The following version is for informational purposes only

TRANS MOUNTAIN PIPE LINE COMPANY LTD.

v.

ASSESSMENT COMMISSIONER

Supreme Court of British Columbia (A820004) Vancouver Registry

Before: MR. JUSTICE A.B. MACFARLANE

Vancouver, March 1, 1982

G.A.Irving and D.L. Mathieson for the Appellant
R.B. Hutchison for the Respondent

Reasons for Judgment March 11, 1982

This is a case stated by the Assessment Appeal Board pursuant to the *Assessment Act*, R.S. 1979, c. 21, s. 74 (2). The appellant is a person affected by a decision of the Assessment Appeal Board made the 19th day of November, 1981. The appeal lies only on questions of law.

The appeal to the Assessment Appeal Board involved rates prescribed by the assessment commissioner appointed under the *Assessment Authority Act* pursuant to s. 27 (1) (c), which provides:

> "27. (1) Notwithstanding section 26(2), the actual value of the following shall be determined using rates prescribed by the commissioner:
>
> (c) the pipe lines of a pipe line corporation for the transportation of petroleum, petroleum products, or natural gas, including valves, cleanouts, fastenings, and appurtenances located on the right of way, but not including pumping equipment, compressor equipment, storage tanks and buildings."

The facts stated by the Assessment Appeal Board are as follows:

> "1. British Columbia Regulation 557/80 filed December 9, 1980 (the 'Regulation'), made by the Assessment Commissioner (the 'Commissioner') pursuant to section 27 of the *Assessment Act*, prescribed the rates and methods for determining the actual value of the pipe lines of a pipe line corporation for the 1981 Assessment Roll.
>
> 2. Trans Mountain Pipe Line Company Ltd. (the 'Company') is a pipe line corporation within the meaning of the *Assessment Act* and is the owner of pipe lines in British Columbia (the 'Company's pipe lines'), the rates for which were prescribed by the Commissioner in the Regulation.
>
> 3. By applying such rates to the Company's pipe lines, the Assessor determined that the actual value thereof was in the sum of $127,518,165. It was common ground that the

results obtained by the mathematical application of the rates and base figures in the Regulation to the Company's pipe lines was accurate.

4. There was an appeal by the Company to the Assessment Appeal Board (the 'Board') against the rates prescribed by the Commissioner.

5. Notice of appeal to the Board (as amended) was given by the Company on the following grounds:

> '1. The rates for the appellant's pipe lines purporting to be prescribed by the Commissioner pursuant to section 27 (1) of the *Assessment Act* were set out in a regulation published by the Queen's Printer for British Columbia, being B.C. Reg. 557/80 filed December 9, 1980 and made by the Commissioner personally as a regulation and as the Commissioner did not have the requisite statutory authority to make any regulation under the provisions of the *Assessment Authority Act* or at all the document purporting to be a regulation is a nullity and the purported determination and prescription of rates by an invalid regulation is void and of no effect.
>
> 2. In the alternative, in determining and prescribing the rates or purporting to determine and prescribe the rates pursuant to section 27 (1) of the *Assessment Act* the Commissioner erred in that he did not take into account all proper factors which should have been taken into account in order that the use of such rates would produce the actual value of the pipe lines of pipe line corporations including the pipe lines of the appellant, within the meaning of the *Assessment Act*, including such factors as those set out in section 26 (2) of the said Act for the guidance of Assessors in the determination of actual value of improvements, namely: present use, location, original cost, cost of replacement, revenue or rental value, the price that the improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value.'

6. No evidence was adduced in the hearing before the Board respecting the sale in the open market of any pipe line, comparable or otherwise. The Board was informed that to the knowledge of the respondent, no such sale had been completed.

7. Following the hearing before the Board held on the 9th and 17th days of September, 1981, the Board issued their decision dated November 19, 1981, a copy of which is annexed hereto as Schedule A.

8. The operation of the Company's pipe lines is subject to the jurisdiction of the National Energy Board and the provisions of the *National Energy Board Act of Canada* and the regulations and orders made pursuant thereto. The Company's tolls are fixed by the National Energy Board from time to time using the Rate Base Rate of Return methodology. Under this form of regulation assets employed in the regulated business, including the Company's pipe lines, are accorded a Rate Base Value equal to their Net Book Value as a percentage return on Rate Base. In accordance with the above described form of regulation and orders of the National Energy Board the rate base value of the Company's pipe lines in the year 1981 was approximately 11 million dollars on which the Company was allowed a return of approximately 1.3 million dollars. The original cost of the Company's pipe lines was approximately 57 million dollars."

