

THE PUBLIC UTILITIES BOARD, ALBERTA

DECISION E94013

re:

THE TOWN OF BASSANO

Complaint by Mrs. Elizabeth J. Zibell alleging discriminatory water and sewer billings by the Town of Bassano.

BEFORE:

N. W. MacDonald	Presiding Member
J. R. Dunstan	Member
B. T. McManus, Q.C.	Member

FILE 8226-3

March 28, 1994

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APPEARANCES AND WITNESSES

For Herself

: Mrs. Elizabeth J. Zibell

For the Town of Bassano

: Ms. Jeneanes S. Grundberg
Brownlee, Fryett

: Mr. D.G. Neighbour
Town Administrator

: Mr. Bernard Gibeau
Deputy Mayor

1. INTRODUCTION

Mrs. Elizabeth Zibell filed two letters of complaint with the Public Utilities Board (the Board) respecting the water and sewer rates levied by the Town of Bassano (the Town). In her letter dated September 10, 1993, Mrs. Zibell contended that it is discriminatory for the Town to levy four fixed charges for water service to a four-plex with a single water meter. In her letter dated September 7, 1993, Mrs. Zibell contended that it is discriminatory for the Town to levy four fixed charges for sewer service to a four-plex served by a single sewer line. She also asked that the Board make a ruling on her initial complaint respecting sewer charges dating back to December of 1991.

As noted, these complaints arose out of an earlier complaint. In a letter dated December 11, 1991, Mrs. Zibell had complained to the Board about alleged discriminatory water and sewer rates levied by the Town. The Board investigated this complaint and held a public hearing on June 11, 1992.

The Board issued Decision C93025 on July 7, 1993. In this Decision, the Board found that the wording of the Town's By-law 708/88, which was then the current by-law establishing water and sewer rates, provided only for the collection of one fixed bi-monthly charge per four-plex. With respect to Mrs. Zibell's complaint concerning sewer charges, the Board found that it did not have sufficient cost information before it to determine whether the Town's sewer rates were discriminatory.

1. INTRODUCTION

Subsequent to the issuance of this decision, the Town passed a new by-law setting out the Town's water and sewer rates. Mrs. Zibell's complaints to the Board of September 7, 1993 and September 10, 1993 alleged that the new water and sewer rates established in By-law 732/93 are discriminatory with respect to the billing of four-plexes.

The Board scheduled a hearing to examine Mrs. Zibell's further complaints. Notice of the hearing was published in the Bassano Times on October 18, 1993. A public hearing was held in the Board's Calgary Offices on October 27, 1993. Mrs. Zibell and representatives of the Town appeared at the hearing to express their positions. No other interested parties appeared or made any submissions with respect to the complaints.

2. BACKGROUND

Mrs. Zibell is the part owner of three four-plexes located within the Town. These buildings are provided with water and sewer service by the Town. Each building has a single meter for water service and is served by a single sewer line.

These premises are presently billed in accordance with Town By-law 723/93, being the current by-law establishing water and sewer rates, tolls and charges. Schedule "A" to this by-law is reproduced in Appendix "1" of this Decision.

3. POSITION OF MRS. ZIBELL

Mrs. Zibell asserted that the imposition of four separate fixed charges for water and sewer service to each of her four-plexes is discriminatory. She based this statement on a comparison of charges for water and sewer service to other residences and businesses in the Town. Although her buildings consume less water than many other customers surveyed, their total charges for water and sewer service are sometimes higher.

Mrs. Zibell submitted the following billing comparison for the Board's consideration.

"The rates, etc. are from the current water bills - May 1 to June 30/93 since they are the ones everyone had most handy.

Address		Meters Used	Water Charge	Sewer Charge
301 - 3 Ave	residence	117	\$43.00	\$15.00
616 - 4 Ave	residence	139	48.50	15.00
843 - 5 Ave	our shop	8	15.75	15.00
433 - 11 St	restaurant	714	192.25	15.00
501 - 2 Ave	hotel & bar	410	116.25	15.00
301 - 11 St	car wash	202	64.45	15.00
623 - 5 Ave	4-plex	154	87.50	54.00
629 - 5 Ave	4-plex	99	73.75	54.00
635 - 5 Ave	4-plex	99	73.75	54.00"

(Exhibit 3, p. 1)

3. POSITION OF MRS. ZIBELL

Mrs. Zibell pointed out that the residences indicated were consuming more water than the four combined units of two of her buildings, yet their charges for water and sewer service were lower. Similarly, some of the businesses were consuming much more water, yet paying far less in sewer charges. Mrs. Zibell claimed this was particularly unfair, as some of the water consumed by her four-plexes was used to water lawns and gardens, and hence did not enter the sewer lines. Mrs. Zibell asserted that at least two of the businesses surveyed would put all their water back into the sewer system.

Further, she noted that she runs a business and holds a business license. She therefore considered she should be billed in the same fashion as other businesses in Town. With respect to the Town's argument that her units were different as they were complete dwelling units with kitchen and bedroom facilities, she pointed out that some of the motel units have cooking facilities, yet are not assessed a separate fixed charge.

Mrs. Zibell questioned the basis of the Town's billing for water and sewer service. She noted that some premises in Town contain more than one business operation but are billed only one fixed charge for water and sewer service. An example provided was the business containing a four bay car wash, a vehicle repair shop and a used car sales office, which is billed one fixed charge rather than three. If these three operations were considered a single entity for billing purposes, then so should the four units of her buildings be billed as a single entity.

