Discrimination in Public Utility Regulation

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I. INTRODUCTION

Those who work for or regulate public utilities or deal with them on a regular basis are familiar with the extreme complexity of the social, political and economic issues that arise. Those who are involved in human rights-related matters under provincial rights legislation or the *Canadian Charter of Rights and Freedoms* recognize the complexities of the issues which arise and particularly the difficulty in defining discrimination. Hopefully, experts in each field can appreciate the difficulty of dealing with issues related to both public utility regulation and discrimination.

This paper will first provide a bare minimum of background information concerning the regulation of public utilities and what is meant by discrimination in the public utility context. The focus will then shift to specific examples of utility regulation where discrimination is an issue.

II. REGULATED UTILITIES

Regulated utilities include those enterprises, such as gas and electric distribution companies and certain municipal services, defined as utilities under the various provincial public utilities statutes. The major interprovincial oil and gas pipelines, as well as telephones and telecommunications, should also be included, even though not necessarily defined as "utilities" in the legislation pursuant to which they are regulated. Others could be added to this list, such as transportation and certain municipal services. This paper will focus mainly on the energy utilities. Most people are at least aware of them and virtually everyone uses them. However, the discussion is generally applicable to most other utilities.

To varying degrees, utilities share a number of characteristics relevant to the issue of discrimination. First, they offer services essential either for the health or well-being of the individual, or for a properly functioning economy. Some services may be more important than others, but few would quibble with the proposition that utility services are considered necessary for a normal lifestyle.

A person denied utility services on a discriminatory basis would have a potentially life-threatening or similarly serious problem in the absence of an alternative. Unfortunately, there is not likely to be an alternative, since the second characteristic shared by these companies is a monopoly position as suppliers of their services. This monopoly may occur naturally or may be specifically granted by statute.

Because of the capital-intensive nature of the facilities required to provide service, a high output of units of service is required to keep the costs to the consumer at a reasonable level. The higher the unit output, the lower the costs to the customer. One company can supply the entire market in a given area cheaper than two companies. As long as the utility is prevented by the regulator from abusing this monopoly position, the introduction of a competitive operation can only cause higher unit costs of service.

In the case of the provincial energy utilities, the monopoly is statutory. Each utility company is granted the exclusive right to provide service to a specific geographic area, usually referred to as a franchise area.

In the case of the interprovincial pipelines, a natural monopoly exists. The TransCanada PipeLines Limited (TCPL) system is a good example. TCPL has a monopoly on the transportation of natural gas to eastern Canadian domestic and export markets. TCPL does not have a statutorily prescribed franchise area. However, with a depreciated value of $9 billion and a replacement cost estimated to be as much as $30 billion, a competing Canadian pipeline to the east is not likely to be authorized or built.

In the case of both legislated and natural monopolies, a potential customer usually either takes service from the utility on the conditions and at the price offered or the customer gets no service at all. In some cases, a different service, which would meet the customer's requirements, may be available as an alternative. For example, a customer of a gas utility could switch to electricity. However, in a practical sense, this option may be of little use. For most customers, switching from one service to the other would involve prohibitive conversion costs.

Therefore, generally speaking, a customer who is refused service on discriminatory grounds, or is unable or unwilling to meet discriminatory conditions of service, is in a very serious situation.

The third and most obvious characteristic shared by these utilities is that they are regulated. Each utility is regulated by a board or commission (the "regulator") operating pursuant to a statute or statutes, giving the regulator broad powers over the utility and its customers.

For the moment, it is perhaps easiest to think of the regulator as the administrator of an agreement between the utility and the community. As part of the agreement, the community grants the utility a monopoly right to provide a certain service within a franchise area, and agrees to pay the cost of that service through rates set by the regulator. The utility agrees to provide service to all qualifying customers within the franchise area at rates and under terms and conditions of service set or approved by the regulator. The regulator has the powers necessary to ensure both the community and the utility abide by and receive the anticipated benefits of the agreement in a manner consistent with the overall public interest.