The questions of law which have been submitted by the appellant are set forth in a notice of motion dated the 19th day of February, 1982, and signed by counsel for the appellant. They are:

"(1) Did the Board err in holding that the Commissioner had the power to make B.C. Reg. 557/80 which purported to prescribe rates for pipe line corporations?

(2) Did the Board err in concluding that the cost approach to the determination of actual value was the only approach open to the Commissioner in prescribing the rates under appeal?

(3) Did the Board err in holding at page 18 of its Decision

> '. . . the value placed on the subject property by the National Energy Board for regulatory purposes does not represent the kind of actual value which the Commissioner's rates must be designed to produce.'?

(4) Did the Board err in failing to find that the testimony submitted by the Company was proper evidence as to actual value of the Company's pipe lines?

(5) Did the Board err in stating at page 9 of its Decision that the powers conferred on the Board by section 69 of the *Assessment Act* were not intended to enable the Board to decide if the rates prescribed by the Commissioner produce values which are too high or too low, for the reasons stated by the Board at page 10 of its Decision or at all?

(6) Did the Board err in failing to find that the rates prescribed by the Commissioner were too high in that they were inequitable and unfairly represented the actual value of the appellant's pipe lines, resulting in manifest injustice, in view of the evidence provided by the appellant and the facts set out in the Stated Case as to the regulated nature of the appellant's operations and its regulated rate of return?

(7) Did the Board err in stating at page 10 of its Decision:

> 'Thus, each appeal under section 27 by whomsoever is only concerned with the propriety of the rates as such and not the actual value derived from such rates for any particular pipeline in its location somewhere in the province?'

(8) Did the Board err in its finding at page 16 of its Decision that the rates prescribed by the Commissioner were not set arbitrarily?"

On the hearing of the Stated Case counsel for the appellant abandoned the first question. That being so, I will proceed to consider this appeal on the premise that the Commissioner is empowered by the legislation to prescribe rates which are to be applied by the Assessor in determining the actual value of the pipe lines of a given pipe line corporation.

Section 27 (3) of the *Assessment Act* provides that the rates prescribed by the Commissioner are subject to appeal to the Board.

The first issue which must be resolved is what standard should be applied by the Board in an appeal against rates prescribed by the Commissioner. The Board concluded that it should apply the same standards which the Commissioner was bound to apply. After having reviewed the legislation, and having had difficulty finding any firm guidance therein, the Board concluded, at pp. 10-11 of its reasons:

> "Thus, in the absence of any express standards for the guidance of the Commissioner in the setting of rates or the guidance of the Board in an appeal from such rates, the Board views its statutory duty in an appeal under subsection 27(3) as an obligation in the nature of a hearing and review to determine:

(a) what factors the *Assessment Act* requires the Commissioner to take into account in the determination of the rates prescribed by him under section 27; and

(b) having determined those, whether the rates determined by the Commissioner properly reflect those factors.

If the Board determines that the proper factors were taken into account in the setting of the rates and the rates properly applied to the facts, then the resulting values are 'actual value' within the meaning and for the purposes of section 27. If, on the other hand, the Board determines that the rates set by the Commissioner do not reflect those factors, the Board agrees with Counsel for the respondent that the Board must set rates that do so, and direct the Assessor to determine actual value using the rates so determined by the Board. In short, the task of the Board can be no different from that of the Commissioner."

In coming to that conclusion the Board made these comments about the legislation:

"It is not in dispute that the subject matter of this appeal are the rates prescribed by the Commissioner for the determination of the actual value of the pipelines of a 'pipe line corporation' for the transportation of petroleum, petroleum products, or natural gas including valves, cleanouts, fastenings and appurtenances located on the right of way. Also, as Counsel for the respondent states in his memorandum on the 'Scheme of the Act' presented to the Board, the Assessor has no choice than to use those rates laid down or prescribed by the Commissioner. Thus, as contended, the Assessor has complied with the *Assessment Act* when he properly applies the rates so prescribed in his initial assessment of that kind of property.

