

CANADA / JUDGMENT

Atco Ltd. v. Calgary Power Ltd.

[1982] 2 SCR 557

COURT

Supreme Court of Canada

DECIDED

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Atco Ltd. v. Calgary Power Ltd.

Collection

Supreme Court Judgments

Date

1982-11-02

Report

[1982] 2 SCR 557

Case number

16356, 16359

Judges

Ritchie, Roland Almon; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio; Wilson, Bertha

On appeal from

Alberta

Subjects

Commercial law

Decision Content

Supreme Court of Canada

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557

Date: 1982-11-02

Atco Ltd. and 99139 Canada Inc. Appellants;

and

Calgary Power Ltd., City of Calgary, City of Edmonton, Consumers Association of Canada (Alberta), City of Medicine Hat, Sunlife Assurance Company of Canada, Gordon Securities Limited, City of Red Deer, Town of Fort MacLeod, W. Arsene, Town of Coalhurst and Town of Picture Butte, Public Utilities Board, Canadian Western Natural Gas Company Limited, Northwestern Utilities Limited and Alberta Power Limited Respondents;

and between

Canadian Utilities Limited, Canadian Western Natural Gas Company Limited, Northwestern Utilities Limited and Alberta Power Limited Appellants;

and

Atco Ltd., 99139 Canada Inc., Calgary Power Ltd., City of Calgary, City of Edmonton, Consumers Association of Canada (Alberta), City of Medicine Hat, Sunlife Assurance Company of Canada, Gordon Securities Limited, City of Red Deer, Town of Fort MacLeod, W. Arsene, Town of Coalhurst, Town of Picture Butte and the Public Utilities Board of the Province of Alberta Respondents.

File Nos.: 16356 and 16359.

1982: May 5 and 6; 1982: November 2.

Present: Ritchie, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Company law—Ownership—Control—Takeover bid by company holding regulated public utility subsidiaries for another utility company—Union of owners of public utility companies subject to Public Utility Board consent—Owner statutorily defined as person “owning, operating, managing or controlling” a public utility—Interim order restraining takeover—Whether or not company making takeover bid an owner and subject to Board’s jurisdiction—The Public Utilities Board Act, R.S.A. 1970, c. 302, ss. 2(i), (j), 29, 79(2), (3), 98.

Atco owned 58.1 per cent of the shares of Canadian Utilities, which in turn owned virtually all the shares of three Alberta public utilities, including Alberta Power. Calgary Power owned 41 per cent of the shares in Canadian Utilities. Atco, in a takeover bid, offered to buy 50.1 per cent of the outstanding stock of Calgary Power. In an attempt to prevent the takeover, Calgary Power successfully applied to the Public Utilities Board of Alberta for an interim or final order restraining Atco from proceeding. Section 98 of The Public Utilities Board Act provided that where an owner of a public utility was authorized to unite with the owner of any other public utility, the union was subject to the consent of the Board. The Board, in making its interim order, found Atco to be an “owner of a public utility” for the purposes of the Act and therefore subject to its jurisdiction. In this appeal from the Court of Appeal’s judgment upholding the Board’s finding, appellant maintained it was not an “owner of a public utility” and so not subject to the Board’s

jurisdiction.

Held (Ritchie, McIntyre and Wilson JJ. dissenting.): The appeal should be dismissed.

Per Beetz, Estey, Chouinard and Lamer JJ.: Appellant was an owner of a public utility and accordingly came within s. 98 authorizing the Board to intervene in the takeover transaction. The statutory definition of “owner of a public utility” includes a person without legal ownership of the system but having the power to control. The word “controlling” used in the definition extended to the operational realities of control and was not confined to immediate day to day factual control of the operation and management of the utility. “Unite” and “union”, used in s. 98, included a union or combination of companies or their respective undertakings by one company’s acquisition of another company’s shares.

Per Ritchie, McIntyre and Wilson JJ., dissenting: A parent company as a matter of law does not own, operate, manage or control the physical plant of its subsidiary for its proprietary interest is in the shares held and not in the subsidiary’s assets. Although the parent may “control” the assets of the subsidiary in fact if not in law, that de facto control still does not bring the parent within the definition of “owner of a public utility”. The word “control” used in that definition is not used as a term of art in the corporate law context but in its ordinary dictionary meaning of having day to day control of the physical plant and its operations.

[Her Majesty in right of Alberta v. Canadian Transport Commission, [1978] 1 S.C.R. 61; In re Suburban Rapid Transit Co., [1931] 1 W.W.R. 778, considered; Saine v. Beauchesne and Gobeil, [1963] S.C.R. 435; Army and Navy Department Store Ltd. v. Minister of National Revenue, [1953] 2 S.C.R. 496; The St. Louis Breweries Ltd. v. Apthorpe (1899), 79 L.T. 551; Covert v. Minister of Finance of the Province of Nova Scotia, [1980] 2 S.C.R. 774; Buckerfield’s Limited v. Minister of National Revenue, [1965] 1 Ex. C.R. 299; British American Tobacco Co. v. Inland Revenue Commissioners, [1943] A.C. 335; Vineland Quarries and Crushed Stone Limited v. Minister of National Revenue, [1966] Ex. C.R. 417; Barlow v. Teal (1885), 15 Q.B.D. 403; Alleghany Corp. v. Breswick & Co. (1957), 353 U.S. 151, referred to.]