For example, to the extent possible, the regulator ensures that the utility recovers through rates its full annual cost of service including depreciation, operating and maintenance expenses and its regulated return. The regulated return on equity is set at a level which allows the utility to attract the capital required to continue or expand its service. In this way, the utility is shielded from financial loss. However, the regulator also ensures that only those costs necessary to provide a reasonable level of efficient, economic service are recovered. Costs imprudently incurred by the utility will not be allowed in rates and must be paid by the utility shareholders. In conjunction with the authority to set the utility rate of return on equity, this power protects the customers from an abuse of the utility monopoly position.

The regulator also ensures that utility services are offered to all who seek them, without undue discrimination as to price or terms of service. If the regulator should fail in this

task or if the discriminatory practice originated with the regulator itself, judicial review or a statutory appeal would provide a higher remedy.

III. DISCRIMINATION

Having looked at the characteristics of a public utility that are relevant to our discussion of discrimination, we will review briefly what is implied by "discrimination". Two preliminary points should be considered.

First, it is necessary to distinguish between the common connotation of discrimination and what is usually at issue in the public utility context. Most people think of discrimination as singling out one group or individual for different treatment on grounds such as those set out in section 15(1) of the *Charter*-race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, or analogous grounds.

There is no doubt that this commonly understood aspect of discrimination is strictly forbidden where public utilities are concerned and was forbidden long before the *Charter* or the various provincial human rights acts were passed. Discrimination on these grounds would be quickly struck down by utility regulators. In the unusual case where the regulator failed to deal swiftly with this form of discrimination, the situation would no doubt be immediately remedied by the courts through the appeal process contemplated in most public utility legislation or through judicial review.

The commonly-held concept of discrimination is not likely to arise in the public utility context. Why this is so will be dealt with at the conclusion of this paper once the regulatory process has been dealt with in more detail. Instead, the term "discrimination" is usually used in relation to public utilities to describe distinctions of a different nature. These distinctions are usually based on cost of service criteria more familiar to economists than to the general public.

The classic example of this type of discrimination is often referred to as "economic discrimination". It is charging identical customers different rates for the same service or charging identical customers the same rate for a different quality of service. Another example could include making a particular service available to one customer and not to another.

In other words, a discussion of discrimination in the public utility context, and particularly in a utility rate case, is likely to concentrate on the cost of service aspect. The spectre of discrimination is likely to be raised by a class of customers which believes it is paying too much for the service it receives — either because the rate for this service is too high or because it is denied access to a different or complimentary service that would result in a lower overall cost.

As a second preliminary point, it must be clearly understood that discrimination as so defined is *not* prohibited in the public utility context. Utility legislation prohibits "undue discrimination", sometimes referred to as unreasonable or unjust discrimination. This may come as a surprise to those to whom the term discrimination is emotionally-charged, invoking

strong feelings of rage and a sense of injustice. However, it is well established that complete avoidance of discrimination in utility matters is impossible and that, in some cases, discrimination may even be desirable.

Most utility statutes have similar provisions intended to guard against undue discrimination. One is a positive duty imposed upon the regulator to approve only those rates or terms of service that are just and reasonable.[1] The phrases "just and reasonable" and "not unduly discriminatory" are not necessarily synonymous. However, it is hard to conceive of a rate or service that is unduly discriminatory that can be just and reasonable.

A specific prohibition directed at the utility company not to unduly discriminate through rates or terms of service is another common provision.[2] This latter provision may be accompanied by penalty provisions of varying severity. For example, in Alberta the utility company could be liable to a fine of up to $500, the maximum charge for a breach of the provisions of the *Public Utilities Board Act*.[3] However, if the discriminatory practice continues after the Board has ordered it stopped, the fine could be $100 per day for every day it continues.[4]

Further, the regulator is usually given the authority to order the utility to extend its facilities to new areas or new customers if the utility company refuses a legitimate request for service.[5] This provision indirectly allows the Board to prevent undue discrimination between those already receiving service and those within the utility franchise area who are not, but to whom service could be provided by a reasonable extension of the existing facilities.