The Board cannot, however, accept the further proposition put forward in such memorandum that '. . . if the Assessor has used those rates laid down or prescribed by the Commissioner he has determined actual value.'

Such a conclusion could only be valid if 'actual value' was defined to be the result obtained by properly applying to the pipeline the Commissioner's rates, whatever those rates may be or on whatever criteria those rates may have been developed. The Act provides an appeal from such rates obviously with a view to ensuring that the rates do indeed produce the kind of actual value envisaged by section 27. The question remains, therefore, what does the expression 'actual value' mean in the context of section 27, also having in mind other relevant provisions of the *Assessment Act*. Unless the rates prescribed by Commissioner produce that kind of actual value, an assessment based thereon cannot stand.

The answer to this question does not come easily in the absence of any specific standards or criteria for the determination of the rates. In the first place, however, the Board does not agree with counsel for the respondent that the opening words of subsection 27 (1) 'exclude the considerations set out in 26 (2) in determining the actual value of 27 (1) properties'. It seems to the Board that these opening words merely *preclude the Assessor* in his determination of actual value from taking into account the factors mentioned in subsection 26 (2) and compel him only to use the rates prescribed by the Commissioner. In other words, such words eliminate any exercise of judgment by the Assessor in the valuation process and turn the valuation into a mathematical application of the Commissioner's rates to the facts. On the other hand, there is nothing in the wording of the section that precludes the Commissioner from having regard to the factors mentioned in subsection 26 (2) in setting the rates."

I agree with that reasoning.

Section 26, subsections (1) and (2) of the Act provide:

"26. (1) The assessor shall determine the actual value of land and improvements.

(2) In determining the actual value under subsection (1), the assessor may give consideration to the present use, location. original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value, and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of those values."

In making those comments and by deciding that s. 26 (2) was applicable the Board demonstrated that it was approaching the matter on an objective basis and that it appreciated that the rates could not stand if it was shown that they did not produce the kind of actual value envisaged by the Act.

I do not think that the Board fell into error in taking that approach to the appeal.

The difficulty the Board had in considering the appeal was in finding any evidence of actual value, which they were prepared to accept, that demonstrated error by the Commissioner in setting the rates.

I think the Board identified the correct factors to be taken into account when it said, at p. 11 of its reasons:

"Factors Governing Rates

It is recognized as a principle of appraisal for assessment purposes that there are three basic approaches to the determination of actual value or market value, i.e. market sales of comparables, capitalizing income flow, and cost less depreciation from all sources, physical, functional and economic. Although theoretically anyone of these approaches should produce market value, it is also recognized that one may be more relevant than another, or one may be used to test the conclusion derived from another of such approaches."

The Board went on to say, at p. 12:

"In the absence, however, in this appeal of any evidence of sales of pipelines in the open market from which to obtain a general market value or a capitalization rate for application to an economic income stream (see evidence of Mr. LeBoeuf at page 115 to 117 of the transcript of the proceedings), the Board does agree that the Commissioner is faced with setting rates which will produce a value based on the cost approach. In so concluding for this appeal, the Board does not wish to be taken as saying that the Commissioner in setting rates should not take into account any of the other factors affecting value mentioned in section 26 (2), assuming of course that proper evidence thereof is obtainable. Under section 11 of the *Assessment Authority Act*, the Commissioner, although not the *Assessor* referred in section 26 of the *Assessment Act*, shall 'have and may exercise all of the powers of an assessor'. It is, therefore, *open* to him to consider any factor which affects value in arriving at rates for the determination of the actual value of a pipeline which he is not expressly or by necessary implication precluded from considering ."

The Board summarized its view of what factors ought to be taken into account, at p. 13:

"Thus, the Board concludes that in setting his rates for the determination of actual value, the Commissioner is required to take into account all those factors which should properly

be taken into account in the determination of actual value on any or all of the approaches to value recognized by our common law in respect to which there is proper evidence."

The Board heard evidence and submissions as to what factors ought to be taken into account, and with respect to the application of the cost approach to determining actual value.

In making his submissions before me counsel for the appellant did not address each of the questions of law individually, but attacked the findings of the Board on two main grounds:

1. That the cost approach was inappropriate, and that the rates fixed on that basis were patently in error when the value derived therefrom was tested against the capitalized value resulting from application of the income approach.