APPEAL from a judgment of the Alberta Court of Appeal (1980), 117 D.L.R. (3d) 332, 24 A.R. 300, confirming an order of the Public Utilities Board of Alberta. Appeal dismissed, Ritchie, McIntyre and Wilson JJ. dissenting.

J.F. Howard, Q.C., and A.D. Macleod, for the appellants Atco Ltd. et al.

Tom Mayson, Q.C., for the appellants Canadian Utilities Limited et al.

Miles Patterson, Q.C., Brian Crane, Q.C., and High D. Williamson, for the respondent Calgary Power Ltd.

Douglas A. Larder, for the respondent the City of Calgary.

C.P. Clarke and A.V. Lapko, for the respondent the Public Utilities Board of Alberta. The reasons of Ritchie, McIntyre and Wilson JJ. were delivered by

WILSON J. (dissenting)—My colleague, Mr. Justice Estey, has set out in his reasons for judgment the context in which the issue before the Court on this appeal has arisen and it is not necessary to deal with it further. The issue is a very narrow one: does a parent company own the public utility of its subsidiary for purposes of The Public Utilities Board Act of Alberta?

The starting point is the definition section of the Act. “Public utility” is defined as follows in s. 2(j):

2...

(j) “public utility” means

(i) any system, works, plant, equipment or service for the conveyance of telecommunications,

(ii) any system, works, plant, equipment or service for the conveyance of travellers or goods over a railway, street railway or tramway,

(iii) any system, works, plant, equipment or service for the production, transmission, delivery or furnishing of water, heat, light or power, either directly or indirectly, to or for the public, and

(iv) any oil pipe line the proprietor of which may be declared by the Energy Resources Conservation Board to be a common carrier;

“Owner of a public utility” is defined in s. 2(i):

2...

(i) “owner of a public utility” means

(i) a person owning, operating, managing or controlling a public utility and whose business and operations are subject to the legislative authority of the Province, and the lessees, trustees, liquidators thereof or any receivers thereof appointed by any court, but

(ii) does not include a municipality that has not voluntarily come under this Act in the manner provided in this Act; I agree with my colleague that the public utility as defined is the physical plant and associated service. I differ from him in my analysis of the definition of “owner of a public utility”.

I do not believe that a parent company as a matter of law “owns” or “operates” or “manages” or “controls” the physical plant of its subsidiary. To so hold would be to completely ignore a well-settled and, I believe, quite fundamental principle of corporate law, namely, that shareholders have no proprietary interest in the assets of the company in which they hold shares. Their proprietary interest is in their shares only. It is submitted, however, on behalf of Calgary Power Ltd. (and the submission was successful before both the Public Utilities Board and the Alberta Court of Appeal) that a parent may “control” the assets of its subsidiary in fact if not in law and that de facto control of such assets brings the parent within the meaning of “owner of a public utility” as defined.

I think that in considering the merits of that submission it is necessary to distinguish between the word “control” as a term of art in a corporate law context and the word “control” in its ordinary dictionary meaning. As I understand the word “control” as a term of art in a corporate law context, it is not directed to control of the physical assets of the underlying company but to control of the company itself. This is the kind of de facto control Atco may have over the public utility company if its offer is accepted. De facto control in this sense may obviously be obtained in a number of ways. It may be obtained by a majority holding of shares but it may be obtained by considerably less than a majority holding if the shares are widely held. It may be obtained through voting rights not commensurate with shareholding at all or through the right to appoint and remove directors. But it seems to me that when we are talking about this kind of de facto control we are always talking of control over the company and not over its assets. The company itself continues to own, operate, manage and control its assets regardless of who owns or controls it. This, as I understand it, is the essence of the separate legal personality of the incorporated company recognized by the House of Lords in the celebrated case of *Salomon v. Salomon and Co.*, [1897] A.C. 22. Since the *Salomon* case the complete separation of the company and its members has never been doubted. It is true that there are instances in which the legislature and the courts have allowed the corporate veil to be lifted but when the legislature has done this it has done it by express statutory provision, for example, by expressly providing that the members of a company may become personally liable for the company’s debts if the company continues to do business at a time when the number of its members has fallen below a prescribed minimum. The courts have permitted the veil to be lifted if the corporate personality was being used as a cloak for fraud or improper conduct. The courts, however, have only construed statutes as permitting the corporate veil to be lifted if compelled to do so by the clear language of the legislation.