Finally, regulators are usually given a broad statutory power to do anything required to give effect to the intent and purposes of the legislation they administer. If a discriminatory practice arose which for some reason could not be addressed through the regulators' specific powers, this general power would likely fill the gap.

The efficacy of the powers of the regulator to prevent undue discrimination is enhanced by the regulatory process of rate setting. Utility rates and terms of service are usually the subject of a public hearing at which interested parties can make their views known. Those who potentially might be adversely affected or discriminated against have an equal opportunity for input; a chance to protect their interests.

Clearly, public utility legislation recognizes the serious implications of discrimination in utility rates or services. But what is undue discrimination? This question has always been difficult to answer. Numerous articles, textbooks and decisions by regulators and

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1. See, for example, *Public Utilities Board Act,* R.S.A. 1980, c. P-37, s. 81 (a) and (c), or the *National Energy Board Act,* R.S.A., c. N-6, s. 62.
2. See, for example, the *Public Utilities Board Act*, *ibid.* s. 91 (a) to (d) or the *National Energy Board Act, ibid*. s. 67.
3. See *Alberta Public Utilities Board Act*, *supra* note 1, s. 117.
4. *Ibid.* s. 114.
5. See, for example, *ibid*. s. 81 (1)(e), or *National Energy Board Act, supra* note 1, s. 71(3).

the courts have devoted considerable discussion to the topic over the years, without arriving at a definition applicable in all circumstances.

Perhaps it is impossible to define undue discrimination in the context of a regulated utility. Use of the word "undue", like the use of "unjust" or "reasonable" creates a wide discretion for the regulator in determining when discrimination reaches unacceptable levels. Consequently, what amounts to "undue discrimination" is a moving target, depending very much on the circumstances existing at the time and the perceptions of the regulator. This discretion is unavoidable, since utility regulation is a process of balancing a number of competing interests and public policy goals in a constantly changing environment.

Consider for a moment the extreme difficulties facing the utility regulator. The regulator must protect the interests of the utility including setting rates sufficient to recover the utility revenue requirement and to allow the utility to attract further capital at reasonable rates. The interest of the existing customers as a whole must also be protected. Good quality service must be available at the lowest reasonable cost. Further, the needs of future generations of consumers must be considered. Regulators must avoid decisions which unduly benefit existing customers, by unreasonably impacting the cost or availability of services to customers five or ten or even twenty-five years from now.

In addition to all of this, the regulator must have due regard for the nebulous concept of "public interest". Environmental concerns, conservation of resources, economic policies, such as regional development requirements or the need for a robust agricultural or small business sector, can (and most would agree should) influence utility regulation. For example, requiring electrical utilities in eastern Canada or the United States to switch from coal to natural gas as a thermal generating fuel is expensive. However, few would argue that reductions in sulphur emissions would not justify the cost.

Finally, the regulator must apportion the utility cost of service among all the existing customers. In doing so, the regulator must balance the interests of one customer against another. This task, which is usually a separate phase in a rate proceeding, is probably the most difficult and the most likely to lead to arguments of undue discrimination.

No two utility customers are exactly the same. Customers may appear similar but each is unique in the amount of the utility service consumed, the time at which the service is consumed, the pattern of consumption and any number of other factors. The interests of one customer may not be the same as the interests of another. It is true that all customers share a common interest in keeping the costs incurred by the utility (for which they are ultimately responsible) to a minimum. However, when it comes to the allocation of those costs or the setting of terms and conditions of service, some customers will be adverse in interest to others.

Whether undue discrimination exists requires a consideration of each opposing interest individually as well as relative to other interests. The weight to be given to a particular interest may vary as conditions change.