2. That the decision of the Commissioner was arbitrary.

The appellant's argument on the first ground and the answer of the Board is clearly set forth in the reasons of the Board, at pp. 16-18:

"The Board has dealt at length with the provisions of the *Assessment Act*, the said Regulation and the testimony of the witnesses for the Assessment Authority because of the nature of the appellant's argument, the thrust of which is that since the appellant engages in an activity regulated by the National Energy Board, the subject property should be valued having regard only to the revenue it is permitted to earn from such assets. The testimony of the appellant's witnesses reveals that under the Rate Base Rate of Return methodology, the rate base value of the British Columbia pipeline assets equals the net book value of approximately eleven million dollars. The tolls and tariffs are then set to allow the appellant a return of approximately 1.3 million dollars on such assets used in the service. Counsel for the appellant, therefore, argues that since such assets represent an 'imbedded or locked-in investment and have no value for any other purpose', the Rate Base Rate of Return method fixes the true value of the assets on which the earnings are made. Counsel for the appellant relies on certain provisions of the *National Energy Board Act* and regulations thereunder which prevent the appellant from disposing of or taking their assets out of service without the consent of the National Energy Board. Such Counsel also argues that the massive disparity between the value of the subject property derived from the Commissioner's rates (i.e. approximately 127 million dollars) and the 11 million dollar rate base value demonstrates that something is 'clearly wrong' for which, reason the appeal should be allowed.

The fallacy in this argument has been amply demonstrated by the evidence of the appellant's own witnesses who were most knowledgeable and forthright in the giving of their testimony. Mr. Goulson, the chief financial officer of the appellant, admitted (at page 41 of the transcript) that it would be fair to say that the National Energy Board is 'not so much concerned with the value of the assets but. . . that the return is fair having in mind what those assets and expenses are'. In the course of a lengthy cross-examination by Counsel for the respondent, Mr. Goulson admitted that if the appellant had had a long term debt, the National Energy Board would have allowed an additional return on the rate base in order to service that debt. Mr. Goulson went on to say that by not having debt and no resulting income tax deduction for interest, the appellant was paying more income taxes than might normally be the case with this type of utility and was not fully compensated for this in the fixing of the rate of return. This and other aspects of the testimony of the appellant's witnesses amply demonstrate to this Board that the value placed on the subject property by the National Energy Board for regulatory purposes does not represent the kind of actual value which the Commissioner's rates must be designed to produce.

> Clearly, on the basis of the whole of the evidence, the rate of return allowed to the appellant on its pipeline assets is geared to its financial structure. The same pipeline in the hands of a company with a different financial structure could be allowed under federal regulation to generate a different return. Even assuming, therefore. that it was possible to obtain a capitalization rate from market evidence, the application of that rate to revenue flow would not produce an objective value for the assets concerned. The result would invariably be tainted with a considerable dose of 'value to owner'."

I do not perceive any error in law in that reasoning, and I think that the Board was justified in concluding that the appropriate approach to prescribing rates upon which actual value would be determined was the cost approach, and that the income approach advocated by the appellant would not produce an objective value. That, in effect, disposes of questions 2 to 4 inclusive, which are answered in the negative.

The second main ground of attack is that the Commissioner was arbitrary in finding replacement value, and in determining that the pipelines in the Province were subject to a maximum total depreciation of 35 per cent. The Board heard evidence and submissions on these questions. The factors which were taken into account are reviewed in detail at pp. 14-16 of the reasons of the Board, which are incorporated by reference as part of the Stated Case. It is not necessary to repeat fully what was said, other than these words to be found at p. 16:

> "On the basis of this evidence, the Board concludes that the rates and limit of depreciation have not been set arbitrarily, but on the basis of a rationale derived from data based on actual experience. Specifically, with reference to the 35% limit, the Board is content that safety and environmental factors require a high degree of maintenance and that some limit is therefore justified. In the absence of any evidence which might demonstrate that the limit should be some other figure, the Board finds that the 35% limit is not arbitrary and for this appeal at least must be allowed to stand."

In the course of its carefully reasoned decision the Board analyzed the various valuation procedures prescribed by the *Assessment Act* and made this statement, which I think is correct, at p. 12 of its reasons:

> "As stated previously, unlike sections 28 and 29, there is no express statutory direction in section 27 which compels the Commissioner to set his rates for valuation in a designated manner."