3. POSITION OF MRS. ZIBELL

Mrs. Zibell noted that she is the Town's customer; the meter is in her name. She should, therefore, be treated in the same fashion as all other customers who pay only one fixed charge.

"The meter is in my name. I'm the one responsible for it. I'm the one who pays the water bills. It shouldn't matter to the Town whether four families or half a dozen use it." (Tr. p.66)

Mrs. Zibell also objected to the fact that she is billed four fixed charges per four-plex, whether or not all units are occupied. She volunteered to notify the Town of vacancies, but was informed that the four fixed charges would be levied whether or not all suites were occupied. Mrs. Zibell asserted that there was no cost basis for the different billing treatment accorded to four-plexes.

"The cost for either supplying water on one water meter or removal on one sewer line has not, in my estimation, ever been justified as to why it should cost more for a multiple family residence consuming 100 metres of water for \$74 in comparison to any other place that can obtain the same 100 metres of water for \$53; and also why it should cost \$54 for the multiple family residence to single line sewage 100 metres of water and someone else can sewage 700 metres of water on a single line for \$15." (Tr. pp.12-13)

Mrs. Zibell concluded that she should be billed similarly to all other customers of the Town's water and sewer systems. She was willing to pay for all water consumed by her buildings as indicated by the meter readings, through the consumption charge and one fixed charge per building. When questioned as to the appropriate sewer charges for her buildings, where there are no meters, she indicated that she would be willing to pay the standard \$15 per building, as other customers consuming varying amounts of water paid.

4. POSITION OF THE TOWN

The Town asserted that By-law 732/93 is not discriminatory in its treatment of four-plexes with respect to water and sewer rates.

The Town noted that the *Municipal Government Act*, R.S.A. 1980 c.M-27 (MG Act) gives a municipality broad powers in setting utility rates. Particular reference was made to sections 288 and 306 of this statute, which provide as follows:

"288(1) A council may pass by-laws or resolutions

(a) for the general maintenance or management or conduct of any public utility constructed or maintained, and of the officers and others employed in connection with them;

(b) fixing in connection with public utilities, the rates, charges, tolls, fares and rents and the times and places where they will be payable and providing for a discount that the council considers expedient for prepayment or punctual payment, or an additional percentage charge not exceeding 10% of the rates, tolls, fares or rents in arrears that the council considers advisable for failure to pay them until after the date fixed for payment;

(c) providing for the rent of fittings, machines, apparatus, meters or other things leased to consumers;

(d) providing for the collecting of the rates, charges, tolls, fares or rents in connection with any public utility;

(e) providing for enforcing payments of those rates, charges, tolls, fares or rents by all or any of the following methods, namely:

(i) by action in any court of competent jurisdiction,

(ii) by shutting off the utility being supplied to the consumer or discontinuing the service thereof, or

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(iii) by distress and sale of the goods and chattels of the person owing the rates, charges, tolls, fares or rents wherever they may be found in the municipality,"

"306 If a municipality has constructed any public utility and if there is a sufficient plant capacity or supply thereof, the municipality shall supply, on the terms the council considers advisable, any building within the municipality and situated on land lying along the line of the public utility, on the supply being requested by the owner or occupant or other person in charge of the buildings."

The Town noted that the provision of utility service shall be "on the terms the council considers advisable." As an elected body, the council has been granted broad discretion to set rates, according to the Town's counsel.

"So it's a very broad reference to the council's discretion. "On the terms that the council considers advisable." I think that this is a recognition by the legislature that the council has some leeway. Council, after all, are elected officials and we leave it to them to make some very hard choices depending on the issues such as cost, social factors, revenues, whether or not the utilities should be subsidized or whether or not they should be profit making." (Tr. pp.69-70)

The Town also made reference to the writing of James C. Bonbright, a respected expert in the field of rate design. It was noted that Bonbright has stated that the determination of a rate structure is a very complex undertaking, partly due to the necessity of taking into account numerous conflicting standards of fairness and functional efficiency in the choice of a rate structure. There must always be compromise among the variety of competing attributes, including revenue-related attributes, such as the stability and predictability of revenue and the rates themselves; cost-related attributes, such as discouraging wasteful use and ensuring fairness in the apportionment of total costs of service among the different rate classes; and practical-related attributes, such as simplicity,

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understandability and feasibility in application. There is therefore no easy, scientific method for arriving at a just and reasonable rate structure.

The Town advised the Board that it rewrote its water and sewer by-law in the spring of 1993. The Town's goal was to simplify its billing and to move to a user pay concept for water, with a fixed charge and a commodity charge for all user categories.

Where most residential, commercial and industrial customers are billed in the same fashion, a different rate was deemed appropriate for multiple family residential premises. These multiple family premises are billed on a per dwelling unit basis, although the fixed bi-monthly charge per unit is set at \$13.50, rather than the \$15.00 fixed charge assessed other customers. This lower rate was set in recognition of the fact that some units may be vacant from time to time. It was pointed out that all 15 multi-residential premises in Town are charged in the same manner, which the Town considers to be justified and fair. As Mr. Neighbour stated:

"The council looked at it at the fact that each fourplex was an individual housing unit. Even though there was one line going into the building, there are four individual houses, four individual units, all having their own living accommodations including cooking, sleeping, everything; where a hotel or motel wouldn't have that." (Tr. p.27)

The Town further advised the Board that the municipality faces a large number of fixed costs in providing service, most notably in the construction of the system. Few of these fixed costs relate to the actual meter itself. Accordingly,

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the Town considers itself justified in collecting the bi-monthly fixed charge from each unit of a four-plex, as Ms. Grundberg indicated:

"We know that the incremental cost of servicing each of those units, the meter charges and the like, are very minimal. The main cost for the system to the municipality is in the main infrastructure. The sewage expansion in the mid '80s was an enormous expense to the municipality. To start saying, geez, we should set our rates according to the incremental cost, it's not going to be practical as far as covering those expenses. So we have like people having to be treated alike." (Tr. p.73)

In the case of sewer charges, consumption cannot be metered and consequently, the Town considers the imposition of a basic charge to each unit of four-plex to be appropriate. Indeed, the Town contends that, if anything, the basic bi-monthly charge of \$13.50 per four-plex unit favours four-plexes rather than discriminates against them.