The broad nature of the discretion arising from the word "undue" is not lost on the parties to utility rate proceedings. These parties are likely to argue undue discrimination, or

the more general "not just and reasonable", each time they feel aggrieved by a utility proposal. Consequently, it may be necessary to expand or contract the meaning of "undue" in order to arrive at a reasonable conclusion in each case. It is little wonder that the courts and regulators seem prepared to provide little more than guidelines as to the meaning of undue discrimination. For the process to work, the rule cannot be so precise that it limits the regulatory discretion.

When called upon to deal with the concept of undue discrimination, the Courts have left the regulator with considerable flexibility. A.I.G. Priest, in the text *Principles of Public Utility Regulation*, Vol. 1, cites the United States decision of *E. & Lazarus & Co. v. Pub. Util. Commis.*,[6] for the following definition of undue or unreasonable discrimination in a public utility context:

> *. . . a utility may charge but one rate for a particular service and any discrimination between customers as to the rate charged for the* same service *under* like conditions *is improper . . ."* [Emphasis added]

In *Alberta Treasury Branches v. Invictus Financial Corporation Ltd.*, a case concerning Alberta Government Telephones, the Alberta Court of Queen's Bench used similar language in finding that undue discrimination did not exist in the following situation:

> *[Alberta Government Telephones] is not denying service to a customer. It is not charging one customer more than another for* identical or similar *telephone service.*[7] [Emphasis added]

The approach in these two examples focuses on the service provided. It can be criticized for not properly taking into account reasonable differences among the consumers of the service. No customer services are ever precisely identical. The difference among them impose different burdens and costs on the utility system. However, the Court allows the regulator a broad discretion to determine when the service is "identical or similar".

In *Chastaine et al v. British Columbia Hydro and Power Authority*, the British Columbia Supreme Court offered the following comments:

> *The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers.*[8]

This approach takes into account the differences among customers to a greater extent. However, it offers no guidance as to when customers are similarly situated or how to

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6. (1954) 7 P.V.R. at 317.

7. (1985), 60 A.R. 105 (Q.B.).

8. [1973] 2 W.W.R. 481 (B.C.S.C.) at 492.

determine the appropriate characteristics to use in setting a customer class. Once again, a broad discretion remains with the regulator.

Although the discretion given a utility regulator is broad, certain principles or guidelines have developed. Currently, the most important of these is the cost responsibility principle: to the extent possible, a customer should pay the full cost associated with the service received. Put another way, the ratio between the revenue received from a customer by the utility and the cost of providing service to the customer should be as close to 1 to 1 as possible.

Since no two customers are likely to impose the same costs on the system, strict adherence to the cost responsibility principle would dictate a different rate for every customer. This would obviously be impractical and unworkable considering the number of customers being served by most utilities. Instead, customers are grouped in classes based on the characteristics having the most significant bearing on cost causation. These characteristics may include similarity in demand for utility services (units of service over a given period), during similar times (peak, off-peak, or continuous), similarity of load factor (the average daily use expressed as a percentage of peak day use), similarity in peak demand and similarity in the guarantee of service provided by the utility (continuous v. interruptible).

Sophisticated cost allocation studies are performed to allocate costs to each class and the rates for each class are set accordingly. The costs allocated to each class usually differ. Consequently, the unit cost of service — the cost per cubic metre of gas or kilowatt of electricity delivered — may vary from class to class.

It should now be apparent that even loosely defining undue discrimination is no easy task. It appears that regulators and the courts tend to view discrimination in the public utility context as treating similar customers differently or different customers in a similar fashion. However, the determination of which customers are similar and to what extent is left to the broad discretion of the regulator. In the attempt to design services that are not unduly discriminatory and to classify customers in a fair or reasonable manner, regulators rely to a large extent on the cost causation principle, although it is not blindly followed. Variations from this principle occur to balance a number of competing interests, including the overall public interest, and to recognize the need for a workable system of utility rates.