At p. 13 the Board said:

> "While the *Assessment Act* does not limit the Commissioner from prescribing rates for several areas in the Province, or indeed for pipelines with varying types of ancillary equipment, the Commissioner has chosen to adopt one set of rates for application to all pipelines wheresoever located and with whatever ancillary equipment. The application of these general rates to a particular pipeline will not always produce the replacement cost new of the particular pipeline in its specific location. The question is, of course, does the Act tolerate the built-in degree of arbitrariness which must flow from the application of general rates? In this appeal, however, in the absence of any evidence as to the extent, if any, to which the general rates fail to produce replacement cost new, the Board need not concern itself further with that troublesome issue."

Counsel agree that the legislation does tolerate a certain amount of arbitrariness in that it authorizes the Commissioner to prescribe rates, and does not provide a method for doing so. General rates have been prescribed. The statute does not limit the power of the Commissioner to set general, rather than specific rates. If it had been intended to have particular rates for the pipelines of each pipeline corporation then the enactment of s. 27 would have been an exercise in futility. There would have been no need to fix rates but only to determine the actual value of the

pipelines and other improvements of each corporation as could already be done under s. 26 of the Act. It would appear that the legislative scheme was to empower the Commissioner to prescribe general rates, and that the remedy of an individual pipeline company, if it disagreed with the resulting assessment, was to have the matter reviewed on appeal. In effect, that is what has occurred in this case; the Board finding no evidence upon which it could decide that the general rates were inapplicable to the appellant, and no basis upon which to hold that the rates and limit of depreciation had been set arbitrarily. I agree with the Board that in the light of the legislation, and upon a review of the evidence, the appellant has failed to demonstrate that the decision ought to be set aside on the ground of arbitrariness. Question 8 is answered in the negative.

I think that questions 5 to 7 inclusive can be dealt with together. In essence the appellant complains that the Board refused to address the question whether the actual value of the appellant's pipelines resulting from the application of the rates prescribed was too high having regard to the evidence, and in particular the regulated rate of return from the appellant's operations. It seems to me that the short answer to that complaint is that the Board did address that question and found as a fact that there was no acceptable evidence to show that the actual value of 127.5 million dollars was too high. The Board considered the evidence adduced by the appellant that it was a regulated utility, that its income was approximately 1.3 million dollars on an 11 million dollar rate base. It pointed out the fallacy of the appellant's argument that the disparity between an "actual value" of 127 million dollars and a "rate base value" of 11 million dollars demonstrated that the rates were clearly wrong. The Board considered the possible approaches to valuation, selected the only appropriate one, and analyzed the application of it. In that respect it considered the evidence before it, and, in the absence of evidence demonstrating error, it was unable to find that the rates would produce an excessively high actual value.

I agree with the Board when it says that it is not satisfied that s. 69 applies to an appeal under s. 27 (3). In context s. 69 would appear to apply to appeals from a Court of Revision. But despite that finding the Board did consider evidence relating to actual value, and did consider whether such evidence justified the conclusion that the rates were in error, and held they were not.

Question 7 has to do with what the Board said at p. 10 of its reasons:

> ". . . each appeal under Section 27 by whomsoever is only concerned with the propriety of the rates as such and not the actual value derived from such rates for any particular pipeline in its location somewhere in the Province."

Those words, read out of context, imply that the Board would not concern itself at all with the question of actual value of any particular pipeline. It is correct to say that the appeal lies with respect to the propriety of the rates, and not with respect to the actual value of each individual pipeline. A full reading of the reasons of the Board, however, reveals an appreciation that the validity of the rates must be tested, on an objective basis, to ensure that the actual values produced will satisfy the statutory purpose. The Board demonstrated its objective view of the matter by finding that s. 26 (2) applied, and thereby including for consideration many of the factors which apply at common law in determining value. The Board conducted its review on an objective basis, it heard all of the evidence and all of the submissions put before it which were relevant to determine whether the rates were valid and proper. Some of that evidence went to the question of what was the actual value of the appellant's property, and such evidence was, in fact considered in determining the propriety of the rates. This case is confined to questions of law, and it is not for this Court to substitute its opinion for that of the Board on what weight should have been given to the evidence before it.

Questions 5 to 7 inclusive are answered in the negative.

All questions having been answered in the negative (with the exception of question one, which was abandoned) the appeal by way of Stated Case is dismissed.