a transmission-line, main supply-wire, or cable suitable for that purpose, and who wishes to be supplied with electrical energy by the power company controlling or operating the transmission-line, supply-wire, or cable, the board may order the power company to supply, within the time that the board may direct, the electrical energy required by that person, and to make those extensions and install the equipment and apparatus that may be necessary to supply it upon the terms and conditions that the board may direct, including, if the board thinks advisable, provision for the cost or a portion of the cost of the extension, equipment, or apparatus to be borne by the person requiring the electrical energy.

(Emphasis added.)

[12] Section 55 will not result in an automatic order in every circumstance where the requested service is more than one hundred metres from the nearest transmission line. If that were the case, presumably the legislature would have simply imposed the obligation on Hydro to provide service subject to directions by the Board.

[13] Rather, the purpose of section 55 is to authorize the Board to require Hydro to meet a request for electrical service by installing "extensions" to a "transmission-line, main supply-wire, or cable suitable for carrying electricity" that Hydro operates. The extension may include additional equipment and apparatus where necessary. However, on an ordinary reading of the language, section 55 applies only where the "extension" of existing Hydro transmission lines is feasible or reasonable. Whether that criterion is satisfied in the case of Natuashish is a determination to be made by the Board.

[14] It follows that the Board would have explicit authority under the *Public Utilities Act* to require Hydro to provide electrical service to

Natuashish if it determined under section 55 that the extension of existing Hydro transmission lines would be feasible or reasonable.

[15] Alternatively, the Innu submit that the Board has implied or implicit authority to make an order requiring the provision of electrical service by means of a separate generating plant in Natuashish. The analysis to be applied is discussed in the *ATCO* decision. At paragraph 51, Bastarache J. cautioned against “crossing the line between judicial interpretation and legislative drafting”, and continued:

[51] ... That being said, this rule allows for the application of the “doctrine of jurisdiction by necessary implication”; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature

... .

(Emphasis added.)

[16] Bastarache J. went on to explain:

[73] The City seems to assume that the doctrine of jurisdiction by necessary implication applies to “broadly drawn powers” as it does for “narrowly drawn powers”; this cannot be. The Ontario Energy Board in its decision in *Re Consumers’ Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

- [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
- [when] the enabling Act fails to explicitly grant the power to accomplish the legislative objective;
- [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
- [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
- [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

[17] Bastarache J. cautioned that care must be taken not to use the doctrine of jurisdiction by necessary implication to broaden the scope of a board's jurisdiction where, in fact, the power at issue is one that was excluded from the legislation. This caution is consistent with the presumption of implied exclusion which is engaged in statutory interpretation. The presumption is discussed in Sullivan, *Sullivan on the Construction of Statutes*, fifth edition (Markham, ON: LexisNexis, 2008), at pages 243 to 254. In particular, at page 244:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent" [*University Health Network v. Ontario (Minister of Finance)*, (2001) 208 D.L.R. (4th) 459 (ONCA), at paragraph 31]. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

For recent reference to this presumption, see: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at paragraph 92; *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774, at paragraph 54.

[18] As applied to the questions put in the stated case, it is relevant that sections 54 and 55 of the *Public Utilities Act* specifically address the authority of the Board to direct Hydro to provide power services in specified situations, that is, connection to existing power lines. It may be argued that, had the legislature intended that the Board should exercise a broader authority to order Hydro to provide power services beyond those set out in sections 54 and 55, language to achieve that objective would have been expected.

[19] On the other hand, it may be argued that there is a gap insofar as the legislation does not address the situation of isolated communities which could not feasibly be provided with electrical power by means of the extension of Hydro's transmission lines. The question, then, is whether, in that situation, the legislative intention was that, where electricity is not available in the community, the Board would have jurisdiction to order

Hydro to provide power, and, if the Board has that jurisdiction, whether it would extend to the situation where a community already has access to power, but seeks an order to change the service provider. As stated in the *ATCO* decision, at paragraph 51, the question is, what powers of the Board are “practically necessary for the accomplishment of the object intended to be secured by the statutory regime”? See also section 118(2) of the *Public Utilities Act* which provides that the Board has “in addition to the powers specified in the Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.”