Whether the regulator is successful in avoiding undue discrimination among customers within a class, among classes of customers, and among those on the system and those seeking access to the system, becomes a question of fact to be determined in each situation.

With this rather loose understanding of the import of the term "undue discrimination", it is now possible to turn to a number of examples and the reader can form his or her own conclusion as to whether the discrimination is undue.

IV. "UNDUE DISCRIMINATION" IN PUBLIC UTILITY REGULATION

Example 1. Is it unduly discriminatory if residential customers pay a higher unit cost for electricity than industrial customers when the energy generating source is identical?

If the annual bill of a typical residential customer were divided by the units of electricity consumed (Kw/hrs.) the unit cost of electricity would likely be higher than the result of dividing a typical industrial customer's annual cost by the number of units consumed. The industrial customer may pay $1,000,000 annually while the residential customer will likely pay much less than $1,000 annually, but the cost per unit to the residential customer would be higher. Even those who are totally unfamiliar with public utility operations have at some point probably read or heard media reports of complaints by consumer groups that this situation is unduly discriminatory.

Those attempting to establish undue discrimination tend to take the approach that the cost of generating, transmitting and distributing a unit of electrical energy on any given day will likely be the same, or at least similar, for the industrial and the residential customer. Therefore, the residential customer argues that the unit cost charged to both customer classes should be the same.

The industrial customer would likely agree that the cost of generating a unit of electrical energy will not differ much between the two classes at a particular time. However, the industrial customer would quickly argue that energy generation is only one cost. To focus solely on the unit cost of generation ignores differences in costs due to transmission and distribution (one of the most significant costs), metering, customer service and administration. More significantly, industrial load is likely to be relatively even throughout each day, and throughout each year. Residential loads will vary substantially from daily peak periods (4 to 7:30 p.m.) and between the winter peak period (November through March) and summer off-peak period. The industrial customer therefore argues that the proper focus is the total cost to serve each customer class, and that both the industrial and residential rates should be designed to recover the cost of serving each class.

The residential class unit cost of energy is higher because the unit costs imposed on the utility by the residential customer are higher. The utility must invest capital to ensure it can serve the highest peak demand of each customer class. Industrial customers tend to consume energy at close to peak levels throughout the year. The residential customer will normally consume at peak levels only a few times in a year. However, the facilities required to provide peak service to the residential class exist year-round and must be paid for. The result is higher unit rates for the residential class.

In other words, the industrial customer would argue that the differences in the costs imposed by the industrial and residential classes account for the differences in unit costs for each class and no undue discrimination exists.

Example 2. Is it unduly discriminatory for a utility to offer a particular service to one customer but not another?

It makes economic sense for the utility to attempt to utilize the physical plant which must be available to meet peak requirements of its customers but which would otherwise be idle in the off-peak period. It is therefore normal for a utility to offer incentive rates to

increase consumption of electricity during off-peak periods. The effect is to reduce the total cost of electricity for the industrial or commercial customer who is able to use the incentive rates. The residential customer, whose periods of use are quite inflexible, does not have the wherewithal to take advantage of these rates. Residential customers are simply not in a position to shift the period of their consumption. Consequently, the residential customer cannot reduce his or her overall cost of electricity by taking advantage of these incentive rates.

To offer an economic incentive to one class of customers and not another is likely discriminatory. But is it unduly discriminatory? Since incentive rates are common, it is clear that utility regulators do not consider the discrimination to be undue. Regulators consider it to be justified on the basis of efficient use of existing facilities; or, because ordinarily incremental revenue will be derived which can be applied to reduce the rates of all customers of the utility.

A similar situation exists with interruptible service. In return for the right to interrupt the customer's service during periods of high demand, the utility offers certain customers lower electrical rates. Residential customers, who normally could not withstand an interruption of service during the peak period, cannot avail themselves of this service.