The question, it seems to me, boils down to this. Even supposing that the acceptance of the appellant’s offer gives it de facto control over the public utility companies whose shares are the subject of the offer, does this give it control over the assets of those companies within the meaning of s. 2(i) of the Act? I do not think it does. I think the word “control” here is used in its ordinary dictionary meaning and means the person having the day to day control of the physical plant and its operations. This, in my view, means the public utility companies themselves. I am confirmed in this view by three things. The first is that the definition of owner includes lessees, trustees, liquidators and receivers and it seems to me that those are persons into whose hands the physical plant and its operation might fall. The second is that the obligations imposed on “owners” under the various sections of the statute are more appropriately discharged by persons having the day to day control of the physical plant and its operations, e.g. the filing of the required rates and schedules. But perhaps most important of all, I find it hard to believe that the legislature intended by inserting the word “controlling” in s. 2(i) to extend the definition of owner to shareholders and others controlling the company which owns the public utility plant and operation. I am persuaded that it is not necessary to give that meaning to the word “controlling” because its ordinary dictionary meaning is fully in accord with the other language of the section, particularly “operating” and “managing”. I think the common denominator of the persons identified as owners within the definition is that they are in charge of the plant. They either

operate it, manage or control it. They are, in other words, in the corporate context the operating companies or public utility companies themselves.

I may say that I do not view the task of the Court on this appeal as being to decide whether to give a narrow or a broad interpretation to the word “controlling” in s. 2(0), the narrow being allegedly the one which would exclude the appellant from being an owner and the broad being the one which would include it. In my opinion, the issue is whether the concept of control as a term of art should be injected into a definition which makes very good sense in its ordinary dictionary meaning. In other words, the question is whether the Court should find that the legislature intended, when it spoke of a person controlling the assets of a public utility company, to look through the public utility company itself to its share-holders and find that they controlled the assets. We are concerned with the intention of the legislature in using the word “controlling” in the context of the definition section. Does it simply mean “controlling” in an analogous sense to “operating” or “managing”, i.e. exercising physical control over the plant or does it have this more sophisticated meaning of control through share ownership? That, it seems to me, is the issue before us and I think that in resolving it the Court must have regard to well-settled principles of corporate law. I would respectfully adopt the reasons of Mr. Justice Spence in *Her Majesty in right of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, where he said at p. 82:

To give the interpretation to regulation 19 sought by the respondent would have very far reaching effect in corporate shareholding and dealing in corporate shares. PWA is a public company. Its shares, therefore, may be traded freely on the market whether or not its stock is listed. The shares in a very large number of air carriers are similarly traded. It would be impossible to determine whether any particular sale and purchase of shares in an air carrier would affect the control of that air carrier let alone the commercial air service which it operates. It is often said that one may control a company with very much less than a majority of the issued stock and a shareholder who held X thousand shares of a particular air carrier could not possibly determine whether he would control the company were he to purchase an additional thousand shares or even an additional one share. It surely was not intended by this regulation that every transfer of shares in a public company which was an air carrier should be subject to the submission to the respondent of an application for approval before the share transaction should be consummated.

After quoting the above passage from the judgment of Spence J., Mr. Justice Clement, in giving the unanimous judgment of the Alberta Court of Appeal, said this:

With respect, I do not think it useful to draw a distinction as to the means by which shareholder control of a public utility is gained. We start with the premise that a person (whether a company or not) has in fact gained shareholder control or is on a proclaimed course that, upon completion, will have that end result.

In my view, this comment discloses that the Court of Appeal failed to distinguish between de facto control of the company and de facto control of the company's assets, the latter being the real concern on the appeal before it, and on this appeal. The appellant may well on the acceptance of its offer obtain de facto control of the public utility companies. Indeed, this was the finding of fact made by the Board. It said:

For the purpose of this Decision, the Board finds as a fact that Atco is "managing and controlling" CUL and its subsidiaries and therefore is an owner of a public/gas utility.

The Board may be perfectly correct in its finding that the share transaction if consummated will give Atco de facto control of Canadian Utilities and its subsidiaries but, with respect, its conclusion does not follow and its conclusion is the issue before us. Will Atco by acquiring de facto control of Canadian Utilities and its subsidiaries acquire de facto control of the assets of Canadian Utilities and its subsidiaries?

It seems to me that if the legislature had intended to cover control through share ownership, voting rights or powers to appoint and remove directors, it would not have done it in such an enigmatic fashion. I prefer to assume rather that the legislature was well aware of the basic principle of corporate law referred to earlier in these reasons, namely, that shareholders do not own or control the assets of the companies in which they hold shares. If this is a proper assumption and the legislature had intended to extend the reach of the Act to dealings in the shares of public utility companies, then I believe it would have done so in explicit terms. It would have been very easy for the legislature to prohibit dealings in the shares of company-owned public utilities without the prior approval of the Board. Indeed, it has expressly done so in the case of Alberta companies in s. 88 of the Act which in itself strongly suggests a "hands off" approach to companies incorporated elsewhere. Section 88 would, of course, be quite superfluous if all parent companies were caught through the combined effect of the definition section and s. 98.