According to the Town, for a rate to be found discriminatory it must distinguish between different groups of people without a valid reason for so distinguishing. While the Town has established a special rate for multiple family residences, its counsel asserted that there are valid reasons for billing this category of users differently from other users. Town Council had to grapple with the various competing rate attributes and design a rate structure which best met the needs of the municipality. Acting within the broad discretion granted to them by the applicable legislation, Council has determined that all units of a four-plex should be assessed a fixed bi-monthly charge for water and sewer service. The Town's legal counsel made the following remarks:

"I think it's fair to say, as Bonbright has said, there is no one perfect rate structure. The council of the Town of Bassano in its wisdom has said part of this fixed cost or the revenues should be

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assessed to each of the units within the town, and whether or not there is one service line, one meter going into a certain premise, if there is more than one unit benefitting and entitled to use the service, they should be paying some of the fixed charge. They are then tempering that with a consumption charge to take into account inequalities in use.

From what Mr. Neighbour has said, they have gone from a more complex rate structure to one that is more streamline (sic) just to try and get away from some of the difficulties in treating different types of classes differently and determining who fits in within the various rate classes." (Tr. pp.78-79)

Consequently, the Town submitted that its water and sewer rates, as set out in By-law 732/93, are not discriminatory with respect to the billing of multiple family residences. The Town contended that the Board should therefore dismiss Mrs. Zibell's complaint.

5. FINDINGS AND CONCLUSIONS OF THE MAJORITY OF THE BOARD

This section sets out the findings and conclusions of the majority of the Board. The opinion of the dissenting member is set out in section 6.

The Board's jurisdiction to determine this matter is contained in section 291 of the MG Act, which states:

"291 Any user of a public utility aggrieved by service charges, rates and tolls made to him may by application appeal to the Public Utilities Board and the Board, if satisfied that the service charge

(a) does not conform to the public utility rate structure established by the municipality,

(b) has been improperly imposed, or

(c) is discriminatory,

may make an order varying, adjusting or disallowing the whole or any part of the charge."

The Board's authority to act pursuant to section 291 must be considered in light of the overall intent of the MG Act. This statute provides a municipality with broad powers to establish utility rates, tolls and charges; to provide for the collection of the rates, tolls and charges; and to deal with all other matters necessary for the general maintenance or conduct of the municipal utility. Only in cases where the municipality has passed a by-law submitting its utility operations to the jurisdiction of the Board, are these municipal powers subject to Board scrutiny. It is noted that the Town of Bassano has not passed such a by-law.

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Therefore the Board would have to be fully satisfied that Mrs. Zibell's complaint meets the criteria outlined in section 291 before it could exercise its authority to vary, adjust or disallow the Town's water and sewer charges, as requested by Mrs. Zibell.

The majority of the Board considers that the term "user of a public utility" contained in section 291 refers to a customer to whom service charges, rates and tolls are made by the public utility for commodity consumed or service rendered to the premises. The majority of the Board concludes that Mrs. Zibell, as an owner of three four-plexes, is a user of the Town of Bassano's water and sewer utilities and is properly before the Board with her complaint.

Therefore, the issue before the Board is whether the Town's practice of billing multiple family residential premises a basic bi-monthly water and sewer charge, on the basis of the number of individual dwelling units contained within the premises, is "discriminatory" in the sense that the term is used in section 291 of the MG Act. Reference materials provide differing definitions related to the concept of discrimination. The *New World Dictionary* defines discrimination in a general sense as "showing a partiality or preference in treatment". *Black's Law Dictionary*, Fifth Edition, includes in its definition the following:

"...a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

Since the discrimination referenced by section 291 relates to a discriminatory rate or price, more specific references were reviewed.

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Black's Law Dictionary indicates that price discrimination:

"...exists when a buyer pays a price that is different from the price paid by another buyer for an identical product or service."

In addition, reference was made to two well recognized authorities in the field of utility regulation. James C. Bonbright, in his text, *Principles of Public Utility Rates*, 1988, p.520, defines price discrimination as "the practice of charging different rates to different customers for substantially the same product". Charles F. Phillips, Jr., in his text *The Regulation of Public Utilities Theory and Practice*, 1993 edition, p.69, states "Price discrimination occurs when a seller establishes for the same product or service different rates which are not justified entirely by differences in cost or the same rate where differences in cost would justify differences in price".

The definitions by Bonbright and Phillips relate to the somewhat complex question of distinguishing between "due" and "undue" discrimination. As Bonbright notes at page 516:

"Readers of the treatises and the case law on public utility rates will often come across bald statements to the effect that the practice of rate discrimination is unlawful. Such statements are grossly inaccurate. What the law forbids is merely undue or unjust discrimination. The statutes use terms, such as 'unjust' or 'undue' or 'unreasonable,' 'preferences,' 'advantages' or 'prejudices'."