To the extent interruptible rates reduce peak demand on the utility system the need for additional facilities can be forestalled. In the case of an electrical utility this could mean the postponement of up to a billion dollars in expenditures for new generating capacity. In the case of a gas utility, expensive compression or additional pipeline facilities can be avoided.

The question becomes whether the benefits to the system as a whole outweigh the potentially discriminatory nature of rates providing direct cost saving benefits to one class which another class is unable to enjoy.

Example 3. Is it unduly discriminatory to impose economic penalties which will impact only certain classes?

This problem is really the other side of the interruptible rate discussed above. In order to reduce peak demand or effect conservation of the resource, a utility may impose a penalty, in the form of a higher cost for energy provided during the peak period, rather than an incentive to allow an interruption of service. Those customers with a fixed consumption pattern will be less able to avoid incurring the cost penalty than those customers who can shift their consumption pattern. This type of penalty is rare. More often the interruptible rate is used. However, the justifications argued for the penalty and the potential discriminatory results are the same as for the interruptible incentive.

Example 4. The justification for the incentive, interruptible and penalty rates discussed above is in keeping with the cost allocation principle which most utility regulators attempt to follow. However, what happens in the situation where one customer is denied access to service offered to another for non-cost reasons?

This situation exists in Alberta as a by-product of the de-regulation (or re-regulation) of the natural gas industry, which commenced on 31 October 1985 with the Agreement on Natural Gas Markets and Prices (the "Agreement") between the federal government and the producing provinces. As part of the attempt to reduce regulation of the natural gas industry, the Agreement contemplated significant changes to the way local distribution companies (LDCs) operate. The transportation service and the sales service of the LDCs would be separated. The LDCs were to retain their monopoly on gas transportation services, but not the sole right to supply the commodity to their formerly captive customers. Consumers were to be permitted to purchase their gas supply from other sources. Sellers replacing the LDCs as the suppliers of gas, or the customer purchasing that gas, were to have access to the LDC transmission and distribution facilities. The cost of providing this service was to be provided by way of new transportation service rates.

In Alberta, large industrial customers were already receiving a transportation service on the utility transmission lines. The report of a joint inquiry conducted by the Alberta Public Utilities Board and the Alberta Energy Resources Conservation Board recommended that "transportation service should generally be provided to customers".[9] However, the report also recommended that, while industrial customers would have open access to the LDC transmission and distribution systems, "core customers", such as residential customers, hospitals and schools, only be permitted access to the transportation system if they signed 10 to 15 year gas supply contracts with suppliers. No such restriction was recommended for industrial customers.

The recommendations of the joint inquiry have not yet been formally accepted by the Alberta Government. The Alberta Public Utilities Board was instructed by Cabinet to approve broader industrial transportation rates and has done so. However, in spite of numerous requests from core customers, transportation service is, as yet, unavailable to these customers.

Core customers argue that to refuse them the transportation service which is offered to industrial customers is unduly discriminatory. In their view, the refusal is not based on matters arising from cost allocation principles and there is no reasonable public policy reason which would override the statutory requirement to not discriminate unduly.

In favour of the restriction, it has been argued that core customers cannot live without natural gas supply. Therefore, those customers would have a high priority in the event of a supply shortage. In a market where there is a significant surplus of gas, there may be little risk of supply disruption. However, as gas supply tightens (as is the case in today's market) core customers purchasing gas through short term contracts may not be able to renew their supply or obtain new supplies at a price they can afford. In the event of a shortage, gas would likely be diverted from others, particularly industrial or commercial customers, to the core market. In other words, those who have contracted prudently could be penalized because of poor contracting practices by the core customers.

It is noteworthy that the policy restricting core customers from obtaining transportation service arose at a time when the LDCs had existing long term contracts with

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9. *PUB/ERCB Report* No. E87162/87-C.

gas producers and when the price of gas was going down. Loss of the core market could have had a significant impact on the LDCs, the producers and, consequently, government royalty revenue.