In view of the conclusion I have reached that the appellants are not owners within the meaning of the definition section, it is unnecessary for me to consider whether the proposed transaction would result in a "union" within the meaning of s. 98.

I would allow the appeal, set aside the order of the Court of Appeal of Alberta and the decision of the Public Utilities Board and declare that the appellants are not owners of a public utility within the meaning of The Public Utilities Board Act.

I would award the appellants Atco and Canadian Utilities their costs throughout as against the respondent, Calgary Power Ltd. The judgment of Beetz, Estey, Chouinard and Lamer JJ. was delivered by

ESTEY J.—This is an appeal from the Alberta Court of Appeal which confirmed an order of the Public Utilities Board of Alberta wherein the Board found that the appellant Atco Ltd. (hereinafter referred to as "Atco") was, for the purposes of The Public Utilities Board Act, R.S.A. 1970, c. 302, as amended, an "owner of a public utility" and that accordingly s. 98 of the Act

applied to a proposed takeover by Atco of the voting control of Calgary Power Ltd. (hereinafter referred to as “CP”). It was from this interim jurisdictional ruling by the Board that the appeals culminating in this Court were taken.

Atco is an Alberta corporation. It owns 58.1 per cent of the common shares of Canadian Utilities Limited, a federally incorporated company (hereinafter referred to as Canadian Utilities, which in turn owns virtually all of the outstanding shares of three public utilities distributing electricity and gas in Alberta, one of these being Alberta Power Limited. CP directly owns systems engaged in the same business, being a major utility in southern Alberta. It also owns 41 per cent of the common shares of Canadian Utilities.

Atco, by a formal takeover bid, offered to purchase 50.1 per cent of the outstanding stock of CP. If successful this would place Atco in the position of having voting control over a corporate pyramid comprising three Alberta public utilities and having voting control of CP. That the significance of such a shareholder position was vital to Atco in making its bid is illustrated by the following excerpt from the “Offer to Purchase”:

The Purchaser is seeking to acquire 50.1% of the outstanding voting shares of Calgary Power. If the Offer is successful, ATCO will be the controlling shareholder of Calgary Power, and will be able to elect its nominees as directors of Calgary Power and to control the affairs of Calgary Power. Through its control of Canadian Utilities, ATCO is in a position to elect its nominees as directors of Alberta Power. [Emphasis added]

The Public Utilities Board, in its decision below, made this observation:

From the information before the Board in these proceedings and from knowledge the Board has with respect to CUL (including the directorships and the influence of same with respect to policies implemented by the subsidiaries of each) it is obvious to the Board that ATCO and CUL ‘manage or control’ the public/gas utility operated by their respective subsidiaries.

CP in an attempt to prevent the takeover made an application to the Board for an interim or final order restraining Atco from proceeding. The Board therefore ordered (Decision No. E80115, August 18, 1980):

1. That ATCO, through 99139 Canada Inc. or otherwise, shall not take up or pay for any share of CP which may have been tendered or deposited in acceptance of the new “Offer to Purchase for Cash” dated August 6, 1980.
2. This Order is an Interim Order and shall remain in effect until otherwise finally ordered by the Board following its hearing of evidence, and its investigation, with respect to the matter.

Atco, the appellant, takes the position that it is not an owner of a public utility and accordingly does not come within s. 98 of The Public Utilities Board Act, *supra*, (which I will set out later) which is the only statutory provision which might directly authorize the Board’s intervention in the takeover transaction.

There are certain key provisions in the Act which bear on the outcome of the issue. Section 2(i)(i) and (j)(iii) define the terms “owner of a public utility” and “public utility” respectively: (i) “owner of a public utility” means

(i) a person owning, operating, managing or controlling a public utility and whose business and operations are subject to the legislative authority of the Province, and the lessees, trustees, liquidators thereof or any receivers thereof appointed by any court,...

(i) “public utility” means

(iii) any system, works, plant, equipment or service for the production, transmission, delivery or furnishing of water, heat, light or power, either directly or indirectly, to or for the public,...

It is readily apparent that the definition of public utility relates to the hardware or the associated or resultant service, but does not refer to the corporate vehicle within which the public utility functions. The term includes the power generating and transmitting facilities by including the word “service” in the definition. “Public utility” comprises as well the maintenance, accounting, financial and other support elements. In short, “public utility” is a concept embracing physical plant and non-physical service elements.