The *Public Utilities Board Act*, (PUB Act) deals with this issue in section 91. Section 91(1)(a) states:

"91(1) No owner of a public utility shall

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- (a) make, impose or extract an unjust or unreasonable or unjustly discriminatory or unduly preferential individual or joint rate, commutation rate, mileage or kilometre rate or other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within Alberta."

Bonbright observes at page 517 that:

"This tendency to treat 'undue discrimination' as if it were one word has been encouraged by the failure of the rate regulators to observe any single and definitive distinction between discriminatory and non discriminatory rate differentials. At times, the cases suggest a distinction similar to that drawn by economists, in deeming discriminatory any rate differential not based on a cost differential. But at other times 'discrimination' has been used as a mere synonym for any kind of rate differentiation; whereas at still other times it has become a convenient, shorthand term for undue discrimination".

Both Phillips and Bonbright conclude their considerations regarding due and undue discrimination by noting that strict avoidance of price discrimination in the setting of rates is, practically speaking, unavoidable (see Phillips page 414 and Bonbright page 525).

It is necessary, firstly, to determine if the term "discriminatory", as utilized in section 291 of the MG Act, is meant to be read literally or used in the sense of unduly or "unjustly discriminatory" as found in section 91(1)(a) of the PUB Act. It would not seem logical to the majority of the Board to conclude that legislators intended that the test applied to the rate structure of a municipally-owned utility would be more stringent than that imposed on utilities regulated by the Board pursuant to the PUB Act, which only prohibits "unjustly discriminatory" rates.

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The majority of the Board must, secondly, consider if it is even reasonable to conclude that undue or unjust discrimination in the sense utilized in the PUB Act is the concept intended to be applied by section 291 of the MG Act.

The majority of the Board considers the practical difficulty in attempting to assess "undue discrimination" in the same fashion as for regulated utilities is that it would be necessary to utilize cost of service studies. A cost of service study is the initial step in the Board process of rate design, from which the Board proceeds to examine a whole host of additional factors. A similar process would involve a cost and level of complexity in the regulation of the rate designs of municipalities which the majority of the Board, after consideration of the overall scheme of the MG Act and the powers granted to municipalities to establish rates, tolls and charges, does not believe was intended by the legislature.

There is a dearth of judicial interpretation of section 291 of the MG Act, but reference was made to the section by the Honourable Mr. Justice Coté in his oral reasons dated June 19, 1990 for denying leave to appeal in the *Town of Bashaw vs The Public Utilities Board, et al*, which offered the following view of discrimination:

"In my view the reasons expressed by the Public Utilities Board do not say that difference is itself discrimination. In my view they go further and consider the reasons and the fairness, [for and of the difference.]

It was suggested in argument that if the practical workings and effect of different procedures for computing the charges to different people in fact produce the same charge, there is no discrimination. In my view that is not correct. In my view a municipality could not

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arbitrarily pick one consumer or class of consumers and for no rational reason establish a method of computation or no method of computation, but escape scrutiny by the Public Utilities Board simply on the grounds that as luck would have it the final number works out to be similar to that for consumers as a whole. In my view discrimination and how rates are charged between different groups of consumers, plainly fall within s. 291 of the [*Municipal Government Act*], no matter how narrowly one reads that section."

After reviewing the foregoing, the majority of the Board is of the view that the definition most reasonably applied to section 291 of the MG Act is that utilized by *Black's Law Dictionary*, namely that discrimination is "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

The majority of the Board will now examine the customer rates for water and sewer service established by the Town and alleged to be discriminatory by Mrs. Zibell against the above definition of discrimination.

The definition should likely be revised to fit the context of section 291 so as to read "rates are discriminatory when they fail to treat all users of a public utility equally where no reasonable distinction can be found between those favoured and those not favoured".

The majority of the Board notes that Mrs. Zibell is not the only customer being billed in accordance with Rate Classification #2. There are 15 multiple family residential customers in Town; all are billed in accordance with Rate Classification #2.

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While it is true that multiple family residential premises are billed differently than all other premises in the Town, the majority of the Board considers that is not sufficient in itself to prove discrimination. What the majority of the Board must establish is that there is no reasonable basis for this difference in billing.

The Town has testified that careful consideration was given to rate design when the Town rewrote its water and sewer by-law. The Town considered it important to make the rates less complex and to move to a user pay concept for water. As the Town has pointed out, Council members are elected officials who must sometimes make difficult decisions as to rates, balancing such issues as cost, revenues, social factors and whether the rates should generate a profit.

While the Town conceded that there was a slight reduction in cost in serving four residences with only one water meter being served off a single water and sewer line, the Town considered these cost differences to be minimal. The Town asserted that the major costs of both the water and sewer systems relate to the infrastructure, and not to such items as meter reading and customer accounting.

Unlike other premises, multiple family residential dwellings contain separate individual housing units, each having its own sleeping and cooking accommodations. Thus the Town considered it fair to levy a fixed charge on the basis of each individual unit in the four-plexes. The majority of the Board does not consider that the fact that the landlord is billed as the customer detracts from the fairness of the Town's billing system.

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The following table demonstrates that, on a per unit basis, the billing of multiple family residential premises is favourable compared with other premises.