The failure to provide transportation service to core customers similar to that offered to non-core customers appears to be discriminatory, without justification on cost allocation grounds. The question is whether other overriding public interest issues are such that the discriminatory treatment is not undue.

The foregoing examples illustrate the difficulty in balancing the various individual interests against each other and against the overall public interest. Having regard for the duties and obligations imposed upon the regulator, do any of these examples show undue discrimination?

V. JUDICIAL REVIEW

Most utility statutes provide for a statutory appeal to the Courts on a question of law or jurisdiction. Also, in the appropriate circumstances, parties affected by regulatory decisions can avail themselves of the prerogative remedies and judicial review. However, a utility customer should not develop high expectations that the courts will interfere.

Generally speaking, the courts will defer to the technical expertise of the regulator, except in exceptional circumstances. This approach was summed up with the often cited words of Mr. Justice Pratte of the Federal Court of Appeal in *TransMountain Pipe Line Co. Ltd. v. Nat. Energy Bd.*[10] In that case, the court was dealing with "just and reasonable" rather than "undue discrimination" but the principle is equally applicable to both. At p. 121, Mr. Justice Pratte said the following:

> *What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonable of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the court would have adopted.*[11]

This same principle has been applied by the Alberta Courts. As Mr. Justice Laycraft of the Alberta Court of Appeal stated, in reference to the words of Mr. Justice Pratte: "In my view,

10. [1979] 2 F.C. 118.

11. *Ibid.* at 121.

this language is equally applicable to a review of the decisions of the Public Utilities Board by this Court."[12]

If the appeal concerned discrimination on grounds such as those set out in Section 15 of the *Charter*, there would likely be no judicial deference accorded the regulator. Characteristics like race or religion have no bearing on the cost of providing service. Reliance by the regulator on such characteristics in setting rates would undoubtedly amount to proceeding on a wrong principle or having regard to entirely irrelevant matters, thereby inviting judicial action.

VI. CONCLUSION

In determining if undue discrimination exists in the public utility context, a wide variety of factors must be considered. Such factors may have varying impacts on a number of different interests, including the overall public interest. The judicial approach to decisions by utility regulators concerning what is just and reasonable and whether discrimination is undue, is to defer to the expertise of the regulator in most cases.

It was indicated earlier that discrimination on grounds such as those set out in section 15 of the *Charter* is not likely to occur in public utility regulation. Hopefully the intervening discussion has made the basis for that statement more apparent. Utility rates are set based on cost causation principles. The personal characteristics in section 15 of the *Charter* have absolutely no bearing on the cost of serving a particular customer. To discriminate directly against a customer on the basis of, for example, race or religion, would require creating a separate rate class based on characteristics which bear no resemblance to the characteristics used for setting other customer classes. This situation would not be tolerated by regulators or the courts.

It could be argued that discrimination on section 15 grounds could be indirect. For example, if a utility intended to discriminate against an ethnic group which traditionally occupies the low end of the economic scale, it could do so by ensuring its service was priced in a manner that made it difficult for the poor to obtain access. In this way, the group targeted for discriminatory treatment would be caught. This is not likely to occur since some cost justification would be required. Other customers on the utility system and the utility regulator would not accept any rate that priced the service unreasonably above the portion of the utility revenue requirement allocated to a particular class. The cost to each customer class is expected to be the lowest reasonable cost possible in the circumstances.

This is not to say that low income groups may not consider utility services to be extremely expensive. But where the cost of the service is as low as possible and the rate must recover the cost of service, it becomes a social welfare issue to be dealt with through the appropriate social welfare agencies or legislation. It is not a question of undue discrimination.

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12. *Coseka Resources Limited* v. *Saratoga Processing Company Limited, et al; Petro-Gas Processing Ltd.* v. *Public Utilities Board et al* (1981), 16 Alta. L.R. (2d) 60 at 74.