[20] In determining the legislative intention, the *Public Utilities Act* must be read in conjunction with the *Electrical Power Control Act, 1994*, SNL 1994, c. E-5.1, with particular consideration given to the purpose set out in the latter statute and the historical development of electrical power in the Province, especially with respect to rate regulation and access to power. Section 4 of the *Electrical Power Control Act* requires the Board to implement the policy set out in the *Act*:

In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

[21] Section 3 of the *Act* provides, in relevant parts:

It is declared to be the policy of the province that

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

(iii) should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world,

(iv) should be such that after December 31, 1999 industrial customers shall not be required to subsidize the cost of power provided to rural customers in the province, and those subsidies being paid by industrial customers on the date this Act comes into force shall be gradually reduced during the period prior to December 31, 1999, and

(v) should promote the development of industrial activity in Labrador;

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

(iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service,

(iv) that would result in, subject to Part III, a person having priority to use, other than for resale, the power it produces, or the power produced by a producer which is its wholly-owned subsidiary,

(v) where the objectives set out in subparagraphs (i) to (iv) can be achieved through alternative sources of power, with the least possible interference with existing contracts,

and, where necessary, all power, sources and facilities of the province are to be assessed and allocated and re-allocated in the manner that is necessary to give effect to this policy;

(c) in the event of an emergency arising from the loss of use of generating facilities, a shortage of water or a loss of transmission or distribution facilities which results in there being insufficient power to meet the needs of consumers in the province, or a part of the province, the emergency controller should have the responsibility and authority to

(i) determine priorities,

(ii) allocate and re-allocate available power, and

(iii) make all other necessary provisions for the supply and distribution of power for so long as the emergency continues;

...

(Emphasis added.)

[22] Turning first to section 3(a) regarding rate regulation, I begin with section 70(1) of the *Public Utilities Act*, which provides:

A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the 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 and 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 the public utility, until altered, reduced or modified as provided in this Act.

[23] A public utility is defined in section 2(e) of the *Act*:

“public utility” means a person, firm or corporation that owns, operates, manages or controls in this province equipment or facilities for

...

(ii) the production, generation, storage, transmission, delivery, or providing of electric power or energy, water or heat either directly or indirectly to or for the public or a corporation for compensation,

...

I note here that whether the electrical service provided by the Innu with the assistance of Hydro in Natuashish satisfies the definition of a public utility is not before the Court on this stated case. That determination would properly be made by the Board based on the evidence.

[24] Section 70 would apply generally to any entity that satisfies the language of the definition and provides electrical service in the Province, subject to a possible constitutional impediment. For example, as applied to this case, provided there is no basis in federal jurisdiction over “Indians, and Lands reserved for the Indians” under section 91(24) of the *Constitution Act, 1867* to preclude the operation of section 70, and the provision of electricity by the Innu in Natuashish satisfies the definition of “public utility”, the Board would have jurisdiction to review rates in Natuashish under that

provision. The legislation does not limit the Board's jurisdiction over rate regulation to any particular provider of electricity. (Section 91(24) of the *Constitution Act, 1867* is discussed below.)

[25] A similar result applies to the application of sections 16, 17 and 82 of the *Public Utilities Act* which are relied upon by the Innu. Section 16 gives the Board authority for "the general supervision of all public utilities", section 17 permits the Board to inquire "into a violation of the laws or regulations in force in the province by a public utility", and section 82 authorizes the Board to inquire into "unreasonable or unjustly discriminatory rates".

[26] As applied to this case, subject to the operation of section 91(24) of the *Constitution Act, 1867* and satisfying the definition of a "public utility", the Board would have jurisdiction to apply sections 16, 17, and 82 of the *Public Utilities Act* to the electrical services provided by the Innu in Natuashish.