<u>Premise</u>	<u>No. of Units</u>	<u>Consumption in Meters</u>	<u>Water Charge \$</u>	<u>Water Charge/ Unit \$</u>	<u>Sewer Charge \$</u>	<u>Sewer Charge/ Unit \$</u>	<u>Total Water & Sewer Charge/ Unit \$</u>
Residence	1	117	43.00	43.00	15.00	15.00	58.00
Residence	1	139	48.50	48.50	15.00	15.00	63.50
Shop	1	8	15.75	15.75	15.00	15.00	30.75
Restaurant	1	714	192.25	192.25	15.00	15.00	207.25
Hotel & bar	1	410	116.25	116.25	15.00	15.00	131.25
Car wash	1	202	64.45	64.45	15.00	15.00	79.45
4-plex	4	154	87.50	21.88	54.00	13.50	35.38
4-plex	4	99	73.75	18.44	54.00	13.50	31.94
4-plex	4	99	73.75	18.44	54.00	13.50	31.94

(Source: Exhibit #3)

The majority of the Board recognizes Mrs. Zibell's concerns with respect to the imposition of a fixed charge per unit, regardless as to whether it is occupied. It is noted, however, that the Town has attempted to compensate for this potential unfairness by reducing the amount of the fixed charge assessed to multiple family residential premises by 10% to recognize the current vacancy rate.

It is thus apparent to the majority of the Board that the Town had a rationale for distinguishing multiple family residential premises from other premises. The majority of the Board also considers that the determination of a proper rate structure is clearly a matter within the Town's authority pursuant to section 288 of the MG Act.

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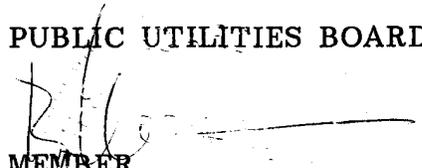
Given the equal treatment of all customers within the multiple family residential rate class, and given the Town's assurances that it considers that By-law 723/93 fairly treats like people alike, the majority of the Board finds the multiple family residential rates for water and sewer service not to be discriminatory.

The majority of the Board therefore dismisses Mrs. Zibell's complaints.

The Board generally considers, that in complaints of this nature, parties should bear their own costs and the majority of the Board considers that position to be appropriate in this case.

Dated in Edmonton, Alberta this 28th day of March, 1994.

PUBLIC UTILITIES BOARD



MEMBER



MEMBER

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

I recognize that the Town, pursuant to section 288 and other sections of the MG Act, has the responsibility and the jurisdiction to establish rate classes, the level of customer rates, and the structure of customer rates within each class for its public utilities. However, the Town, pursuant to section 291 of the MG Act, must establish its rate classes and the level and structure of water and sewer rates to its customers within each rate class in a non-discriminatory manner. Mrs. Zibell alleges that the water and sewer rates established by the Town for owners of multiple family residential premises are discriminatory compared to water and sewer rates established for owners of other residential and business premises in the Town.

The issue before the Board is then whether the Town's practice of billing customers who own multiple family residential premises a basic bi-monthly water and sewer charge, on the basis of the number of individual dwelling units contained within the premises, is discriminatory. Such a determination hinges upon the definition of what constitutes a discriminatory rate.

The following definitions reflect the general meaning of the word discrimination:

- (1) The *New World Dictionary* defines discrimination as "showing a partiality or preference in treatment".

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- (2) *Black's Law Dictionary* includes in its definition of discrimination the following:

"A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

The following definitions reflect a more specific meaning of the word discrimination as it applies to utility rate making:

- (1) *Black's Law Dictionary* contains the following definition of price discrimination:

"Exists when a buyer pays a price that is different from the price paid by another buyer for an identical product or service."

- (2) Bonbright, J.C., in his text, *Principles of Public Utility Rates*, 1988, p.520, defines price discrimination as "the practice of charging different rates to different customers for substantially the same product".

- (3) Charles F. Phillips, Jr., in his text *The Regulation of Public Utilities Theory and Practice*, 1993 edition, p.69, states "Price discrimination occurs when a seller establishes for the same product or service different rates that are not justified entirely by differences in cost, or the same rate where differences in cost would justify differences in price".

- (4) The Town, in its submission, considered that for a rate to be found discriminatory it must distinguish between different customers without a valid reason for so distinguishing.

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- (5) The Honourable Mr. Justice Coté in his oral reasons dated June 19, 1990 for denying leave to appeal in the *Town of Bashaw vs The Public Utilities Board, et al* offered the following view of discrimination:

"In my view the reasons expressed by the Public Utilities Board do not say that difference is itself discrimination. In my view they go further and consider the reasons and the fairness, [for and of the difference.]

It was suggested in argument that if the practical workings and effect of different procedures for computing the charges to different people in fact produce the same charge, there is no discrimination. In my view that is not correct. In my view a municipality could not arbitrarily pick one consumer or class of consumers and for no rational reason establish a method of computation or no method of computation, but escape scrutiny by the Public Utilities Board simply on the grounds that as luck would have it the final number works out to be similar to that for consumers as a whole. In my view discrimination and how rates are charged between different groups of consumers, plainly fall within s. 291 of the [*Municipal Government Act*], no matter how narrowly one reads that section."

In my view all of the above definitions of discrimination are helpful in arriving at a good working definition of the word "discrimination" which would be reasonable to use for the purposes of testing customer rate design. In my view, the following definition blends together the general and specific meanings into such a workable definition:

"Discrimination is the practice of charging different rates to different customers for an identical service where no reasonable distinction, such as differences in cost of service, exists between the customers."