The difficulty arises in the definition of the owner of such a system. To qualify, a person must either (a) own, (b) operate, (c) manage, or (d) control a public utility; it is also a definitional requisite that such person’s business and operations are within the legislative authority of the province. Strangely appended to the tail of the definition are “lessees, trustees, and liquidators” of the system together with “receivers” of the system provided they are appointed by a court. Apart from the word “controlling”, the rest of the definition clearly requires that there be a direct link between the owner and the public utilities system in the sense that the owner must operate, manage or own the system. The uncertainty arises with the inclusion disjunctively of a person “controlling a public utility”. The outcome of this appeal revolves around the word “controlling”. If it means day-to-day factual control of persons and equipment comprising the public utility system, then Atco succeeds. If the word includes a person, however remote, who controls, in the broad sense of that term, a public utility system, then Atco loses the issue.

The general canon of interpretation of course requires a court to ascribe some meaning to each word used by the legislature: *Saine v. Beauchesne and Gobeil*, [1963] S.C.R. 435, at p. 437. The words “owning” and “controlling” are sometimes employed synonymously, but here a person who either owns or controls a system is the owner of the system. Consequently, “control” must mean something more than or different from “own”. A person might control and not own a system and might also own, but not on a daily basis control, a system. But in either situation the person may be within the definition of an owner of a public utility.

Read by itself the definition above would incline one to include within the meaning of the term “owner” a person, natural or corporate, who does not own the system or any of its assets but who has control of the system, and perhaps even where such control is direct or indirect. The next uncertainty is whether or not this control is control in the legal sense or the factual sense. In the

legal sense “controlling” might include both direct and indirect control. As already noted the definition of “owner” includes persons who are lessees, trustees, liquidators or receivers of the system. Thus a person would be a statutory “owner” who does not have legal title to the assets of the system but is the lessee in possession of the system.

In examining the statute and the legal considerations arising in construing its provisions, it is well to bear in mind the Board’s finding of fact on the point of ownership: For the purposes of this Decision, the Board finds as a fact that ATCO is “managing or controlling” CUL and its subsidiaries and therefore is an owner of a public/gas utility.

Section 28 illustrates at once the importance of the breadth assigned in s. 2 to the definition of “owner”. By s. 28 the Board has “all the necessary jurisdiction and power... to deal with public utilities and the owners thereof as provided in this Act”. The powers invoked by CP on the application from which this appeal arises are found in s. 51 of the Act. CP asserts that Atco has “unlawfully done... or is about unlawfully to do... something relating to any matter over which the Board has jurisdiction... and prays that... the Board shall... make such order as it thinks proper under the circumstances”.

The powers accorded to the Board by the Act which came into play when responding to such an application include those found in s. 79. Subsection (1) authorizes the Board to “investigate any matter concerning a public utility”. It might be argued that this subsection authorizes the Board to investigate ownership of the public utility; but even so, that will not form the basis for an order with respect to that ownership. Subsection (2) indicates a distinction in the mind of the legislator between the system and the owner of the system for the subsection states:

- (2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of the owner thereof, the Board shall have access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Province.

Unhappily the latter portion of the subsection begs the question which arose in the first instance concerning the definition of owner of a public utility in s. 2 above. Subsection (3) may shed some light on the status of Atco under the Act by reason of its ownership of the controlling shares of Canadian Utilities, where it provides:

- (3) Where any person directly or indirectly controls the business of an owner of a public utility within Alberta, that person and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish such information in respect thereof as may be required by the Board.

Setting aside for the moment the problem created by the presence of the word “business”, the subsection would appear to authorize the Board to examine the records of anyone who “directly or indirectly controls” a public utility. I have for the moment omitted some intervening words in

order to illustrate that there appears to have crept in, at least in this subsection of s. 79, the concept of an owner, natural or corporate, of a corporation or other agency which itself owns or controls a public utility as defined. The reference to control of “the business of an owner of a public utility” was explained by the respondent as an attempt by the legislature to limit the reach of this subsection to companies operating a utility within Alberta without any reference to any business outside the province which that owner might conduct. Having in mind the history of the ownership of some public utilities in Alberta in earlier times, this may well be the correct explanation. The term is ambiguous, however, in that it might well include the opposite meaning, that is to say that the business of the owner, wherever it may be carried on, can be examined because of its possible influence upon the public utility operated by the owner within the Province of Alberta. The reference to the “business of the owner” in the latter portion of the subsection would encourage this interpretation for there is no territorial limitation at that point in the subsection on the business of the owner which might be examined. Whatever the subsection means it does indicate some legislative realization of the possibility of a person not directly owning the assets of a system but having indirect control of the system by any means, including perhaps the ownership of shares of the corporate owner of the system. This result is consonant with the literal reading of the four principal words (owning, operating, managing, or controlling) employed in s. 2(i)(i), *supra*, and the assignment to each of a separate and different meaning.

This brings us to s. 98 which is the platform from which the order under appeal was issued by the Board:

98. Where, by any general or special Act, an owner of a public utility is authorized to unite with the owner of any other public utility, the union is subject to the consent of the Board, and has no effect until the order authorizing the same is published in the Gazette.