[27] The question flowing from these sections is whether the legislative intention was that rate regulation should be assessed on a Province-wide, regional or individual location basis. This issue arises because the cost of providing electrical service will vary, thereby potentially affecting the rate a public utility could charge in order to "earn a just and reasonable return" (*Electrical Power Control Act*, section 3). For example, in this case, a different result would obtain if sections 70, 16, 17 and 82 of the *Public Utilities Act* were applied to Natuashish as an isolated community than if it was considered as part of a Province-wide analysis or compared to other isolated Labrador communities.

[28] The adjustment of rates involving some form of subsidization to achieve fairness and equity on a Province-wide basis may be a viable goal where all locations are served by the same public utility. The analysis and application of the *Act* is more problematic where different public utilities are involved. In that situation, the provisions of the *Public Utilities Act* would have to be reconciled with section 3(a)(iii) of the *Electrical Power Control Act* which requires that rates be set so as to "provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable" financial return.

[29] In determining the legislative intention related to these issues, a consideration of the historical development of electrical service in the

Province, and the related legislation, is of assistance. A summary of the history is found in the Board's decision in Order No. P.U. 7 (2002-2003). The Board's purpose in providing the summary in that case was to address changes in the *Electrical Power Control Act, 1994*, "which required that, as of December 31, 1999, the Island industrial customers [would] no longer subsidize the rural deficit". The Board was assessing the impact of this change on other customers.

[30] Electrical service, first supplied in the Province in 1895, was initially provided by unregulated, independently operating utilities. In 1949, a Board of Commissioners of Public Utilities was established for the purpose of supervising and regulating public utilities in the Province. In 1954, the Newfoundland Power Commission was established with its main focus being to develop a rural electrification program that would be financed by public funds.

[31] Under the *Rural Electrification Act, 1963*, SN 1963, c. 27, the Lieutenant-Governor in Council was authorized to "instruct" the Newfoundland Power Commission to undertake investigations and make reports related to the provision of electrical service to "any part of the province" where a power utility had not yet been authorized to supply power (section 4(1)). The Lieutenant-Governor in Council was also authorized to establish "power distribution districts" and to appoint a board of trustees for each district (section 8). Subject to the approval of the Lieutenant-Governor in Council, a board had authority to contract for the supply of power, operate works for generating power, or acquire lands, waters and works "used or adapted for generating power or for the transmission thereof to or in its district" (section 10). Also subject to the approval of the Lieutenant-Governor in Council, a board had authority to borrow money (section 16). However, pursuant to section 24:

Except with the approval of the Minister, the board shall not in any year incur, enter upon, or contract or become liable for an expenditure or indebtedness beyond or in excess of the estimated amount of expenditure set out in an approved budget.

The Act repealed the *Small Towns (Electric Lighting) Act*, RSN 1952, c. 85.

[32] The *Rural Electrification Act, 1963*, was followed in 1977 by the *Electrical Power Control Act*, SN 1977, c. 92, which set out the policy of the Province regarding rates to be charged for electrical service. Rates "should

be reasonable and not unjustly discriminatory” (section 3(a)) and should allow (1) a private company supplying electricity to earn a “just and reasonable” financial return; (2) the Hydro Corporation to “recover the cost of service”, with a margin of profit; and (3) a power distribution district to “recover the cost of the services provided by it” (section 3(d) of the *Electrical Power Control Act*). Pursuant to sections 5 and 6 of that *Act*, a change in rates proposed by Hydro or a power distribution district required the approval of the Lieutenant-Governor in Council, which would not be given until the Public Utilities Board had reported to the Minister with its recommendation.

[33] In 1989, having achieved the goal of providing electrical service to rural areas, the power distribution districts were eliminated, and their assets and liabilities transferred to Hydro (section 46.2 under section 19 of the *Electrical Power Control (Amendment) Act*, SN 1989, c. 40). The effect of this change was to bring locations throughout the Province under the umbrella of Hydro. While the language of the statutory power policy was adjusted, the policy was not substantively altered (section 6 of the *Electrical Power Control (Amendment) Act*). Similarly, the process applicable to altering rates was not substantively changed (section 9 of the *Electrical Power Control (Amendment) Act*). Insofar as Hydro took over the electrical services, rate regulation throughout the Province was facilitated.