I note that section 291(c) of the MG Act provides the Board with the jurisdiction to vary, adjust or disallow service charges made by the Town provided the Board is satisfied that the service charge "is discriminatory". I also note that

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section 91(1)(a) of the PUB Act states that no owner of a public utility shall make, impose or extract any rates, tolls or charges which are "unjustly discriminatory" or "unduly preferential". Having regard to the overall scheme of the MG Act and the PUB Act, I do not consider that the Board should apply a more stringent test of discrimination on rates established by municipally-owned utilities than it would on rates established by investor-owned utilities. For example, I note that the Board considers it not "unjustly discriminatory" or "unduly preferential" to allow some tolerance in revenue to cost ratios by customer class for investor-owned utilities to recognize rate design principles other than cost. Accordingly, I consider that the Board should be fully satisfied that the Town had established rate classes and rates within each class which were "unjustly discriminatory" or "unduly preferential" before it should exercise its jurisdiction to vary, adjust or disallow the Town's water and sewer charges, as requested by Mrs. Zibell.

I will now examine the customer rates for water and sewer service established by the Town and alleged to be discriminatory by Mrs. Zibell against the above working definition of discrimination. I do not consider it necessary to carry out a full-blown cost of service and rate design analysis in order to assess whether or not the Town's rates are unjustly discriminatory. I consider that order of magnitude cost estimates and general rate design principles are sufficient to discern any unjust discrimination.

I consider that the term "user" of a public utility contained in section 291 of the MG Act refers to a customer to whom service charges, rates and tolls are made

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

by the public utility for commodity consumed or service rendered to the customer's premises. Accordingly "user" of a public utility is synonymous with "customer" of a public utility. The Town's By-law No. 732/93 defines a customer as the owner or purchaser of the building where the owner or purchaser has entered into a written agreement with the Municipality for the supply of utility services.

I conclude that Mrs. Zibell, as the owner of one or more multiple family residential premises to whom billings are made, is a "user" and "customer" of the Town of Bassano's water and sewer utilities and is properly before the Board with her complaint. I consider that it is important to note that the occupants living in the four-plexes owned by Mrs. Zibell are not "users" or "customers" of a public utility as defined by section 291 of the MG Act or By-law No. 732/93 since no service charges, rates or tolls are levied by the Town of Bassano to those occupants.

Accordingly, I consider that any test of discrimination pursuant to section 291(c) of the MG Act must be applied between "users" or "customers" as defined by section 291 of the MG Act, and not on some other basis such as number of residents, families or dwelling units in the Town.

I note from Appendix 1 that the Town has two rate classes for water and sewer service to customer premises which have water meters. I note that Rate Class #1 includes all customer premises located in the Town (other than multiple family residential premises) such as mobile homes, detached dwellings, schools,

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

churches, community buildings, restaurants, service stations, car washes, hotels and motels. Rate Class #2 refers to multiple family residential premises including duplexes, three and four-plexes, row housing and apartments. I note that the establishment of more than one rate class in itself appears on the surface to be discriminatory. However, generally accepted utility ratemaking accepts, as a reasonable distinction, rate classes for groups of customers that have similar customer costs and/or water/sewer usage (e.g. residential, commercial, industrial).

The Town indicated that there are approximately 539 customer premises billed under Rate Class #1 and 15 customer premises (13 four-plexes and 2 duplexes) billed under Rate Class #2. The Town, in its rate design, is recovering the fixed and variable costs of the sewer system by a basic bi-monthly charge and the fixed and variable cost of the water system on a combination of a basic bi-monthly charge and a consumption charge for water used in excess of the minimum usage included in the basic charge. I note that the above rate structure within each rate class has not been challenged by Mrs. Zibell as being discriminatory. Rather, Mrs. Zibell contends that the Town's practice of establishing a separate rate class for owners of multiple family residential premises and billing those customers a basic bi-monthly water and sewer charge, on the basis of the number of individual dwelling units contained within the customer premises, is discriminatory.

I consider that the above rate design established by the Town implicitly views occupants of individual dwelling units within a four-plex premise as customers or

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

users of the public utilities and therefore responsible for bearing a portion of the system costs. Clearly the owner or operator of the multiple family residential premise (in this case Mrs. Zibell) is the customer or user of the Town's public water and sewer utilities as defined by section 291 of the MG Act. I note that billings are made to all other customer premises in the Town on the basis of one basic bi-monthly charge per customer premise rather than some other basis, such as the number of businesses within the premise, the number of car wash bays within the car wash, the number of units within the hotel or motel, the number of seats in the restaurant, the number of people in a detached dwelling, etc.

I consider that it is unjustly discriminatory to single out customers who own multiple family residential premises from all other customers who own commercial and residential premises in the Town and impose basic bi-monthly charges on the basis of what is contained within the premises (e.g. number of dwelling units). That is not to say that there should not necessarily be different basic bi-monthly charges to different customer premises in the Town. There may well be customer cost differences (e.g. size of service line, size of meter, etc.) which should be recognized in the establishment of customer classes and in the determination of an appropriate basic bi-monthly charge for each customer premise within the customer class. However, in the case before the Board, no such cost differences were identified which would validly distinguish a multiple family residential customer premise from other commercial and residential premises in the Town thereby suggesting the need for more than one basic bi-monthly charge for multiple family residential premises.

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

Generally, the purpose of a basic monthly or bi-monthly charge is to recover all or a portion of customer costs which vary with the number of customers. These costs include a portion of the distribution system, service lines, metering equipment, meter reading, billing and accounting.