Many problems immediately spring from a reading of this section. It is said by the respondent and it was concluded by Clement J.A. in the Court of Appeal that the reference in the opening line of the section to general or special Acts refers to statutes of incorporation of the owner of the public utility in question. All counsel agree that the section has no application until there are two owners of a public utility involved in a transaction wherein provision is made for “the union” of the public utilities of the two owners or some of their respective public utilities. The preface to this section is strange. It could hardly be suggested that owners of public utilities who were not by statute “authorized to unite” would in the absence of the section be capable of uniting without Board authority. The words must simply be read as enunciating by way of premise, the prerequisite legal capacity or authority of the parties to enter into the transaction in question, and however this authority may have come about, the section requires the prior consent of the Board.

The clear intent of the section is to authorize the Board to defer such union of these systems until there is time to consider and to authorize such action. The use of the verb “to unite” and the noun “union” can at least be described as an attempt by the legislative draftsman to employ the widest terminology so as to embrace the sense of the ordinary terms of amalgamation, merger or

consolidation, usually found in laws relating to corporate enterprise. Perhaps the novel employment of the word “union” is to be taken as the clearest indication from the legislature that corporate or non-corporate action of all kinds and descriptions in the nature of merger or unification of more than one enterprise is to come within the purview of the Board. It also may have been chosen by the legislature because it would embrace proprietorships, partnerships limited and unlimited, corporations established by special Act, or corporations brought into being under general corporate legislation.

In any case, if the respondent cannot find authority in the Board under s. 98 for the order quoted above then it conclusively determines the issue against it for no other legislative foundation for this order has been drawn to the attention of this Court. Various dictionary definitions have been advanced. The appellant favours the definition of “union” found in Webster:

the act of joining two or more things into one, and thus forming a compound body; the state of being united...

The respondent, on the other hand, refers the Court to the Oxford Universal Dictionary, 3rd ed., p. 2303:

The action of uniting one thing to another or others, or two or more things together so as to form one whole or complete body; of persons or countries with reference to joint action or policy...
[Emphasis added]

There may be many explanations as to why s. 98 has been drafted in such unusual terms. Section 88 may be an insight into one possible explanation. In that section the Act requires prior authority from the Board for the sale or transfer of the shares of an Alberta corporation which is the owner of a public utility to any other corporation “if the result of the sale or transfer... would be to vest in the other corporation more than one-half of the outstanding capital stock of the Alberta company”. No such provision identifiable as being directly in parallel therewith appears in the Act with reference to corporations incorporated outside the Province of Alberta. Section 98 may be that provision.

Our attention was directed to numerous other sections in the Act, including ss. 80 and 87 directing or prohibiting the owner of a public utility from doing or not doing a long list of things. Nowhere in the Act does there appear any universally applicable prohibition against dealing in the shares of the corporate owner of a public utility without prior approval of the Board. No provision is found in the Act which expressly deals with corporate mergers or amalgamations, although in s. 87(1)(g)(ii) there is regulation of physical merger or consolidation of assets with those of any other owner of a public utility.

Section 98 is of course predicated on action proposed to be taken by “an owner of a public utility”. This brings us back to the question already indicated in the analysis of the definition in s. 2(i) as to the scope of the Act and its purpose, and as to the functions accorded therein to the Board as a regulatory agency of public utilities in the Province. The Board, by Divisions 2 and 3 of the Act, is given broad powers of enquiry and of direction requiring or prohibiting that things be done or not done according to the various provisions in the statute. Section 29, for example, provides:

29. In matters within its jurisdiction the Board may order and require any person, or local authority, to do forthwith or within or at any specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that such person, or local authority, is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Under The Gas Utilities Act, R.S.A. 1970, c. 158, the Board is directed in Part 2, entitled “Regulation of Gas Utilities”, to investigate and to prescribe rights, tolls or charges to be collected by the utility for the sale of gas (ss. 26-27). Like powers are accorded to the Board under ss. 80 and 81 of The Public Utilities Board Act, *supra*, with reference to charges for electricity service delivered by public utilities to their customers in the Province. The Board has other duties with reference to oil pipelines, transportation and telecommunications.

In the discharge of its varied functions it is difficult to appreciate how the Board can maintain a sound and comprehensive regulatory position so as to discharge its duty to the public at large in the regulation of public utilities and their owners, unless a broad interpretation is accorded to the words adopted by the legislature in s. 98. In my view, the words “owner of a public utility” must, by reason of s. 2, *supra*, include a person without legal ownership in the system but having the power to control. This may give rise to innumerable difficulties and may indeed require further legislative attention to the problem, where, for example, corporate control is exercised from a minority position by reason of widely disseminated shareholdings. When this interpretation under s. 2 is brought to the examination of s. 98, it follows that a person in the position of Acto as a defined owner of a public utility must obtain the prior consent of the Board to combine that facility with that of another owner of a public utility, and this is so whether the union is brought about by the mechanics of merger, amalgamation or other corporate action, or whether it be the result of a physical merger of assets or by means of a contractual pooling including or falling short of the relationship ordinarily described as a partnership. Any of these structural alterations, to employ a neutral term, would require, by reason of s. 98 the prior consent of the Board. In some cases other sections may be called into play as well but in my view it is s. 98 which is invoked by the transaction here in question. It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the

combination or, as the legislature says, “the union” of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.