[34] In 1994, the current *Electrical Power Control Act* was enacted. Sections 3(a)(i), (ii) and (iii), which reiterated the provincial power policy regarding rates, were not substantively changed from the 1989 legislation. Sections 3(a)(iv) and (v) were added but are not relevant to this case. The addition of section 3(b), which was new in the 1994 legislation, is discussed below.

[35] By amendment in 2012, section 5.1 was added to the *Act*. Subsection (1) addresses authority that may be exercised by the Lieutenant-Governor in Council in directing the Board:

Notwithstanding sections 3 and 4 of the *Act* and the provisions of the *Public Utilities Act*, the Lieutenant-Governor in Council may direct the public utilities board with respect to the policies and procedures to be implemented by the board with respect to the determination of rate structures of public utilities under the *Public Utilities Act* and, without limiting the generality of the foregoing, including direction on the setting and subsidization of rural rates, the setting of industrial rates in Labrador, the fixing of a debt-equity ratio for Hydro, and the phase in, over a period of years from the date of coming into force of this section,

of a rate of return determination for Hydro, and the board shall implement those policies and procedures.

(Emphasis added.)

[36] Section 5.1(1) applies only if the Lieutenant-Governor in Council exercises the authority to direct the Board. In the absence of a direction, the provision does not derogate from the Board's authority to implement the power policy set out in the *Act*.

[37] This historical review, beginning with the provision of electricity by individual entities and an absence of rate regulation, demonstrates a gradual transition from rate oversight by government to the power of the Board to implement the legislated policy that "rates to be charged, either generally or under specific contracts, for the supply of power within the province" should satisfy specific criteria (section 3(a) of the *Electrical Power Control Act*).

[38] I turn next to the power policy to be implemented by the Board pursuant to section 3(b) which addresses the Board's authority over "all sources and facilities for the production, transmission and distribution of power in the province". These sources and facilities "should be managed and operated" so as to result in (1) "the most efficient production, transmission and distribution of power" (section 3(b)(i)); (2) the delivery of power "at the lowest possible cost consistent with reliable service" (section 3(b)(iii)); and (3) "consumers in the province having equitable access to an adequate supply of power" (section 3(b)(ii)). Section 3(b) also provides that "where necessary, all power, sources and facilities of the province are to be assessed and allocated and re-allocated in the manner that is necessary to give effect" to those criteria.

[39] This provision, particularly section 3(b)(ii) stipulating that consumers in the Province should have equitable access to power, must be interpreted to mean that, where the Board does not have explicit authority to order the provision of electrical power in a location currently lacking power, then, in appropriate circumstances, by necessary implication the Board has jurisdiction to make such an order pursuant to the exercise of power practically necessary to accomplish the legislative intention. The same implicit authority would apply if, as a result of the discontinuance of service by a public utility, whether authorized by the Board or otherwise, a community was left without electrical service. (See discussion of section 38 of the *Act*, below.)

[40] This conclusion is consistent with the objects of Hydro as set out in section 5(1) of the *Hydro Corporation Act, 2007*, SNL 2007, c. H-17:

The objects of the corporation are to develop and purchase power on an economic and efficient basis, and, in particular, to engage in the province and elsewhere in the development, generation, production, transmission, distribution, delivery, supply, sale, purchase and use of power from water, steam, gas, coal, oil, wind, hydrogen or other products used or useful in the production of power, and to supply power, at rates consistent with sound financial administration, for domestic, commercial, industrial or other uses in the province, and, subject to the prior approval of the Lieutenant-Governor in Council, outside of the province.

(Emphasis added.)

[41] The same need for the extension of jurisdiction by necessary implication would not apply where the community has access to power provided by an entity other than Hydro. If the intention had been to preclude the operation of more than one public utility to deliver electrical service, the legislature could have imposed that limitation. Instead, the language of the *Electrical Power Control Act* accommodates the operation of more than one utility.