No evidence was presented to suggest that customer costs (e.g. the size of water distribution and service lines, size of water meter, water meter reading costs, or customer accounting costs) were any different for multiple family residential customer premises than other premises in the Town. I note that one bi-monthly charge per customer premise results in each customer paying a fair share of the water system customer costs. Evidence was presented that all customers of the water utility paid a consumption charge for water used in excess of the minimum usage of the minimum usage included in the basic charge. In this regard, I note that all metered premises, including multiple family residential customer premises, are charged the same consumption rate and are paying for all water used in excess of the minimum usage. I consider that this user pay principle results in each customer premise paying a fair share of the water system's fixed capacity costs and the water system's variable costs.

Similarly, no evidence was presented to suggest that customer costs (e.g. the size of sewer distribution and service lines or customer accounting costs) were any different for multiple family residential customer premises than other premises in the Town. I note that one bi-monthly charge per customer premise results in each customer paying the same proportion of the sewer system's fixed and variable costs.

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

I consider that the unjustly discriminatory nature of the "per dwelling unit" rate design can be seen in Appendix 2 where the water unit cost and the sewer charge per premise for multiple family residential premises is significantly higher than those imposed on other premises in the Town.

While the Board is not bound by its previous Decisions, I do note that the majority of the Board decision runs counter to previous complaints of an identical nature respecting the Town of Calmar (Decision E87114 dated November 6, 1987) and of a similar nature respecting the Town of Bashaw (Order E89112 dated December 6, 1989). Leave to Appeal Order E89112 was denied by the Alberta Court of Appeal.

In summary, I consider that the rates being charged owners of multiple family residential premises are unjustly discriminatory for the following reasons:

- (1) Customers who own multiple family residential premises are being singled out from all other customers who own residential and commercial premises in the Town and being charged higher service charges on the basis of what is contained within the premises rather than the cost or load imposed on the utility system by the premises.
- (2) The higher service charges being imposed on customers who own multiple family residential premises are not justified by a higher cost to serve the premises.

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

- (3) It is not a reasonable distinction to classify owners of multiple family residential premises differently from owners of other residential or business premises in the Town for utility ratemaking purposes.
- (4) In my view, the Town's discriminatory practice has been caused by the Town improperly viewing occupants of individual dwelling units within a four-plex premise as customers of the Town's public water and sewer utilities and therefore responsible for bearing a portion of the system costs. Clearly the owner or operator of the multiple family residential premise is the customer of the Town's utilities as defined by section 291 of the MG Act and by the Town's own By-Law No. 732/93.

For all of the above reasons, I find that the Town's practice of determining the basic bi-monthly water and sewer charge for multiple family residential customer premises on a per individual dwelling unit basis to be unjustly discriminatory. I consider that basic bi-monthly water and sewer charges should be levied on a per customer premise basis. Having satisfied myself that the service charges being imposed by the Town are unjustly discriminatory, I would have disallowed the Town's Rate Class #2 and varied the service charges to multiple family residential premises by including such customers in Rate Class #1. I note from Appendix 2 that the charges for water and sewer service with the above adjustment provide a fairer allocation of costs to the customers of the water and sewer system.

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

I would have applied the above adjustment retroactively to the date of Mrs. Zibell's current complaint which initiated these proceedings. I agree with the Town and the majority of the Board that Mrs. Zibell's previous complaint dated December 11, 1991 was dealt with to the extent the Board could deal with it based on the evidence before it at that time in Decision C93025.

I agree with the majority of the Board that in complaints of this nature, parties should bear their own costs.

Dated in Edmonton, Alberta this 28th day of March, 1994.

PUBLIC UTILITIES BOARD

N. W. Macdonald
PRESIDING MEMBER

FOLLOWING ARE

APPENDICES "1" AND "2"

ATTACHED TO AND FORMING PART OF

PUBLIC UTILITIES BOARD

DECISION E94013

DATED MARCH 28, 1994

BY-LAW NO. 732/93
SCHEDULE "A"

DESCRIPTION OF USER	WATER	SEWER	GARBAGE
1) All premises excluding those defined below, without restricting the generality of the foregoing this shall include: Mobile Homes, Detached Dwellings, Schools, Churches, Community Buildings and Uses, Restaurants and Service Stations.	\$15.00 basic bi-monthly charge for the first 5 cubic meters of water or less, plus an additional charge of \$0.25 per cubic meter of water consumed in excess of the first 5 cubic meters of water.	\$15.00 basic bi-monthly charge.	\$5.00 basic bi-monthly charge.
2) Multiple family residential premises including Duplexes, 3 & 4 plexes, Row-housing and apartments.	\$13.50 basic bi-monthly charge for the first 5 cubic meter of water or less, plus an additional charge of \$.25 per cubic meter of water consumed in excess of the first 5 cubic meters of water.	\$13.50 basic bi-monthly charge.	\$4.50 basic bi-monthly charge.
3) Hotels and Motels, excepting the unmetered Lot 9, Block 5, Plan 7810993. The unmetered Lot 9, Block 5, Plan 7810993.	As detailed in Item "1" above.	As detailed in Item "1" above.	\$10.00 basic bi-monthly charge.
4) Premises that: - are on lots larger than 1 acre; - have a detached dwelling thereon; and - are used for livestock pasture.	\$21.00 flat rate bi-monthly charge.		\$10.00 basic bi-monthly charge.

** In the case of Item "2", the basic bi-monthly charge for each individual Dwelling Unit, whether or not all are occupied.