Little assistance can be derived from an examination of earlier decisions dealing with the interpretation of words similar to those employed by the legislature in defining the owner of a public utility, such as “owning” or “controlling”. In the judgments of this Court in *Army and Navy Department Store Ltd. v. Minister of National Revenue*, [1953] 2 S.C.R. 496, Cartwright J., as he then was, found that the shareholder of a holding company was not the indirect owner of the shares of the subsidiary of that holding company for the purposes of the Income Tax Act as it then stood. The dissent, following the earlier English cases, took the view that when interpreting a tax statute, one ought to look at the substance and not merely at “matters of machinery and form”, referring to the dictum of Wills J. in *The St. Louis Breweries Ltd. v. Apthorpe* (1899), 79 L.T. 551, at p. 555. A result contrary in principle to the majority in *Army and Navy* was reached by the majority judgment of this Court in *Covert v. Minister of Finance of the Province of Nova Scotia*, [1980] 2 S.C.R. 774, where Martland J. stated at p. 797:

This conclusion does not involve any conflict with the principle stated in cases such as *Macaure v. Northern Assurance Company, Limited and others*, [1925] A.C. 619, that a corporate shareholder does not have a right to the corporate assets of a corporation. The point in issue in this appeal is that by virtue of its total control over the subsidiary company, the parent company is in a legal position to compel it to deal with its assets in the manner dictated by the parent company.

The majority concluded that, for the purpose of interpreting and applying a taxing statute, the parent company was “beneficially entitled” to the assets held by its wholly-owned subsidiary.

It is of interest to note that the courts have gradually moved from the rather strict view of direct and indirect ownership or control to a more comprehensive view based upon the entire statutory pattern and the factual elements of control in reality. In *Buckerfield's Limited v. Minister of National Revenue*, [1965] 1 Ex. C.R. 299, at p. 303, Jaccett P. stated:

I am of the view, however, that, in section 39 of the Income Tax Act, the word “controlled” contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors.

That decision reflected the comments of the House of Lords in *British American Tobacco Co. v. Inland Revenue Commissioners*, [1943] A.C. 335, where Viscount Simon stated, at p. 339:

I find it impossible to adopt the view that a person who (by having the requisite voting power in a company subject to his will and ordering) can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has in fact control of the company's affairs, is a person of whom it can be said that he has not in this connexion a controlling interest in the company.

The process so far as the then s. 39 of the Income Tax Act was concerned was completed by Cattanach J. in *Vineland Quarries and Crushed Stone Limited v. Minister of National Revenue*, [1966] Ex. C.R. 417, at p. 429:

In my view the word “controlled” in section 39(4)(b) contemplates and includes such a relationship as, in fact, brings about a control by virtue of majority voting power, no matter how that result is effected, that is, either directly or indirectly.

The appellant and the respondent in the appeal now before us made reference to the decision of this Court in *Her Majesty in right of Alberta v. Canadian Transport Commission [Re Pacific Western Airlines]*, [1978] 1 S.C.R. 61. In that appeal the Court was concerned with the interpretation of a regulation which provided that prior Commission approval was required where a transaction would result in “a change of control, consolidation, merger, lease or transfer of any commercial air service”. Chief Justice Laskin, writing for six other members of the Court, concluded that it was unnecessary to interpret the effect of the regulation, *supra*, on the acquisition of the shares of PWA by the Province of Alberta because the regulation stated “no person” and that this expression in the context of the statutes and regulations under examination did not include the Crown in the right of the Province. Any comments which might be attributable in that judgment to an interpretation of the regulation, *supra*, are therefore *obiter*. He did, however, observe in passing on to the determinative part of his judgment, at p. 67:

The words of s. 19 sit uneasily if literally applied to mean “control of the use of aircraft” or “consolidation of the use of aircraft” or “merger of the use of aircraft”. Despite the definition of “commercial air services”, I do not think that I would be justified in applying it to deny efficacy either to s. 14(1)(e) of the Act or to s. 19 of the Regulations. The thrust of each is clear enough, still leaving, however, difficulty with the meaning of control, especially when s. 19 seeks to embrace intended transactions that would result in a change of control.

The other judgment in that appeal was that of Spence J. (in which all other members of the Court concurred excepting only the Chief Justice and Pigeon J.), who concluded that the regulation had no application to a transaction involving a transfer of share control of a limited company which carried on a commercial air service. Spence J. concluded that the section, which I have set out in part above, was directed only to a change of control over the physical assets and services comprised in the expression “commercial air service”. Spence J. concluded at p. 82:

In my opinion, it envisages such matters as change of routes, change of schedules, change of policy of operation, and many other matters integral to the operation of a commercial air service but not as to the identity of the shareholders of the air carrier which operates the commercial air service.