[42] Further, section 38 of the *Public Utilities Act* provides for the situation where a public utility wishes to discontinue service:

A public utility shall not abandon a part of its line, or works, after they have been operated, or discontinue a service without notice to the board, and without the written consent of the board, which consent shall only be given after notice to an incorporated municipal body interested, and after there has been an inquiry.

[43] Similarly, section 48 of the *Act* provides:

A public utility shall not sell, assign or transfer the whole of its undertaking or a part of it to a person or corporation until the approval of the board has been obtained.

[44] It follows that, if the electrical service provided by the Innu satisfies the definition of a public utility and the *Act* applies, the written consent of the Board would be required in order to discontinue that service.

Presumably, in assessing such a request, the Board would consider any implications, including whether, as a result, the community would be left without electrical service. If that occurred, as set out above, subject to any

constitutional impediments, the Board would have jurisdiction by necessary implication to order Hydro to provide electrical service in Natuashish.

[45] Alternatively, if the electrical service provided by the Innu does not satisfy the definition of a public utility, the *Public Utilities Act* would not apply. In that case, assuming the community, in fact, has access to power, the Board would not have jurisdiction by necessary implication to order Hydro to provide electricity. Further, if the rates for power in Natuashish differ from those that apply in other isolated coastal Labrador communities, this would be a function of a different entity providing electrical service, a situation which is permitted under the legislation.

[46] The above conclusions are not altered by references in section 3 of the *Electrical Power Control Act* to the allocation and re-allocation of power, sources and facilities in the Province. In this regard, the Innu rely on sections 7 and 8 of the *Act*. Those provisions relate to the re-allocation of power, particularly where there is an anticipated shortage. Insofar as a question of allocation or re-allocation of power may arise in Natuashish, given the isolated nature of the community, if the definition of public utility is satisfied and section 91(24) of the *Constitution Act, 1867* does not impede the operation of the *Act*, the Board would have jurisdiction to make a re-allocation order, limited to that community, against the Innu as the provider of the electrical services.

[47] In summary, I would answer Question Two:

(1) If the electrical service provided by the Innu in Natuashish satisfies the definition of a public utility, a matter which the Board has authority to determine, and assuming there is no constitutional impediment to the application of the *Public Utilities Act*, the Board would have jurisdiction to apply the relevant provisions of the *Act*. If the Innu wish to discontinue the service, section 38 of the *Act* would apply and the written consent of the Board would be required. (See brief discussion of constitutional issues below.)

(2) If the electrical service provided by the Innu in Natuashish does not satisfy the definition of a public utility, the Board would have jurisdiction by necessary implication to order Hydro to provide electrical service in that community only if power is not otherwise available to the residents.

Question One: Does the Board have jurisdiction to declare that Hydro's current classification of its Natuashish operations as a "non-regulated business unit" is incompatible with provincial electrical policy under the Public Utilities Act and the Electrical Power Control Act, 1994?

[48] The phrase, non-regulated business unit, is employed as a matter of accounting and reporting convenience. As part of its operations, Hydro engages in business activities that are outside the scope of rate regulation overseen by the Board pursuant to the legislation. The provision of services, by agreement, to maintain the electrical infrastructure in Natuashish is one example. Designation as a non-regulated business unit is a means of separating Hydro's business of providing power to customers using infrastructure it owns and controls from its other business activities.

[49] It follows that, where the answer to Question Two is that the Board would not have jurisdiction to order Hydro to provide regulated electrical services in Natuashish, the designation as a non-regulated business unit is not problematic; the designation is an appropriate accounting and reporting mechanism. Of course, the designation would not apply if Hydro was providing electrical service in Natuashish.

Question Three: Does the Board have jurisdiction to order Hydro to acquire title to the Natuashish electrical assets from the Innu?