March 28, 1994

TOWN OF BASSANO WATER & SEWER CHARGES
(SOURCE: EXHIBIT 3)
(MAY&JUNE 1993)

PER TOWN

(Basic Bi-Monthly Charges imposed per dwelling unit)

Premise	Rate Class	Water Volume (Cubic Meters) (a)	Water Fixed Charge \$ (b)	Water Usage Charge \$ (c)	Water Total Charge \$ (d)=(b)+(c)	Water Unit Cost (\$/cubic meter) (e)=(d)/(a)	Sewer Fixed Charge (\$/Premise) (f)
Residence (301-3 Ave)	1	117	15.00	28.00	43.00	0.37	15.00
Residence (616-4 Ave)	1	139	15.00	33.50	48.50	0.35	15.00
Shop (843-5 Ave)	1	8	15.00	0.75	15.75	1.97	15.00
Restaurant (433-11 St)	1	714	15.00	177.25	192.25	0.27	15.00
Hotel/Bar (501-2 Ave)	1	410	15.00	101.25	116.25	0.28	15.00
Car Wash (301-11 St)	1	202	15.00	49.25	64.25	0.32	15.00
Four-Plex (623-5 Ave)(4 Units)	2	154	54.00	33.50	87.50	0.57	54.00
Four-Plex (629-5 Ave)(4 Units)	2	99	54.00	19.75	73.75	0.74	54.00
Four-Plex (635-5 Ave)(4 Units)	2	99	54.00	19.75	73.75	0.74	54.00

ADJUSTED PER MINORITY FINDING

(Basic Bi-Monthly Charges imposed per premise)

Premise	Rate Class	Water Volume (Cubic Meters) (a)	Water Fixed Charge \$ (b)	Water Usage Charge \$ (c)	Water Total Charge \$ (d)=(b)+(c)	Water Unit Cost (\$/cubic meter) (e)=(d)/(a)	Sewer Fixed Charge (\$/Premise) (f)
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Car Wash (301-11 St)	1	202	15.00	49.25	64.25	0.32	15.00
Four-Plex (623-5 Ave)	1	154	15.00	37.25	52.25	0.34	15.00
Four-Plex (629-5 Ave)	1	99	15.00	23.50	38.50	0.39	15.00
Four-Plex (635-5 Ave)	1	99	15.00	23.50	38.50	0.39	15.00

* Lower than typical consumption

5. FINDINGS AND CONCLUSIONS OF THE MAJORITY OF THE BOARD

Given the equal treatment of all customers within the multiple family residential rate class, and given the Town's assurances that it considers that By-law 723/93 fairly treats like people alike, the majority of the Board finds the multiple family residential rates for water and sewer service not to be discriminatory.

The majority of the Board therefore dismisses Mrs. Zibell's complaints.

The Board generally considers, that in complaints of this nature, parties should bear their own costs and the majority of the Board considers that position to be appropriate in this case.

Dated in Edmonton, Alberta this 28th day of March, 1994.

PUBLIC UTILITIES BOARD

(Signed) J. R. Dunstan

MEMBER

(Signed) B. T. McManus, Q.C.

MEMBER

CERTIFIED A TRUE COPY

ACTING SECRETARY

6. DISSENTING OPINION OF BOARD MEMBER N. W. MacDONALD

I would have applied the above adjustment retroactively to the date of Mrs. Zibell's current complaint which initiated these proceedings. I agree with the Town and the majority of the Board that Mrs. Zibell's previous complaint dated December 11, 1991 was dealt with to the extent the Board could deal with it based on the evidence before it at that time in Decision C93025.

I agree with the majority of the Board that in complaints of this nature, parties should bear their own costs.

Dated in Edmonton, Alberta this 28th day of March, 1994.

PUBLIC UTILITIES BOARD
(Signed) N. W. MacDONALD
PRESIDING MEMBER

CERTIFIED A TRUE COPY

ACTING SECRETARY

FOLLOWING ARE

APPENDICES "1" AND "2"

ATTACHED TO AND FORMING PART OF

PUBLIC UTILITIES BOARD

DECISION E94013

DATED MARCH 28, 1994

APPENDIX 1

BY-LAW NO. 732/93
SCHEDULE "A"

DESCRIPTION OF USER	WATER	SEWER	GARBAGE
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3) Hotels and Motels, excepting the un-metered Lot 9, Block 5, Plan 7810993. The un-metered Lot 9, Block 5, Plan 7810993.	As detailed in Item "1" above.	As detailed in Item "1" above.	\$10.00 basic bi-monthly charge.
4) Premises that: - are on lots larger than 1 acre; - have a detached dwelling thereon; and - are used for livestock pasture.	\$21.00 flat rate bi-monthly charge.	\$60.00 basic bi-monthly charge.	\$10.00 basic bi-monthly charge.

** In the case of Item "2", the basic bi-monthly charge for each individual Dwelling Unit, whether or not all are occupied.

TOWN OF BASSANO WATER & SEWER CHARGES
(SOURCE: EXHIBIT 3)
(MAY&JUNE 1993)

PER TOWN

(Basic Bi-Monthly Charges imposed per dwelling unit)

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ADJUSTED PER MINORITY FINDING

(Basic Bi-Monthly Charges imposed per premise)

Premise	Rate Class	Water Volume (Cubic Meters) (a)	Water Fixed Charge \$ (b)	Water Usage Charge \$ (c)	Water Total Charge \$ (d)=(b)+(c)	Water Unit Cost (\$/cubic meter) (e)=(d)/(a)	Sewer Fixed Charge (\$/Premise) (f)
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* Lower than typical consumption