As Spence J. points out at p. 82, the regulation there dealt with the control of a commercial air service and not the control of an air carrier. Here the regulation concerns a “union” of two persons each of whom is said to be the “owner of a utility”. The meaning to be assigned to ‘control’ in the Air Carrier Regulations must of course be determined in the context of those regulations and the statutory pattern under which they were promulgated, and therefore I do not find the case of much direct assistance in resolving the issues here.

Again we find in a decision of the Manitoba Court of Appeal (*In re Suburban Rapid Transit Co.*, [1931] 1 W.W.R. 778) an interpretation of the expression “every owner of a public utility” which is of course similar to that found in s. 2(i). By another clause in the statute then before the court it was provided that “owner embraces every corporation... that own[s], operate[s], manage[s] or control[s] any public utility”. In that case the franchise and the obligation to operate the transit service was held by a wholly-owned subsidiary of Winnipeg Electric. The order of the Board was directed against Winnipeg Electric and the subsidiary. The court held that the statute in question had no application to the parent company as it had no obligations with respect to the transit franchise, and the Board in question was without power to regulate the holding company’s affairs. Robson J.A., as he then was, dealt with the word “control” in the context of the statutory plan there before the courts, at p. 780:

Even if it were to be supposed that this bulk share ownership amounted to “control” of the Suburban Rapid Transit Company by the Winnipeg Electric Company in any sense known to the law there is no ground for supposing that it was meant that the company so controlling should put all its own assets behind the obligations of the subsidiary company.

and went on to conclude at p. 781:

In the present case the franchise and the contract to build and operate are by statute recognized as those of the Suburban Rapid Transit Company and there is nothing on which to base a holding that the Winnipeg Electric Company has at law either rights or obligations in relation to them.

Other cases dealing with similar expressions were drawn to our attention on the argument of this appeal, no doubt on the invocation of the general interpretative rule that where words have received judicial interpretation, Parliament in subsequently adopting or using such words without indication to the contrary may be taken to have intended to have adopted the prior interpretation by the courts. *Vide Barlow v. Teal* (1885), 15 Q.B.D. 403. However, that general rule has little or no application where the subject matter of the statutes is not similar or where the statutory pattern is significantly different. Nor should the rule be presumed to operate where the case is dealing with statutes and regulations of different communities at different times and enacted under different commercial and social conditions. We are left, therefore, in the position where we started, namely the interpretation of the expression “owner of a public utility” in s. 2 as it applies to the provisions of this statute, notably s. 98, *supra*.

Without proliferating unduly the study of peripheral aids to the interpretation of these sections of the Alberta statute, reference may be made to two United States decisions. In *Alleghany Corp. v. Breswick & Co.* (1957), 353 U.S. 151, the United States Supreme Court was concerned with the interpretation of railway regulations which required administrative approval where “control” of a carrier is sought by a non-carrier “through ownership of their stock or otherwise”. Frankfurter J., writing for the Court, stated at p. 163:

In 1939 ...this Court rejected artificial tests for “control”, and left its determination in a particular case as a practical concept to the agency charged with enforcement.

In its earlier decision referred to above, the Court stated:

Investing the [Federal Communications] Commission with the duty of ascertaining “control” of one company by another [as the basis for the Commission’s jurisdiction], Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. [*Rochester Telephone Corp. v. United States*, 307 U.S. 125, at pp. 145-46]

Remarkably similar are the comments of Clement J.A. writing on behalf of the Court in this appeal:

Having all these matters in mind, I am of opinion that control is not to be confined in its meaning to immediate ostensible control of the operation and management of a public utility. In its context the word “controlling” must be accorded a more comprehensive meaning extending to the operational realities of control for public utilities purposes.

With respect I agree.

For the reasons which I have already set out I have concluded that the appellant Atco is “the owner of a public utility” within the meaning of that expression in s. 2 and as such comes within the reach of s. 98 and secondly, that the terms “unite” and “union” in that section are sufficiently broad so as to include a union or combination of companies or their respective undertakings by reason of the acquisition by one company of the shares of another company. It follows that s. 2 and s. 98, when read in combination, authorize the Board to respond to an application under s. 51 in the manner that the Board has done here. While technically two appeals were taken from the decision of the Court of Appeal, they should be regarded in this Court as one appeal. Therefore, I would not disturb the order below as to costs and would award costs in this Court against the appellants Atco and Canadian Utilities in favour of the respondents in this Court, CP and the City of Calgary. There should be no costs in favour of the Public Utilities Board of Alberta.

Appeal dismissed with costs, RITCHIE, MCINTYRE and WILSON JJ. dissenting.

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