[50] This issue would arise only if the circumstances were such that the Board had jurisdiction to order Hydro to provide electrical services in Natuashish (Question Two). Even assuming that jurisdiction, there is no explicit authority in the *Public Utilities Act* for the Board to direct the means by which electrical service is to be provided. Further, the criteria for applying the doctrine of jurisdiction by necessary implication are not satisfied (*ATCO*, at paragraph 73, paragraph 16, above).

[51] The purpose of the *Public Utilities Act* and the *Electrical Power Control Act*, read together, relates to rate regulation and access to electrical power. Subject to compliance with the general principles stated in the provincial power policy, the manner in which a public utility provides electrical service is not controlled by the legislation. To extend the Board's jurisdiction by necessary implication would go well beyond what is practically necessary to accomplish the legislative objective. In the language of Bastarache J. in *ATCO*, to extend the Board's jurisdiction in this way

would engage “broadly drawn powers” which are outside the scope of the doctrine of jurisdiction by necessary implication (paragraph 16, above).

[52] Accordingly, I would answer Question Three that, even if the Board has authority to order Hydro to provide electrical service in Natuashish, the Board does not have jurisdiction to order Hydro to acquire title to the electrical assets from the Innu.

Section 91(24) of the Constitution Act, 1867

[53] Since reference has been made to possible constitutional impediments to the Board’s jurisdiction in Natuashish, a reserve under the *Indian Act*, I would make the following observations. The basic principles are concisely stated in Hogg, *Constitutional Law of Canada*, fifth edition, supplemented (Toronto, ON: Thomson Reuters Canada Limited, 2007). Beginning with the application of provincial law, at 28.2(a), Hogg summarizes:

The general rule is that provincial laws apply to Indians and lands reserved for the Indians. ...

These decisions establish that the provincial Legislatures have the power to make their laws applicable to Indians and on Indian reserves, so long as the law is in relation to a matter coming within a provincial head of power. ...

[54] As applied to this case, with exceptions not relevant here, the Province has authority generally over the development and provision of electrical power in the Province (sections 92(13), 92(16) and 92A of the *Constitution Act, 1867*). That jurisdiction would extend to Natuashish unless an exception to the general rule applies.

[55] At 28.2(b) to (f), Hogg discusses exceptions to the general rule which may have the effect of ousting provincial jurisdiction. Of the five exceptions listed, only one may apply in the context of this case, that is, paramountcy. That exception is described at 28.2(d):

The third exception to the general rule that provincial laws apply to Indians and lands reserved for the Indians is the doctrine of federal paramountcy. If a provincial law is inconsistent with a provision of the *Indian Act* (or any other federal law), the provincial law is rendered inoperative by the doctrine of federal paramountcy.

[56] Accordingly, if any federal legislation, with particular attention to the provisions of the *Indian Act*, is inconsistent with the jurisdiction of the

Board or the operation of the *Public Utilities Act* or the *Electrical Power Control Act*, the federal law would apply.

SUMMARY

[57] I would answer the questions put by the Board in the stated case as follows:

Question Two

(1) If the electrical service provided by the Innu in Natuashish satisfies the definition of a public utility, a matter which the Board has authority to determine, and assuming there is no constitutional impediment to the application of the *Public Utilities Act*, the Board would have jurisdiction to apply the relevant provisions of the *Act*. If the Innu wish to discontinue the service, section 38 of the *Act* would apply and the written consent of the Board would be required.

(2) If the electrical service provided by the Innu in Natuashish does not satisfy the definition of a public utility, the Board would have jurisdiction by necessary implication to order Hydro to provide electrical service in that community only if power is not otherwise available to the residents.

Question One

Where the answer to Question Two is that the Board would not have jurisdiction to order Hydro to provide regulated electrical services in Natuashish, the designation as a non-regulated business unit is not problematic; the designation is an appropriate accounting and reporting mechanism. The issue would not arise if Hydro were the electrical service provider in Natuashish.

Question Three

Even if the Board had authority to order Hydro to provide electrical service in Natuashish, the Board does not have jurisdiction to order Hydro to acquire title to the electrical assets from the Innu.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

C. W. White J.A.